



# HOUSE OF LORDS

Revised transcript of evidence taken before  
**The Select Committee on the European Union**

Inquiry on

## **VISIONS OF EU REFORM**

*Evidence Session No. 9*

*Heard in Public*

*Questions 92 - 105*

WEDNESDAY 16 DECEMBER 2015

2 pm

Witnesses: Professor Andrew Scott and Professor Laura Cram

Members present

Lord Boswell of Aynho (Chairman)  
Lord Davies of Stamford  
Lord Jay of Ewelme  
Lord Trees  
Lord Tugendhat  
Lord Whitty  
Baroness Wilcox

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**Examination of Witnesses**

**Professor Andrew Scott**, Professor of European Studies, University of Edinburgh, and  
**Professor Laura Cram**, Professor of European Politics, University of Edinburgh

**Q92 The Chairman:** Andrew Scott and Laura Cram, you are hugely welcome here. We very much appreciate your time. These studies are partly continuing studies on the process of this renegotiation-reform-referendum issue, but also trying to look for an element of common vision as to what is behind all this, both in this country and abroad, and the extent to which they coincide. It has been very useful along the way to tap the mind of academic experts and to have as much cut and thrust as we can. Given your CVs, we are very lucky to have secured you both, so thank you. We could pursue some of the excitement about game theory and Euro politics, on which I am not really an expert. The Lords claims to be an expert on most things, but I do not think that is one that we have represented, though that should not be taken as predictive.

**Professor Cram:** We should always look for volunteers.

**The Chairman:** It is great fun and, if you wish to introduce it in your remarks, that is fine. You are very welcome. We have a good representative team of colleagues, which I am delighted to bring here, one of whom will join us in a moment, but we might kick straight off, if you are happy with that. The first question, I do not think you will be surprised, is: following the publication of the Prime Minister's letter to President Tusk, and I suppose it would be fair to add or gloss his response to the members of Council, do you feel you have now a clearer understanding of what Whitehall is seeking to achieve in its discussions on EU reform ahead of the referendum? In the light of Mr Tusk's reply, do you sense that those objectives are achievable?

**Professor Scott:** The Prime Minister's letter certainly took us to a much clearer place than we had been in before. His earlier speeches had indicated the grounds on which the debate would take place, but the letter identified quite clearly four particular segments and that was very

helpful. What he is trying to do is now clear. What the Government are trying to do is now clear. How he is going to achieve that is still very unclear and the response from Donald Tusk reflected the lack of a common vision about, first, whether it is achievable in the first place and, secondly, how those parts that are achievable, either politically or by treaty change, might be engaged and engineered. There is clarity in what he wants and what the Government are after, but there is still a big lack of clarity in how that may be achieved and to what extent he will get consensus around some of the more difficult parts of his agenda.

**The Chairman:** I will bring Laura in in a minute, but can I just follow up by asking you whether you have any sense in which this is a two-tier kind of debate, one tier being at Heads of Government or European Council level and the other being, if you like, for shorthand, at Sherpa level, where people are worried about how you create legal texts that are sustainable and how you do not conflict with issues that might be third-rail issues for other member states?

**Professor Scott:** That is absolutely right. The idea that, once you get political accord at the European Council, that is it solved is a great simplification of reality. The European Council may agree a number of political objectives and, indeed, ways of achieving them. If the treaty is not revised, these commitments or these agreements are still subject to judicial review. It is fine for the Heads of State to agree to observe certain conventions or agree to certain changes in secondary legislation even, but of course these are still subject to the rule of law and, in the past, the Court has struck down European Community texts or European Union law on the basis that it is not compliant with the treaty.

Therefore, that the Sherpas' job has been somewhat denigrated in public places is unfortunate, because they are very clear in their own minds that this has to be legally watertight, and unless and until the treaty has been revised, even an intergovernmental agreement or even an intergovernmental treaty that is lodged at the UN, outside the EU treaties, would have to be ratified by the member states through their parliamentary procedures at some future date. No matter what is agreed, until and unless the treaty is revised there will always be questions about its deliverability, particularly where it seeks to either change secondary law or introduce conventions that then become subject to judicial review.

**Lord Jay of Ewelme:** If it was just, as with the Danish, a derogation for a particular country from the body of European law, that, presumably, would be okay, would it? Would that precedent, in theory, have been justiciable?

**Professor Scott:** Any derogation would have to be in the treaty.

**Lord Jay of Ewelme:** Yes, but, as you suggested then, when all Heads of Government agreed it formally and then it was deposited with the United Nations and so on, would that have been justiciable?

**Professor Scott:** No. They can make the agreement among themselves, but Denmark and Ireland are useful examples rather for what they do not explain. There are two issues. The Irish protocol was simply explaining in very straightforward language what was not in the treaty of Lisbon. Denmark was an exemption of course from monetary union and from the citizenship recitals. None of that was law until the treaty had been ratified anyway, so Denmark's and Britain's opt-outs and protocols were part of the treaty that was then ratified by all member states. It was not sequential; it happened at the same time. The Irish one was slightly different, because it was not ratified until the Croatian accession, but the point about both those protocols is they did not impose any cost on any other member. If you look at some of the provisions that are being proposed by the Prime Minister, these would have real costs, both political and financial, potentially, for other member states.

**Lord Jay of Ewelme:** There is no precedent for this then.

**Professor Scott:** There is no precedent for this particular exercise that I am aware of.

**Q93 The Chairman:** I have two points on it. First, in your experience, if there is high-level political agreement notwithstanding the treaty provisions, does that at least influence the way in which the treaties tend to be interpreted? Secondly, would it not also be likely that not only what you might call the barrack-room lawyers, who have an interest in this, but also the electors in the United Kingdom will take a certain interest in saying, "Do these provisions really stand up and do they amount to the paper they are written on"?

**Professor Scott:** In answer to that, I do not think the court would pay that much attention to the seniority of the signatories of an agreement if the subsequent action violated European law. I think it would say, "I am sorry; this is incompatible with European law".

**The Chairman:** I am leading you, but I think you will understand the context—this could be on discrimination law, for example.

**Professor Scott:** Absolutely. I would fully expect that, if the Heads of State come to an agreement to ratify a protocol in a future ratification round, it would be honoured. I do not think that is really the problem. My problem with that scenario, which is emerging as the most likely but, in my view, ill advised, is that the treaty revision, of which the protocol would be part, may involve very controversial proposals that may be rejected on their own merit by other countries. In that case, the British protocol would fall not because anybody opposed the British protocol, but because it was bundled up in a ratification process that was controversial

for quite different reasons. Croatian enlargement, where the Irish protocol was bundled, was not controversial. No Parliament was going to reject that, but if the British protocol was ratified in the context of a revision to the recitals about fiscal union, you could imagine in a referendum in France that it is not beyond the pale that the French people would say, “We do not want this”, despite what the French Government have signed up to. They have done it in the past and that, to me, is the high risk of saying, “We will ratify the protocol in the future”, if the future involves a broader treaty revision that introduces quite unrelated controversies, which may play badly in some member states.

**The Chairman:** You said that this is high risk and you would not have approached it that way. Do you offer an alternative scene that might be rather more legally or otherwise watertight?

**Professor Scott:** My approach would be to use Article 48, argue that this protocol is not of sufficient importance to warrant the convening of a full convention and ask the European Parliament for permission—which you have to do; you have to get the Parliament’s consent—not to convene a convention on the grounds that the changes being proposed are not sufficiently important. Take the protocol through an Article 48.3 procedure, which does not involve a convention, but it is not the simplified process that can only affect the TFEU. This would be a change in the TEU pending a protocol. Take that on its merit and accept that that will take a couple of years to get done, but with a very high probability of success. Delaying it until a further treaty round, I think, is very high risk, frankly.

**Lord Jay of Ewelme:** Politically that would be tricky, would it not? If the Prime Minister says he can get something through because the Parliament has said it is not particularly important, it is not something that is going to help his referendum campaign back home or whatever.

**Professor Scott:** That is the politics of it, frankly.

**The Chairman:** If you are offering us a two-year timescale for that 48.3 procedure, by definition that takes you outside the Government’s undertakings on a referendum.

**Professor Scott:** I think anything does there, frankly. I do not think it is possible to have a legally binding protocol, assuming that is how one would package the British exceptionalism, which I guess is the way. You could have a political declaration appended to the treaty that does not require that, but the political declaration is not legally binding.

**The Chairman:** Thank you. Laura, you have been majestically silent in this. What is your take on this?

**Professor Cram:** As I am not a lawyer, the politics are what I would probably dwell on. I think the substance of the four baskets is reasonably clear. Where the interplay, in terms of the public relations and relations with other EU member states, comes in is in the form and the frame of the way those substantive issues are being presented. That comes to the question of whether these are seen as significant or not, because if you have to sell a story that says these are not very significant responses in order to get the legal and technical parts through, then you have an issue in terms of public relations, and public relations with the other member states.

