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Witnesses: Mr Andy Lebrecht, UK Deputy Permanent Representative to the EU, and Mr David Tripp, Private Secretary to Mr Lebrecht, examined.

Q22 Chairman: Thank you very much indeed for coming and helping us with our inquiry on codecision and national parliamentary scrutiny. The formal thing to begin with is this is a formal evidence-taking session of the House of Lords EU Select Committee, so a note will be taken. There will be a transcript and that will be available to you, hopefully within a few days, and you can have a look through and remove any slips that have crept in. As I said, thank you very much indeed for coming and helping with our inquiry. We are at the relatively early stages in our inquiry. We have heard from our own Minister for Europe and have received a fair amount of written evidence, so we thought it would be appropriate to come over to Brussels at this time and speak to people like yourselves and particularly people who have knowledge from the European institutions’ perspective of how codecision works, and the important thing is what changes are likely to come in as a result if we get Lisbon, rather than looking back all the time, looking ahead to the future and how things may evolve. I suppose the tension we detect, and is it real or not, is between the increase in the number of first reading deals and the way that has developed over recent years and the emphasis on effective parliamentary scrutiny? Because decisions are being taken earlier in the process,
how does that impact on effective parliamentary scrutiny? Do you have a view on that and what is your experience?

Mr Lebrecht: Perhaps I could first thank you for inviting me to give evidence. I am accompanied by David Tripp who, amongst other things, is our representative on the Burton’s Committee which supports deputy permanent representatives here in Brussels; he may be able to help me answer some of your questions. To look at your question, firstly, it will be quite interesting to see if in the next Parliament this trend to first reading agreements continues. Certainly we hear some mumblings in the Parliament that they would rather move back towards more second reading, possibly conciliations, but that is just as an aside really. My own view on the process and how it links to parliamentary scrutiny is I am not sure if it makes it harder to conduct scrutiny, but I suspect that it changes the way that scrutiny has to be conducted in the sense that, whereas under the old system of consultation, the procedure that still applies for the moment in agriculture, for example, there was a much more formalised process and there were fixed points, with first reading agreements and, indeed, second and conciliation agreements, the whole process is much more iterative. That is why I think the Government in its guidance has moved towards the concept of keeping the committees in the picture when there are significant moments in the process rather than the fixed points that characterised the situation previously. I think my answer to your question is it does not necessarily make it more difficult, but it does change the nature in which we need to involve the committees so that you can do your scrutiny as effectively as possible.

Q23 Chairman: Is there the chance that things move too quickly in order to be able to intervene effectively in a scrutinising way and we just have to be quicker and nimbler?

Mr Lebrecht: The straight answer to that is sometimes. One of the characteristics of codecision is that every negotiation is different. Sometimes a first reading agreement can be very predictable, it can even have fixed points, and it can be manageable. An example of that
will be the 2020 climate change package where we knew right from the outset what all the
fixed points were, but you will get other situations where things move incredibly quickly, as
you said. We have just done two very, very quick ones that I can give you as an example.
One was the proposal to ban the import of seal products where, partly because we were facing
the deadline of the end of the recent Parliament, it became clear that a first reading deal was
on the cards, so the negotiation moved very fast. A second, even faster one was on airport
slots where the Commission made a proposal in April to apply in July to adjust the rules on
airport slots in the context of the current economic recession. That moved very fast. That
said, there are examples of negotiations moving very fast under the consultation procedure as
well, so it can happen.

Q24 Lord Hannay of Chiswick: From what you say, presumably you identified those very
fast ones at a fairly early stage as negotiators on behalf of the Government. Are there
arrangements there which would enable the Government to tell the committees of the
Commons and Lords that they are faced with a very short timescale to get their views in? Are
they doing that, do you know?

Mr Lebrecht: My understanding is that the rules require the initial Explanatory
Memorandum to include a reference to the fact the department anticipates that there will be a
first reading agreement. Sometimes it is very easy to anticipate a