For example, recently the YouGov experimental survey looked at what would be the likely effects if a minor change was agreed at the EU level or if a major change was agreed at the EU level. We know that with the public it is only the major change that appears to swing the voters towards the remain campaign. More than that, if this looks like an indulgence, something that was not very significant that was more to do with managing internal party politics, it is very difficult to manage that externally as well. You already have very fatigued member states, which have had now not just the long historical tradition of UK awkward membership but a series of recent blows, as they see it, to that relationship, which has always been a carefully balanced relationship. The feeling that it has become a bit beleaguered is really significant and the notion that that would be done for something that was not seen to be terribly significant has real issues.

To that extent, we have had lots of conversations about whether this is a symbolic debate, but in the tradition of political science symbolism is not seen as nothing. Symbols are seen as having a huge effect on mobilisation of publics and acquiescence of publics, so how that symbol is played and how this debate is framed is something that has to be taken into huge consideration in the presentation of these reforms.

As to the technical issues and how they play out, the lawyers, traditionally at EU level, have also been pretty creative in finding solutions where they can be found. Although I agree with very much of what Drew says, in that the likely interpretation if there is a clash with EU law would be difficult, there has been a tradition of finding creative solutions, but finding a creative solution in the absence of political will is a particular problem.

**Q94 The Chairman:** Just simply in terms of scorecard, are the Prime Minister's problems more intense in relation to his 27 colleagues at Council this week or in relation to an electorate that want material change? If you want to go on to say that, what would be the way in which he might be able to persuade an electorate that that was worthwhile, given that there are other problems in Europe, whether it is the eurozone or migration, for example?

**Professor Cram:** That is the major issue. We can see from the Tusk letter there is a willingness to try to keep the UK in, but increasingly that story is not at any cost. There is also an increasing sense that some of the member states that saw the UK as a partner or as a coalition partner are tired and are seeing the limits to where they are willing to stretch. If the ante is upped to present these as major reforms, then inevitably that is where you have problems with the 27 member states. If the ante is reduced to make it seem like a more minor reform that could be more easily accepted at the EU level, it is going to be much harder to play at home that it was worth having the referendum. A ComRes poll out this week shows that the issues that the Government have put on the agenda—the in-work benefits for migrants and issues about the eurozone negotiations—are now part of the internal debate, which they never particularly were before. In some ways, it is also about being careful what you wished for. Once you have created a scenario, you are also creating an electorate that is responding to that scenario.

**The Chairman:** I must let colleagues come in, in a moment, but, given at least the formal terms of the referendum question are “remain or leave” and without reference to any preceding negotiations or reform proposals of any kind, do you think the debate will morph into its more existential elements? Will it tend to centre on some of these particular issues that have been thrown up in the Prime Minister’s negotiation or will they have an afterlife and continue to go through into the referendum campaign itself, in the way you rather suggest about migration?

**Professor Cram:** I think they will. They have now been put on the agenda, so you will have the broader debate. There will simply be the anti-EUs and the pro-EUs, but there are appearing to emerge a series of debates around the specific issues that have been put on the agenda and linked with the EU. For example, we are doing some analysis of Twitter conversations as this debate is going on and one of the things we are seeing is linkage with the refugee issue, with the migrant issue. As these issues that are put on and related to the conversation on the EU increasingly, then you expect them also to play out as substantive in the debate. Following on from that is what Drew was saying about this not going away. It is rather like a genie out of the bottle, the notion of this debate and of this referendum. It is extremely hard to shut down these issues. We have seen that in Scotland following the referendum. There is no end to a debate like that. Having now put these issues on to the agenda related to that referendum shapes the future nature of debates on the UK and we should also predict that that will continue and not disappear.

**The Chairman:** Just a comment: if you look at 2012 when the balance of competences, for example, was launched, slightly up to and including the Bloomberg speech, there was quite a strong emphasis on the working time directive, which appears to be virtually silent now, Drew.

**Professor Scott:** I was just about to use the words “balance of competences”. One of the great disappointments to me is that we have two debates running. One is whether we should be in or out. A lot of the information in the balance of competences is incredibly important for that debate and it is a great disappointment to me that that material, voluminous as it was—it is a big file—has suddenly ceased to exist for the purposes of this debate. That is a huge opportunity missed, because it is probably the most comprehensive, well-informed cost-benefit exercise on European membership that has ever been undertaken by any member state. I do not say that because it has come out with results that I do or do not support. As a matter of fact, having been involved in these cost-benefit analyses across the EU in the past, I think that this is an extraordinarily rich piece of work and it is a great shame. That has now become conflated with the terms of membership argument, and if we could separate these out a bit it would be very helpful. Plus, it ignores the 2011 legislation that says there would be a referendum in the event of treaty change anyway. These three separate issues have been completely conflated and the electorate could be forgiven for being thoroughly confused about what the Government wants. Until and unless the Government can settle on what it wants, it is going to be quite difficult for the public to have some idea of where the polar points in this debate are. That is perhaps a political opinion.

**The Chairman:** No, it is very helpful. You will know that our Committee came to a rather similar view on the balance of competences review. I am just going to put a flyer in and then shut up and let my colleagues speak. This obviously relates, in a sense, to issues about devolution as well in Scotland, but would you say that the balance of competences review would have been better appreciated across the United Kingdom if it had been, as it were, in a formal federal country where people were used to ordering, overlaying and, to some extent, qualifying competences, such as the Federal Republic of Germany? Is that a reasonable comment?

**Professor Scott:** Yes, it probably is. There is still this conception of sovereignty in Britain that fails to distinguish between what I would call constitutional sovereignty and effective sovereignty. The hunt is on for constitutional sovereignty, ironically, potentially at the loss of effective sovereignty. If you end up outside the European Union, you may have constitutional sovereignty but, if you want access to the internal market, you have lost effective sovereignty



because you can no longer contribute towards the legislations that will affect your economic actors. This puzzle has to be unravelled, but I am not convinced it will be over the next 18 months or so.

**Lord Davies of Stamford:** A brilliant point.

**Q95 Lord Tugendhat:** Can I take up two separate points that have emerged? I agree certainly with Professor Cram that people say they want Britain to stay in but not at any price. But, when one is trying to analyse what that means, one thing is the idea of Britain leaving and then the negotiation that would take place over Britain's future relationship. The issues that that would give rise to within the Union are so dreadful that when people say "not at any price" it is important to bear in mind that they very much want to avoid that scenario. It would be bad for us, but it would be very bad for the Union. The second point where I would nuance what you were saying relates to what you said about a whole lot of other issues entering into the debate. Well, yes, I agree with that up to a point, but surely the feature of this referendum, unlike the Scottish one, is that in the Scottish one a great many people really, really cared about the outcome, on both sides. They really, really cared. There are people who really, really care about the outcome of this referendum, but they are a minority. Indeed, a very large number of people do not care much at all and it is of very low salience in terms of what they care about. Therefore, it is not so much, I would suggest to you, the significance of the other issues that are entering into the debate that will matter; it is whether Cameron is able to come back and look as if he has had a success. It may be a coup de théâtre and it may not be very substantial, but does it look as if he has had a success? Is it something that he can sell confidently? Will people whose credibility matters—John Major had something to say only this morning—rally to what he says? That is more important for most people than the issues you were talking about.

**Professor Cram:** Absolutely. That would be the point that I made, in that this is about the framing of this debate rather than necessarily the substance. But even if you can manage it for the current time, if you have placed issues into the frame as public issues related to the EU in the debate, I suspect that the ongoing negotiations post-referendum will always link those issues with the EU. That means that, if this debate will not go away, it is worth being careful how you frame it for the future, because the referendum itself really will not close the issue about UK and EU relationships, but anything that gets put into it now will become part of the narrative of EU-UK relationships. I think you are absolutely right that it is very much about how it is framed in the current debate. I know we are going to come to migrant benefits later on, but whether they can be reframed as protecting our current welfare state as opposed to

restricting free movement is absolutely crucial in terms of how people are able to respond to that from other member states.

On salience, you are absolutely right. One of my favourite quotes to our students is from the fabulous focus groups that people like Sophie Dushesne did, where they asked groups of people what issues mattered to them, and they never spontaneously came up with the EU. Until they were asked about the EU, they did not come up with it. We will come on to it later, but that salience issue is slightly different in Scotland and that will relate to the difference in the debates, where it played an enormous part in the discussion on the independence referendum. In fact, I think that, if you were to go around the public houses of Edinburgh, you would find a consciousness and an awareness of that place in the debate that would be different.

**The Chairman:** Drew, do you want to comment on Lord Tugendhat's first point about how "not at any price" is seen and the implication of that? I do not know if this comes in now, but there may even be a sort of covert wish, either in the UK or maybe in other member states, to tear up Article 50, although that is the formal provision, and start looking for some sort of way out if the worst happens.

**Professor Scott:** Article 50 in itself was a response. Nobody really thought Article 50 would be exercised. It is only recently that lawyers have thought about how Article 50 would work. It is almost the same as the Scottish question, in so far as the decision to become independent, had it been that decision, would then be followed by a set of negotiations the terms of which may not have pleased the people who had voted for independence. If I could generalise, and I defer to my political science colleagues on this, there was an assumption implicit when the debate in Scotland began that it would be a soft exit, that somehow this would not be disruptive, because both parties would act as grown-ups, to use wildly generalistic language, and that they would find a deal that suited everybody, for the best interests of everybody. It became clear in the latter stages that it would be a hard exit. This was not going to be a soft exit. There is a presumption among those who advocate leaving the European Union that it would be a soft exit and that they would find it in their hearts to be generous to the UK.

**The Chairman:** Just like they were with Norway. They did not join, but they were not penalised for voting against it.

**Professor Scott:** It is a small country, yes. The dynamics of moral hazard, as we have seen, if you want to use that in the generic sense as opposed to the financial services market sense, given the domestic politics of many member states, raise the question: why would you give

Britain a soft exit if that would then run the risk of inspiring renegotiations in other member states who thought, “Well, these guys got a good deal and so could we”?

**The Chairman:** The worse you behave, the better a deal you get.

**Professor Scott:** Absolutely. There is now something else on offer. We do not have to be totally immersed in the swimming pool; we can sit on the sides and put our feet in.

**Lord Tugendhat:** On the other hand, the Greek experience would tend the other way. I hesitate to compare the UK with Greece to any great extent, but it became clear at one point that, when people had to choose whether they would prefer to have them screwing things up inside or letting them go, having them screwing things up inside was a lesser price than having them go. The implications of having them go were sufficiently awful that they were willing to put up with a great deal having them stay. It is not a direct comparison. Britain is a very large country and a very important market, and, although there would be a lot of hard feelings, when you look at the totality of British relationships with France, Germany and other countries, Norway and Switzerland are not in quite the same league.

**Professor Scott:** I quite agree. I think Greece was told this would be a hard exit.

**Lord Davies of Stamford:** I do not think that is a good analogy, because what happened was the Greeks took the decision that, however hard staying in would be, getting out would be even worse. I think it works the opposite way from the one that Lord Tugendhat suggests.

**Q96 The Chairman:** Can I chip in with a couple of questions? One arises from these exchanges and one is, as it were, the next stage. The short question is: in this referendum campaign compared with, say, a Scottish independence referendum campaign, the very complexity of the issues—the words I use for shorthand are “protocol” and “derogation”, but you will know—is greater. We all talk Euro-speak and have some idea of what it means; the person on the street, even if they are sophisticated and interested or wanting to be interested, is in quite another kind of country. To what extent do you think that will colour the campaign? There may, indeed, be a push back from people who say, “If all you can talk to me about is these words, I am just not with it”. Laura, do you have a view on that one?

**Professor Cram:** I think that one is real. That distance and the lack of salience are relevant, but it also has consequences and it seems like people are taking much more of a party cue in terms of their voting patterns. Again, it is something we are going on to, but the difference in the Scottish dimension is partially explained by that, because there are not as huge differences between individuals in Scotland in their opinions on individual issues, but the overwhelming propensity to vote for staying in the EU is much more indicated by the government position. There seems to be some evidence that that is much more likely to affect people, because, once

you start getting down to technical details that people are not interested in, either they will turn off and not vote at all, which has its own consequences in terms of the meaningfulness of a referendum and closure, or they will take certain cues from their party leaders and head that way. Again, then you need a very clear message on what your party wants you to do. That is currently clear, for example, in Scotland. It is clearer in Wales, but in England that remains an issue.

**The Chairman:** I suppose it would not be unreasonable to say arguably the two largest political parties in England are both conflicted on some of these issues.

**Professor Cram:** Yes.

**Q97 The Chairman:** My other question, in a way, comes back to the Scottish scene in relation to the nuts and bolts of this process. How much has the UK Government taken the views of the Scottish Government and the Scottish Parliament, making that distinction, which is not always made, and other key stakeholders—social partners, regional interests and local authorities, for example—sufficiently into account in defining its reform objectives? Is this a dialogue that has taken place in London and Whitehall or has there been a real attempt to engage other parts of the United Kingdom and Scotland, in particular?

**Professor Scott:** I should perhaps declare an interest, because I spent two years on secondment working with the Scottish Government on European issues ahead of the referendum, as a Civil Service adviser rather than as a political adviser. I just wanted to put that on the record. I have also studied, some time ago, the intergovernmental relationships. Formally, there is no obligation on the UK Government to consult on this issue. The memorandum of understanding and the concordats place not a legal obligation but certainly an obligation for good governance on co-operation and discussion on common measures where devolved issues are in play. On constitutional issues it is quite clear.

However, I think most sensible observers would say that on an issue of this significance it would perhaps be wise to ensure you are not going to get a fragmented national position, because it makes negotiations tougher if you have clear fragmentation. On this issue, there is clear fragmentation not only between the UK and Scottish Governments; that is clear because the Scottish Government's position has always been, yes, we need reforms, but they can be handled within the context of the treaties as they exist. Indeed, some of the reforms being proposed, not the least of which is the free movement of labour, would impinge adversely on Scotland, which is a country with a perhaps more acute demographic problem over the next 40 years than is true in other parts of the UK.

That is an instance where although the issue of constitutional negotiations of the treaties lies with the UK, there is a very direct issue in play in Scotland. Presumably, one of the reasons that led the Scottish Government to its position, which post-dates my time there, is that this would damage Scotland's interests; this referendum is not necessary because there is no indication that what we are trying to seek could not be achieved with the treaties.

Although the JMC system would facilitate that, as far as I am aware there has been no formal invoking of the JMC to discuss the territory of the reforms being sought by the Prime Minister. That may be simply because when you are in negotiations you cannot have open dialogue with anybody; it has, almost by its nature, to be a relatively small group of people. How far that should extend is a normative proposition that I am not really qualified to answer, but my understanding is that there has been no formal engagement with any of the devolved Administrations on the question of the proposals that the Prime Minister has put forward.

**Professor Cram:** We talked about the balance of competences review, where there was formal involvement.

**The Chairman:** And Scottish Government input.

**Professor Cram:** Yes, so it is quite interesting that that has not formed part of the renegotiations, as far as it appears. On JMC, now there is a standing item on renegotiations, but again, once you get into after-the-fact information, it is not really feeding in to the conversation. On the Parliament part of the conversation, again going back some time to when we were looking at the treaty of Lisbon inquiry, we had Chris Bryant, who was then the Minister for Europe, up and one of the discussions was about the nature of what happens when there is a conflict between the Scottish Government position and UK Government position. His statement to that inquiry was really clear: at that point the UK Government position wins, because this is a reserved matter. I think that really has been the story. There is probably a political element to it as well in that, in as much as these renegotiations are fairly symbolic and the substance of most of them is not huge, there is not an enormous incentive to have anybody involved, whether it was devolved Administrations or all the stakeholders with a very strong claim to what they wanted to achieve, because then you would have to go and achieve that at the EU level. There is probably an element of that, in the sense that this is more about closing down a debate, and that has its own consequences for renegotiation.

**The Chairman:** Just for the record, there will be cases—I am thinking obviously of the separate Scottish legal system as being perhaps the most easily definable, but also in terms of the delivery of services or whatever, such as in the benefits system—where there may be local/national implications in terms of delivery and those are, of course, devolved matters or

may be devolved matters. Is there a debate about that, in terms of people in Scotland saying, “How can you expect us to do this, because we would have to implement it but we are not being consulted about how to implement it”?

**Professor Scott:** There is a debate running. One of my colleagues has taken this debate forward about whether the renegotiation decision should have been subject to a Legislative Consent Motion in the Scottish Parliament. He is a constitutional lawyer and I would not pretend to go down that road with you, so I shall not, but it is an interesting argument precisely because many of the changes implicit in this approach would affect Scottish competences or at least the implementation. Of course, as we find welfare more devolved, it would impact on a number of traditionally reserved policies that are now being devolved, so I think you are absolutely right.

To turn the situation around, if the UK Government had said, as the Dutch Government said, “We think there are some flaws in the way that European policy is being managed”, you would expect the UK Government to consult with the devolved Administrations to say, “We are going to put together a reform request basket, not treaty reform, but changes to the subsidiarity, perhaps changes to the working time directive. We want to see legislative changes in secondary European law rather than the treaties”. In a country with devolved Administrations, which the UK Government would obviously lead, as the member state, one would expect they would be inviting a very high degree of input from the devolved Administrations given that they would be implicated in the outcome. It is rather surprising, I think. If you just reversed the argument and if you did it in a less politically charged environment, you would expect to see a high level of engagement by the devolved Administrations.

**The Chairman:** Presumably, at a very simple level, if only to achieve political buy-in. You have the constituent parts singing to the same hymn sheet and saying, “We have had one negotiation and this is what we have”.

**Professor Scott:** Yes, so if it is about subsidiarity, for example, how could we change the way the Scottish Parliament inputs to the subsidiarity discussion at Westminster? Does that need to be looked at if we extend subsidiarity or move to a more pronounced subsidiarity check? That would be a normal bottom-up way of doing it. This has been very much politically driven top-down.

**Q98 Lord Jay of Ewelme:** There has been a lot of speculation about what might happen to the integrity of the United Kingdom if the United Kingdom voted to leave and Scotland voted to stay. Nicola Sturgeon has warned that, if Scotland voted to stay in but the UK withdrew,

there would be an unstoppable demand for another referendum here. I just wondered what you thought the implications would be if that happened. In particular, would that be affected by, for example, a referendum that was, say, 52-48 in favour of leaving, but 60-40 in favour of staying in Scotland? Would it be affected if there were also votes in Wales and perhaps Northern Ireland in favour of staying, but the whole thing was effectively determined by votes in England?

**Professor Cram:** Or the other way around as well. To the question of whether it would automatically trigger a referendum, that may or may not happen, but regardless the public will be watching very carefully what the outcome is of the referendum. If you see that kind of imbalance in the vote share, then there is going to be a continued sense of that divergence between the different parts of the UK. Whether or not they have a referendum is uncertain and I am sure would be chosen according to political conditions, but the sense of divergence would be fed by that. If there was the other scenario and it was Scotland that kept the UK in, or Scotland and a combination of Wales and Northern Ireland, there would be very interesting discussions going on elsewhere.

**Lord Jay of Ewelme:** If it was the first scenario, where the UK voted to leave but Scotland voted to stay, would that, in a sense, provide the Government here and Nicola Sturgeon with almost the authority, even if she decided not to exercise it, to say, “Okay, there has been a sufficient material change in the relationship for us now to feel free to go for a referendum when we judge it right”? Is that how she would see it?

**Professor Cram:** It would be a very easy narrative to play in that kind of scenario.

**Professor Scott:** Again, it is the narrative that David Cameron has played. The Tory majority in May gave him the political leverage to go looking for renegotiation. He knew that he was going to push a rock up a hill, at least in some of these things, but he had political legitimacy and that is what he has claimed he has. The voice of the British people has spoken and they have endorsed his approach for renegotiation. That allows him to have political leverage.

I would just reinforce the point that Laura raised earlier, which was not to underestimate the importance of the EU question in the Scottish debate. In other words, Scottish views, I think, are more pro-EU in the polls for a few reasons, but one of them is that we have had this debate. I remember talking to politicians before the referendum, maybe two years out, who said, “The EU will not play in this referendum”. The EU became the second most important issue after the currency in the Scottish referendum. People have very firm views. They do not think about the EU. They think the EU is a good thing.

**The Chairman:** I am not sure that is understood in England as well as it should be. Can you just articulate that a bit more in terms of the different sides? It could appear on both sides of the argument, but what were they saying about British membership of the EU? Were they saying, “If there is independence, then reapply; if Scotland remains in the UK, that is the only way of remaining in the EU”? Was that the nature of that debate?

**Professor Scott:** There are two things I would say. Politicians disagreed extremely on the whys and wherefores of independence, but not one political leader in Scotland voiced the view that if Scotland became independent it should leave the EU. The EU membership question emerged as a single large question: how do we get into the European Union? There was a minority who said, “Oh great, we can dump the EU as well”, but by far the majority view was: if Scotland becomes independent, we must be within the European Union.

**The Chairman:** And we will find a way to be within it.

**Professor Scott:** We will find a way, whether it is by political agreement so there is no interruption in our effective membership. However it will be done, we will get into the European Union. The view was very strongly, the day after the vote, that if the vote had been yes, the realpolitik would have ensured that there was a continuity, at least in effect rather than necessarily in constitutional law.

**Baroness Wilcox:** If they felt that strongly, how come they did not vote?

**Professor Scott:** If you recall, there was a very clear view from the European Commission, and I do not want to go into that, because I disagreed very much with it.

**Baroness Wilcox:** That they could not just stay in.

**Professor Scott:** That they would be thrown out. For example, if you look at the Polish community in Scotland, which is large, I spoke to the Polish consul general and his view was that the Polish people would vote to—

**Baroness Wilcox:** If they felt that strongly that it really could happen—that, by hook or by crook, no matter what was being said at the moment, the day when they had got away from England and had got themselves standing at the door of the European Union, as you are saying, they would get in somehow—how come, therefore, they did not vote for it?

**Professor Scott:** No. I am being slightly misunderstood. There was a large part who believed that getting in would be really problematic, and we may have to leave and then we might get back in. The point I was making was that no politician, no civic leader, no leaders of any of the campaigns were saying—

**Baroness Wilcox:** They would have liked to do it, but they did not think it would be able to be done; is that it?



**Professor Scott:** No, the opposite. Everybody thought we would eventually get into the European Union. It may be disruptive, it may be costly and it may be problematic, but we all wanted to be there. The point I am making is that no politician in Scotland said, “If Scotland becomes independent, we should also leave the European Union”. The point I am trying to make, and I do not want to overstate this, is that the Scottish pro-EU disposition was reinforced by the referendum campaign almost by all sides.

**Baroness Wilcox:** But not enough for them to take the chance.

**Lord Trees:** The irony, surely, was that the fear that Scotland would not be in the EU caused quite a number to stick with the UK. That is ironic, given where we are now.

**Professor Scott:** That is exactly right and, in a sense, the irony is the base of this question about public opinion in Scotland.

**Lord Jay of Ewelme:** What is interesting in what you are saying is not only is public opinion in Scotland more in favour, but the salience of the EU in the political debate more broadly in Scotland is much larger than it is in England. That is quite a major difference between the two.

**The Chairman:** Also, the logic of what you are saying, and I am putting this in simplistic terms for the purposes of the argument, is that if the United Kingdom “let us down” by voting to leave, at that point we would have to look at the alternative approach, which is to apply for membership or use an accelerated or political procedure.

**Baroness Wilcox:** Yes. We know that.

**The Chairman:** Can I ask a very small point on this? You talked about the Polish community and there is an issue, which I have noticed is in a briefing paper to the Scottish Parliament EU Committee, which I do not think has surfaced very much in the UK generally in the argument, about acquired rights. Do you see that as being a serious issue with people, in terms of their legitimate expectations to work here or, if they are Brits, in other parts of the UK? It seems to me that is a pretty legally fraught issue.

**Professor Scott:** I am not a lawyer; I should make that clear. I am an economist. The paper that the adviser to the Scottish Parliament Committee produced a few days ago was very compelling on the complexity. This was an issue that also came up in the Scottish debate, and some very learned colleagues in European law argued that Scottish people had acquired rights under EU citizen law that simply could not be ignored and the EU was under an obligation to recognise those rights in the debate about Scotland’s putative membership as an independent country.

**The Chairman:** I think that David Edward was arguing that point.

**Professor Scott:** Indeed, he was one of those, and few people are wiser on the intricacies of European law than David. It is a very interesting point, but I am not competent to comment on that.

**Q99 Lord Whitty:** One of the big issues, as far as the UK is concerned, is migration. A lot of different aspects of migration tend to get bundled up, but the Prime Minister has made it clear that, in relation to intra-EU migration, he wants an outcome that controls migration into the UK. The politicians we saw earlier today said that Scottish public opinion in general does not want to see discrimination against other EU citizens in the way that certainly the original formulation on work and benefits and so forth would have led to some discrimination. Is it your view that that is where general Scottish opinion is? If so, why is it so dramatically different from English opinion, from the media approach to these things and from general political discourse down south, which sees migration as the big issue and, in a sense, if David Cameron does not come out with a solution on migration then he will have failed?

**Professor Cram:** Migration is quite a diverse issue even in England, to be honest. It has great popular appeal, but it is more located in certain pockets, particular communities that are under threat, if you like, from the UKIP vote, rather than being general. In many ways, a lot of the debate in Scottish public opinion is not that different from, say, London, where you have a much more multicultural and much more open attitude to migration.

There are some interesting statistics on that, though. Some of our colleagues—Ailsa Henderson, Charlie Jeffery and James Mitchell—did a study and some of the details, when you burrowed down into how people feel about migration and such like, were not as hugely different across England and Scotland as one might have expected for the attitude towards the EU. But the way it has been linked with the EU is very different and, even if an individual might not be as pro-migration as they appear, they are also not as strongly anti-migration. It does not mobilise them in the same way and it has not been linked with EU membership in the same way. Disentangling it a little bit is worth while. The other aspect is the conversation about how Scotland sees itself, how that narration has played, which is, in part, to do with the demographic situation, but also, in part, to do with a governmental position that is speaking to a public. There is a formal position that Scotland welcomes refugees and that is important. The relationship between that public face and things like the Scottish Refugee Council have had an input into that kind of conversation and is relevant to that distinction.

**Lord Whitty:** Is that a quasi-ethical position or is it demographic: that migration puts great pressure on public services and, in any case, you need the skills?

**Professor Scott:** It is interesting to reverse the question and ask why this is such an issue elsewhere and we may be normal. To me, there are three things that perhaps inform this. One is Euroscepticism, this political movement. We did, of course, have one MEP returned from UKIP, but Euroscepticism has been a non-starter in the body politic of Scotland. Laura is much more au fait with this than I, but across the political parties and the trade union movement since the late 1980s there has been no prominent anti-European political voice in Scotland. We had people like Teddy Taylor, of course, who was very prominent, but that voice left and since then there has been no leadership of the Eurosceptic type in Scotland. That is one issue. The second issue is the abuse of the system. I sometimes wonder to what extent migration and the abuse of the welfare system are put into the same bracket. The fact is, of course, we know that migrant workers are not able to abuse the system. Anybody can abuse the system illegally, but the system is not perennially abused. But people believe the system is being abused. People believe there are welfare tourists.

**Lord Jay of Ewelme:** Do they believe that in Scotland?

**Professor Scott:** I do not think there is any evidence they have this view that the system is vulnerable to abuse. Some of the press in England, which does not play so strongly in Scotland because of the political dispositions, present migration and abuse of the system almost as conjoined issues. I do not think linkage of the abuse of the welfare system to migrant workers is at all in play in Scotland. That is the second issue. Many countries are concerned about the potential abuse of welfare systems, not only by migrant workers but by anybody, by indigenous people. The Dutch are on record as saying, “We must look at posted workers directives and so on to make sure this does not happen”. The third thing is the demographic and labour market issue. In Scotland, we are a small country and the whole question about demography and migration has become quite a prominent part of the economic discussion. Colleagues in Glasgow have done a lot of work on the demographic time bomb that Scotland is facing.

**The Chairman:** This is things like the skills shortage, for example.

**Professor Scott:** The skills shortage, but also young people entering the labour market who can pay for us older people when we move on to retirement. There is very acute awareness, because the Scottish Government, the trade unions and academics speak about this potential time bomb. Particularly as taxes are devolved and the tax base in Scotland becomes a much stronger driver of future entitlement, this issue about whether the labour force is sufficiently agile, young, robust and trained to service this ageing population is a very big question in Scotland. It is quite a prominent one, and most interlocutors argue that inward migration is

necessary and desirable in Scotland. I do not think we have the same characteristics, so we have to try to disaggregate this question of what causes the migrant worker backlash, if you can put it in such simple terms. I am not sure we have disaggregated that enough to understand why it is so prominent in parts of Britain but less prominent in others, so we may be more rational about it, if I might suggest.

**Lord Whitty:** It might be the very fact that the demography is a bit different. It is not hugely different in terms of age, but it is a bit different in terms of the skills base and where the work is going.

**The Chairman:** Generally, you are not getting day-to-day problems in, for example, shortage of school places or reasonable housing or whatever.

**Professor Scott:** Not to the extent that one reads about. It comes to Laura's point about the conversation we have had with ourselves over two years: who are we? We are a small, open society and the Scottish Government, to their credit—and this is not a political comment, because I think all political parties in Scotland have sung the same song—have said that we welcome diversity. They add richness to our society. They are not to be seen as outsiders. Even over the Syrian refugee question, our former First Minister and our current First Minister are certainly on record saying, “We want to see more being done to address this crisis of refugees”. “Scotland welcomes refugees” is the kind of thing that is running in local newspapers in communities where refugees from Syria are being housed.

**The Chairman:** That does not generate a backlash, then, with people saying, “How dare you say that?”

**Professor Scott:** Not in so far as I can detect.

**The Chairman:** I am pleased to hear it.

**Q100 Baroness Wilcox:** The Prime Minister argues that all the different proposals, promises and agreements on the single market, on trade and on cutting regulation should be brought into one clear commitment that writes competitiveness into the DNA of the whole European Union. Are such priorities shared in Scotland?

**Professor Cram:** Yes.

**Professor Scott:** Yes. One of the ironies of devolution is that, for almost everything, Scotland and rUK are singing the same song over environment and agriculture. There are differences, of course, but it is difficult to find something on which we are implacably different. On competitiveness, the only qualification I would make is that the Scottish Government—and, indeed, Scottish trade unions and other social and civic actors—have made a greater play of the social side of the European Union. It is not competitiveness at all costs, but

competitiveness within the context of a social contract. I think that reflects the political disposition of Scotland, which is different in the body politic than perhaps it is in England, so I think competitiveness, yes, but not at any price. I am now saying this as my casual criticism: there would be a clear qualification to that that says that it must be within the context of a social charter or a social contract to ensure that it does not mean driving down standards or wages. There still has to be a fairly socially inclusive approach to competitiveness, if that is not a contradiction in terms.

**Baroness Wilcox:** I thought that would be your answer, and I am pleased to hear that it is, but there is a problem with language. Some people really find words like that difficult to take. They do not even like them. They can hear what it means but they like to hear it in different words. Some of the words we heard this morning include “solidarity” and “mutual support”, which I am much more likely to hear here than I am where I live. The use of the words is really one of the problems for us going into this next stage.

**The Chairman:** On the converse, we heard some pretty critical comments about TTIP this morning. I do not want to caricature it as the work of the devil, but there was a real worry about this being some sort of secret sense of subverting the social order.

**Professor Scott:** That is an entirely different subject.

**The Chairman:** Indeed, and I should not lead you.

**Professor Scott:** I would love to respond to that, but I shall not at this moment.

**The Chairman:** I am grateful for your self-restraint.

**Lord Whitty:** This is part of the same point, really. It is difficult to argue with greater competitiveness and better regulation, but it seems that, among the politicians we saw, there was a suspicion about precisely what you say: that this was a bit of a cover for reducing social protection and areas like that. That reflects the cultural difference that you are talking about, but it does not seem that what is likely to be agreed on the competitiveness agenda will either change things very much or fulfil the suspicion that they are going to take out significant parts of social protection. We do not know yet but, at the moment, there is a difference of perception on words. Words can mean different things to different people.

**Professor Scott:** There is a bit of a straw man going on here, I feel. To be fair to the European Commission, as one tries to be, they have, for many years now, had a Better Regulation stream, which owes much to the Better Regulation segment of the Cabinet Office that began many years ago. In doing that, they have tried to address—perhaps not successfully or as quickly as some would like—this issue about burdensome red tape coming out of Brussels. That is a longstanding complaint, particularly among small and medium-size firms.

I feel that that is a legitimate area of discussion but it does not necessarily involve changing the balance between social standards and perhaps profit-seeking, if that can be stylised without being offensive: profit-seeking at one end and social protection at the other. The burdensome-red-tape argument is being addressed quite aggressively now within the Commission. The REFIT programme is a very ambitious and aggressive piece of work that is now headed by its own Commissioner now, Mr Timmermans, who is trying to improve this. One of the answers to improving competitiveness is to try to be leaner and fitter, be more relevant and get rid of stuff that no longer needs to be on the statute, without changing the scope of the law.

The other question is deregulation. I would draw a distinction between better regulation and deregulation. The trouble with the word “competitiveness” is that it is never clear which one you are talking about. It could be either or it could be both. My personal view—and it is probably political—is that the legitimate arguments about improving the quality of regulation to enhance competitiveness is a very worthy cause, and it is one we should pursue aggressively. I think the Commission, to be fair, is, and few Governments would find that at all problematic.

The second argument—that better regulation means less regulation—will come unstuck, because, of course, the idea that market-making is better than market-correcting, which is the traditional British philosophy, really ran into a rather large storm called the financial crisis. Deregulation can lead to regulatory failure. We need to separate the argument for better, more efficient, more effective and less burdensome regulation on the one hand from deregulation on the other, which is a much more sensitive question, and rightly so, in my view.

**The Chairman:** That slides us nicely into Lord Davies’s question about the eurozone.

**Q101 Lord Davies of Stamford:** Can I just state, first of all, how much I have benefited personally from this afternoon? In terms of original, new insight per hour, you score very highly indeed. Thank you very much.

**The Chairman:** I think it is the view of most of us, if I may say.

**Lord Davies of Stamford:** I was speaking personally but I thought it would be the view of most of us. The Prime Minister has made much of the danger, as he sees it, of us being disadvantaged in the single market, given that an increasing number of initiatives are going to be taken by the eurozone for the eurozone. How seriously do you take that threat to our economy and that of the other non-eurozone members of the EU? Secondly, what mechanism do you think would be most effective in addressing such threats, as they exist, of that kind? Thirdly—and this relates to something said earlier this afternoon—how would you square this

demand, if you were advising the Prime Minister, with his requirement that all provisions emerging from this negotiation are legally binding?

**Professor Scott:** Your last point is really the €50,000 question. “Legally binding” is a very high-risk statement. The first thing to say, of course, is that, in terms of the single financial market, the Commission is legally obliged to observe the integrity of the single financial market, so that has to be put on the record. Part of the Commission’s job is to make sure that there is no discrimination within the single market. The problem arises, as you rightly point out, through qualified majority voting. If we are developing new directives concerning the conduct, performance or accessibility of financial services firms to the single financial area, will there be higher standards or different standards imposed by the eurozone countries that the UK will be obliged to follow, simply because of QMV? That is a possible risk. I think it is fair to address that as a risk. There is no evidence of it thus far, but it has to be accepted.

**Lord Davies of Stamford:** There were two occasions: one was the financing of the ESM and the other was the threat by the ECB to deny any liquidity support in euros to clearing houses that were not located within the eurozone, but they backed off from that within about 48 hours.

**Professor Scott:** On the latter one, the UK need not worry too much about that because it has its own central bank and it can provide the liquidity.

**Lord Davies of Stamford:** No, this was euro liquidity in a crisis. These clearers would need euro liquidity if there was a crisis in the financial markets, when an awful lot of these instruments are denominated in euros. That can be provided only by a central bank that produces euros, which is the ECB.

**Professor Scott:** I accept that there are risks; I agree there are risks. The more interesting question, in a sense, or the more difficult question, is how you address those risks. At the moment, you will remember the UK Government got an agreement when it came to the European banking union. The European banking union is a regulator, not a legislator, but it is a regulator that has become quasi-legislative. The agreement was that a double majority would prevail in terms of this regulatory instrument, so there would have been a majority of the eurozone countries but there would also have to be a majority of the non-eurozone countries when it came to the decisions made by the European banking union.

**Lord Davies of Stamford:** As long as there were more than four.

**Professor Scott:** Yes. That, in a sense, is the model that seems to be being used as a potential model for broader questions. That raises issues about how the European Union legislates. Can that be done in a legally binding way? If it were to be done in a legally binding way, what you

are implying, I suspect, is that the treaty would have to be amended *per se* formally. You would have to then determine which legal base would be subject to this particular rule, and it is a legal base concerning the operation of the single financial area. This legal basis would now require a double majority, if it was to be legally binding. I would find that virtually inconceivable to be agreed by the other member states, because you are saying that, for something that is a core proposition—the single market—albeit only one element, based on the articles you were making subject to this agreement, a small number of countries have a veto. I do not think that that is possible. You can have conventions. There is a whole range of potential agreements by the European Council to say that, in the event that two or three countries outside the eurozone take issue with this, we will have an emergency break that will be used to find a consensus.

**Lord Jay of Ewelme:** A sort of Luxembourg compromise for three or four, rather than one.

**Professor Scott:** It was actually the Ioannina compromise which is the model for this, when the blocking minority was reduced. The agreement was that, if the blocking minority under the old system was not met but it was met under the laws, then they would have a break.

**The Chairman:** It is fair to say that the Luxembourg compromise was never a veto.

**Professor Scott:** It was never a veto.

**The Chairman:** It was, “Let the discussion continue until agreement is reached”.

**Lord Tugendhat:** It could be said, however, that the Luxembourg compromise is now a dead letter.

**Lord Jay of Ewelme:** That is why you would need something else.

**Professor Scott:** Yes. QMV has killed the Luxembourg compromise.

**The Chairman:** In a sense, you are hinting after a kind of political arrangement: what I have loosely called a non-aggression pact, where you say, “We do not stop you integrating but you do not mess us about in relation to the single market”.

**Professor Scott:** To be fair, if the European Union wants to continue to command legitimacy, in my view the biggest crisis with the Union just now is that it is losing the trust of its citizens, not only in the UK, and potentially quite a significant number. That is a crisis for the Union, not a crisis for Britain. The Union must respond to this type of difficulty, which is a legitimate question. I do not doubt the legitimacy of the argument that says that non-eurozone countries may have to have a louder voice in decisions that impact on them. If they are always going to be in the minority and cannot block the legislation, it would be appropriate to say, “We will devise a political solution to this”. I am doubtful whether you can go as far as to say, “Let us revise the treaty”, because I think you would then be reversing, in a sense—



**Lord Davies of Stamford:** Vetoes are out and changes in the treaty are out.

*Professor Scott:* I think vetoes are out.

**Lord Davies of Stamford:** What might be in as a delaying mechanism?

*Professor Scott:* A political agreement at the level of the European Council, which would then be observed in the Council if there was a majority of non-eurozone countries. A possibility would be to have, effectively, a double-majority system, but very informally: if the majority of the eurozone but a minority of the non-eurozone agreed with it, you would hold. You would then say, “We need to take cognisance of the non-eurozone majority view and we need to reflect that”.

**Lord Jay of Ewelme:** Just going back to something you mentioned at the beginning, you said that one of the Commission’s jobs is preserving the unity of the financial markets of the 28.

*Professor Scott:* Yes, the integrity of the single market.

**Lord Jay of Ewelme:** Is that in the treaty somewhere? Could one build on that to say, “In pursuance of that, then something else would follow”?

**The Chairman:** “Should be interpreted as”.

*Professor Scott:* The difficulty is if the legislative process says that, notwithstanding that, this will be done by a qualified majority, which all single market issues are. This could raise a question about the integrity of the single market. The one problem with all this is the Parliament. We must not forget the European Parliament. It is a co-legislator. If the European Parliament says, “You can do what you want in the Council. We still have to agree or, if we do not agree with legislation, we can block it”. The difficulty or the interesting proposition is that most European legislation now is passed at first reading, so a trilogue goes on before the legislation is even introduced. You are creating a complex system, which, presumably, would not be invoked that often, one would possibly expect, and it may also create a self-denying ordinance: “Let us not bring forward legislative proposals that are clearly going to fall foul”. It is a complex political dance.

**The Chairman:** I think we might give notice to revert to that question about crisis of democratic legitimacy as our wind-up question, so I will just mention that.

*Professor Scott:* Yes, sure.

**Q102 The Chairman:** Can I go on to ask a bit about national Parliaments? The Government’s formal position or wish is to introduce a new arrangement where groups of national Parliaments acting together can stop unwanted legislative proposals. To relate this to the democratic deficit that you have just touched on but which we will come back to at the end, do you feel that this stated approach to democratic legitimacy adequately captures, first

of all, the role of national Parliaments at the top level, at the level of the member state, and, secondly, the role of the devolved legislatures and, more widely, regional or local government structures or anyone including civil society?

**Professor Cram:** This one is quite difficult. The House of Lords has done lots of really good work on trying to extend the whole red card procedure, and there is fairly widespread support around Parliaments generally for working on that.

**The Chairman:** To make a simplistic point and then leave it, I think our view would be, collectively, if you are going to have a power to withhold consent, you also need a power to promote ideas, because that is the way a Parliament works.

**Professor Cram:** Without an ability to be a legislator in that formal and proactive sense, it is difficult. You also have some really practical difficulties if you think of this as building on the original subsidiarity protocol and the roles for the national Parliaments—issues such as, where appropriate, the consultation of regional and local bodies. That was one of the issues that came up. Immediately, we would ask, “What is the scope of this? What would count as a national Parliament? Who gets to decide, for example, if we start to talk about the devolved Parliaments, and when and where they would be involved in that?” There were differences between what the Commission thought was appropriate and what the different Governments in different countries thought was appropriate. In terms of that, there would be a lot of issues involved.

There is also the question of whether or not that addresses democracy at all in the European Union. There is a fair consensus among a lot of the academics who look at it that that is going down a track that is a bit of a red herring. In practice, increasing the role of national Parliaments does not really touch very much on the democracy of the European Union without that proactive role to formally propose the legislation, and it would involve a lot of resource. For anybody who has been involved in the explanatory memoranda or dealing with the subsidiarity scrutiny, it is a really resource-intensive process and has not resulted in an awful lot. A real question around this is not that you will not get support—that was one of the relatively easy ones in the letter—but whether or not, having got that support, some of the parliamentary bodies will be coming back with, “This has been an absolutely enormous resource-intensive job for us to take on, but we have not really got that much in terms of increasing democracy out of it”.

**Professor Scott:** I agree with everything Laura said. I think the red card possibility is difficult, because then you are changing the EU legislative system. That would have to be a treaty

revision, because, if you had a red card, you are saying, “We now have three players in town: the Council, the Parliament and national Parliaments”.

**The Chairman:** In fairness, just to record, there is a red card procedure under the treaty about egregious breaches of subsidiarity, and the only national Chamber that has even threatened to invoke it, to my knowledge, is the House of Lords, because we got very angry indeed about occupational pensions. I penned a letter saying, “If you persist in this course of action, we would be minded to see you at the ECJ”. I would not say that we have heard nothing since, but it has rather taken the wind out of their sails, I think.

**Professor Scott:** The other thing is whether the scope of this national Parliament would only be for those issues that presently trigger subsidiarity or whether this would be for everything, which would be a multiple problem. I can never have this discussion and resist the temptation—I am not going to resist the temptation here either—to say that nothing prevents national Parliaments from doing scrutiny and holding their own Governments to account anyway. There is something called the scrutiny reserve that people have conveniently forgotten about.

**Lord Jay of Ewelme:** Except for the Danes.

**Professor Scott:** Absolutely, and the Danes are very diligent about ensuring that their Government, when they represent the Danish position, represent the Danish Parliament position. I am not sure why a national Parliament system of this would work any better than a scrutiny reserve system, which should ensure that, when the UK Government—or any Government—go and represent the national position, they have the permission and the agreement of the Parliament; therefore, they have a democratic legitimacy. I am not clear in my mind why this system would ultimately be any more or less successful than the decaying—if you do not mind me using that language—system of scrutiny that is common, with the exception of Denmark, across most EU countries.

**The Chairman:** Without suggesting that we are the only players in town, I think I ought to record a moment of some irritation with a government department which, in delicacy, ought to remain nameless. I was heard to march around the office muttering, “If they go on like this, they will find all their documents are held under reserve and they will get nothing through”, which might have been the nuclear deterrent but it made me feel much better. Just glossing on that personal comment, you have huge differences in propensity, appetite and capacity for doing the scrutiny work. In addition, of course, you are negotiating with 41 national Parliaments. I do not think anyone would wish to claim—you know we have written on this

and so forth—that it would be the end of these issues, but it is an interesting perspective. Please, carry on.

**Professor Scott:** Could I just add a quick note to that?

**The Chairman:** We are all right for time if you are. We are finding this fascinating.

**Professor Scott:** No, I could talk about this all day.

**The Chairman:** That is all right.

**Professor Scott:** This is fun. The difficulty, if you want to put it in an ever broader context, is that, if you think about the EU as a regulator, most of the business it does is really regulation, not big politics. The risk I see with giving more power to national Parliaments is that you will then be engaging what are quite technical regulatory questions with broader political dynamics, and I am not sure that that is in the service of a single market. Without proselytising for the single market but assuming we all agree that the single market is good in terms of free trade and improving growth and opportunities, my worry about giving national Parliaments too much power is that these important regulatory questions of directives, for example, on clean water or whatever it may be will suddenly become enmeshed in a broader debate about whether we like the European Union. You may stop and somehow halt good progress being made, which leads to good outcomes, on the basis of political spin or political positions.

**Lord Davies of Stamford:** The British invented QMV in order to create a single market.

**Professor Scott:** Yes, absolutely. This is the irony to most commentators I speak to: “You invented the single market; why do you want to leave it? It is in your own image”.

**The Chairman:** It is also fair to make the point that you have the dynamics of the relationship with the European Parliament, to which we are sensitive, if I may put it that way, and I think there would be, should I say, a certain lack of appetite even among these excellent colleagues for having to embark on trilogues. We are not going to pack our bags and go to Brussels every week. I am just trying to distil this: you have a limited role but not, as it were, taking the democratic train by enhancing the role of national Parliaments.

**Professor Cram:** The converse of Drew’s point is true as well: that it is not just what effect it might have on the negotiations or regulations at EU level, but if a huge amount of national Parliaments’ time is tied up in scrutinising every technical regulation that comes out of the EU, it also has democratic implications at home, because that is where your scrutiny time is tied up.

**The Chairman:** Yes. We begin to work towards a close,

**Q103 Lord Trees:** The fourth issue in the Prime Minister’s letter to Donald Tusk was sovereignty, which we have not touched on much. It has been mentioned, and I suppose the nub of that were these words—and we have asked all the people we have been meeting over these weeks about these words—“ever closer union”. What is your interpretation of them and do you think those words are a problem for the Scottish people?

**Professor Cram:** I do not think “ever closer union” is of any salience to the public anywhere at all. It is one of the issues that those of us who are involved in it know about, but most people would not—

**The Chairman:** It is a beltway issue.

**Professor Cram:** Precisely.

**The Chairman:** Do you take that view too, Drew?

**Professor Scott:** Yes, but I do not think it is about salience. I would like to come back on that, if I may.

**Professor Cram:** The issue with ever closer union was fascinating, because, first of all, it is a preamble aspect, so it affects the spirit of the interpretation of the law but not necessarily the practice of the interpretation. Opting out, even in a protocol, will not change that affecting the spirit of the laws, but the law will be affected by the preamble to the treaty, so that, symbolically, would be less effective than one might think. The other aspect is that the provision on ever closer union embodies a commitment to differentiated integration and a recognition that we could all progress at different stages. It is one of the two formal statements that say, “We know that the UK does not want to have ever closer union and, therefore, you can progress at the rate you like”. It is mostly used for openness and transparency requests now, so that is one to be a little careful with, in terms of making sure that you do not throw out the baby with the bathwater.

**Lord Trees:** A very good point.

**Professor Scott:** David Edward would be very annoyed if I did not say this: as he always says, it is an ever closer union among the peoples of Europe, not among the states of Europe.

**The Chairman:** We always say that.

**Professor Scott:** He is very determined and insistent, and he has done a lot of work recently on the genesis of this argument. You can do a lot worse than invite David to contribute to this discussion, because he has done a lot of work on this question: where did it come from and what does it mean? As a former member of the Court, he would know the extent to which it was reflected in Court discussions. One thing, of course, is that it would require treaty revision. Again, is it worth the candle as far as that goes? Ultimately, one of the big questions

in all this debate is how much it requires treaty revision and how significant it is going to be. I think the difficulty for some countries might be that they see this as almost the same as the idea that there should be more than one currency for the European Union. They may see this as an attempt to create the principle of a constitutional, fragmented Europe. The ever closer union among the peoples of Europe implies that it is unidirectional and not reversible. That is perhaps a common-sense interpretation of it.

**The Chairman:** This is one reason, to be honest, why the Eurosceptics claim not to like it.

**Professor Scott:** No, absolutely.

**Lord Jay of Ewelme:** Is Europe the EU at that stage, or is Europe in that preamble more general?

**Professor Scott:** I cannot answer. That is an interesting question.

**Lord Jay of Ewelme:** It is more general, of course. It is a very noble thought.

**Lord Tugendhat:** Can I take up your point about being unidirectional? You said earlier—and I completely agree with you—that this Commission is doing very good work in undoing a lot of regulations that have passed their sell-by date and, indeed, implementing the view of the Dutch, like Mr Timmermans, that what should be done nationally should be done nationally, and what should be done centrally should be done centrally. I do not know what is in the Prime Minister's mind but I think that, by focusing on this phrase, he is trying to demonstrate to the British people that not everything has to flow one way, but that things can flow both ways. In securing that point, I think he makes a very powerful point in terms of the British electorate. He is able to show that we are members of the European Union but we will not, in future, have to do anything that we do not choose to do. In the real world, that may not be an enormous change but, in terms of the psychology, I think it is a very important change, which is why I think he is going for it in such a big way.

**Professor Scott:** I was wrong. You are right. You are absolutely right. I was misleading you. The treaty now says powers can flow back. The treaty itself will require to be changed for that to happen, as well as secondary legislation. You are absolutely right on that. You are right too on the psychology point. The question is: what is the psychology point from the other side of the argument? What does it mean psychologically for our partners? I would try to make a reasonable case to say that, if Britain gets an exemption from that—and I agree with Laura that this is not the stuff of high politics—

**Lord Tugendhat:** It is not an exemption; it is just saying that people interpret it in different ways.

**Professor Scott:** I think that is already clear.

**Lord Tugendhat:** That is clear. He has got that point.

**Professor Scott:** Yes. If he formally wishes Britain to be exempt from that recital—my understanding is he wants a formal exemption for Britain from those places in the treaty where that phrase is used—that will require a treaty revision, because it would be part of the protocol that would be bundling up these exceptions. From the perspective of the Union, however, I wonder how that would be read. The Union has always said, “We are going in the same direction at different speeds and, through enhanced co-operation, some countries can go further, if they have a minority who wish to do that”, so that is all provided for in the treaty. “We are all going to the same place” is what is implicit in that. This is purely speculation on my part, so I am not holding this as a strong intellectual argument, but I just wonder, if you are sitting on the other side of the channel, if we have countries exempt from this foundational principle, does that mean that we are into a variable geometry Europe almost as a constitutional reality, and that countries can now use that recital to exempt themselves from certain bits of the puzzle?

**Lord Tugendhat:** When you say that people say, “We are all going to the same place at different speeds”, I would slightly query that. Putting it in rather absolute terms, Monnet was going to one place and de Gaulle was going to another place. One of the things the European Union has very wisely done is not to define the finalité. Therefore, there is a danger in this discussion of angels dancing on a pinhead. Everybody recognises that a Union of 28 is different from a Union of six or nine and that, therefore, Bulgaria and Belgium are not going to end up in the same place. Everybody recognises that.

**Professor Scott:** I rather think my point was: if it comes to a treaty revision and there is going to be a treaty revision at some point, could Britain invoke this exemption to say, “Well, guys, we do not have to seek a derogation but we are going to invoke our exemption from the ever closer union and we are simply declaring, without negotiation, that we will not sign that part of the treaty, because we now are exempted from this”? My question is: is it just as irrelevant as people imagine, or could it be used in a more purposeful way subsequently? I am not saying that that is good, bad or indifferent; it is just a question in my mind. I do not think anything is just trivial.

**Lord Tugendhat:** This is not trivial.

**Professor Scott:** No, I was not implying you said it was trivial; it was more the public’s view.

**The Chairman:** Is it not also possible to interpret your remarks as saying that you are moving from a Europe from where exceptions work by exception to a situation where exceptions are as a rule or may be adopted by individual member states as a rule?

**Professor Scott:** You are putting it much better than I ever could. That is exactly what I was trying to convey.

**Professor Cram:** The “dancing on a pinhead” is really important in terms of this being a pressure valve for the EU. The great trick of European integration has surely always been to not define where it is going and to make differentiated integration and variable geometry part of what has allowed it to continue and flow. As soon as you squeeze it into something that is very tightly interpretable, that is when you can see the implosions taking place.

**Q104 Lord Trees:** I love this term “differentiated integration”. Andrew, you say that everybody is moving to the same place. I think the British people would like to know what that place is. Can you tell us?

**Professor Scott:** It is the dynamics of that that really have set in motion this whole question: where are we going in this European Union and is it now, through this kind of spillover logic, becoming something that is completely unrecognisable to what we signed up for? That, essentially, is the foundational question about which this referendum is being held, because that is the argument. Has this now moved from being a simple common market, although common markets are never simple, into something which is much grander, more ambitious and more inclusive of areas of political sensitivity—home affairs, foreign policy or migration—that we never bought into? We do not have a common place we are going to, but the knock-on effects of where we have been are sending us to other places. The Schengen agreement is now part of the propagation of the crisis through the refugee system, which was a totally unexpected, unforeseeable and unpredictable result. I think that raises questions in the mind of many publics, not just the British public, because this system has now gone to a place where nobody really expected it to go. How do we stop this automaticity and this direction of travel?

**Lord Jay of Ewelme:** That is true of the EU, of Great Britain and of almost any political entity: you do not know what the future is.

**Professor Scott:** I am not trying to make an issue out of that so much. It was more whether the exemption from an ever closer union matters. It matters rather more than simply being symbolic. It could have substance as we proceed.

**Lord Tugendhat:** Coming back to my Monnet/de Gaulle thing—and you may think that what I am now going to say is far-fetched—there was a time when there was only one form of Christianity in western Europe, and that was Catholicism. We then moved to a time when there were different forms of Christianity in Europe. I am not suggesting that Protestantism is a less valid form of Christianity than Catholicism, or vice versa—although lots of people



did—or that Calvinism is inferior to anything. We are now in a situation in Europe where, by virtue of the scale of the operation, it is clear that the European faith has many mansions in this church—or whatever the hymn says—and that to try to define Europe as meaning one thing is out of date and now extremely unhelpful.

**Professor Cram:** I do not think you ever could. That is exactly the story from the beginning, from the fact that it was sold as this technical, functional co-operation, but Monnet had a vision behind it. Again, that great trick of European integration is that every single one of the member states has been able to frame it and narrate it to their publics at different stages and in different ways, and trying to tie that down is where you get into trouble.

**The Chairman:** I am going to work this towards a close.

**Q105 Baroness Wilcox:** Following the statement you just made, this may not ring so well, but it has concerned me, in the years that I have worked and lived within the European Union—I lived in France—to try to understand, from my common law, what law it is that we are working with in the European Community. It tended to be a common law for us, for the people down there to start bringing something up. We will all agree it and then we will particularise it. When we have particularised it, we will enforce it on our people. When I lived in France—and particularly in regional France—I lived in three completely different regions of France, always by the water, because of the fishing industry, and it used to fascinate me that a law would come through and they would all agree it, but nobody would do it. It was aspirational, like the Ten Commandments: “I know I should not have slept with my neighbour’s wife, but I did, and I shall try ever so hard not to do it again”.

**Lord Tugendhat:** Or the neighbour’s husband.

**Baroness Wilcox:** These are modern times. I wondered how often that makes it difficult for us. We tend to take these laws as they come to us from the European Community, and treat them as our common law, and we work so hard at trying to impose each one of them and particularise each one of them. For us to bring a law through or an agreement through, say, “Let us all have a chat about it”, and then do it our own way is not our way. It is not our way to do that. It is our difficulty in Britain to have this common law when we joined an organisation that was not based on it, and it still holds for us a great deal of difficulty.

**Lord Whitty:** I would just underline that. Let us focus on transposition and the way that English government lawyers transpose. Some call it gold-plating, but it is particularising, to use your term. I always remember, after foot and mouth disease, we had a movements directive, which was about 12 pages long. The lawyers, in their first draft, brought out a 78-page document, but I managed to get them to go away and get it down to about 20 pages,

which I thought was pretty good. Then I found that the Irish Government had got it down to seven, probably in two languages.

**Professor Scott:** We are in the area now of more general discussion, but I would say two things. One is the gold plate, and that is where I was going with it as well. There is an accusation or an assertion that the difficulty with Britain is that they make it difficult for themselves.

**The Chairman:** Do other people say this about their own laws as well?

**Professor Scott:** Yes. This is perhaps an urban myth or perhaps not, but there is this view that the regulations that come out of Brussels are then gold-plated, because Britain is diligent and compliant. The statistics do not demonstrate that we are top of the compliance league, but we do well. This really is because we over-implement and we over-transpose. There is a much bigger question that almost goes back to your comments about constitutional tolerance. The EU has been characterised by a high level of constitutional tolerance over the years. Different constitutions can coalesce within the framework of the EU. This is purely speculative, but I wonder if that is a condition that can continue. Of the multiple crises that affected the Union, the eurozone crisis is perhaps the most legally important, because it will spawn the most legally complex, sophisticated and comprehensive response, and it has done already. But the refugee crisis could possibly spawn an immigration discussion, because we do not have a common immigration policy as it exists in the EU, and of course foreign policy, given what is happening in other parts of the world.

I just wonder—and I cannot back this up in an academic sense—sometimes whether the constitutional tolerance that you spoke about, which allows a thousand flowers to flourish within this forest, is something that can last. The European Court of Justice always has been, from the 1960s, a constitutional-type court. On the question of Britain's renegotiation of membership, we have to have a very keen eye on how these discussions, decisions and outcomes will play within this legal framework, because the European Court of Justice is answerable to no politician. It has made that clear time and again. In a sense, that takes us the full way round to the question of how Britain can reconcile its constitutional integrity, which, it seems to me, is the very foundation of this discussion, co-existing within a system that has always been constitutionally tolerant but which, perhaps, is reaching—

**Lord Tugendhat:** If you look at the United States Supreme Court—and I am not a lawyer, I hasten to add—it moves with the times, not in step with the times. The judgments it makes about same-sex relationships or colour and equality, for instance, it would not have made in the 1940s or the 1930s. Indeed, it takes decisions now—and it always has—that, in effect,

reverse decisions it took earlier, because public opinion and social mores have changed et cetera.

**Professor Scott:** There is at least one Supreme Court Justice who does not agree with that and who goes back to foundationalism and says that the Constitution is the document and nothing should change. You are right: the Court of Justice has recently made decisions about “welfare tourism”, to use that unpleasant but none the less quite descriptive term, which have changed, and certainly they have been received very well in London because they imply that there are limits to which citizenship does not bestow advantages of that nature, but there is a difference between citizens and workers, of course.

**The Chairman:** Thank you. I would like to draw the formal session to a close. Witnesses have been intensely helpful, as Lord Davies said and I think we would all feel. I am conscious that we left an end exposed, which you might like to reflect on. It may be published material or it may be that you would like to write us a letter. That is the question about what you said was the existential issue for the Union, which is its disconnect with its citizens, because I think that is interesting. Although it is not strictly relevant to this immediate inquiry, it would be very useful to add anything you wanted to provide on that. We can perhaps take it off balance sheet now and revert to a little conversation, if you want to have one informally, before people go. We must let you go and we will need to go in due course.

We want to record our thanks. This has been immensely helpful, as I hoped it would be, in sparking some of these ideas and giving some light and shade, and some very serious longitudinal perspectives on what is an immediate and may become a febrile debate.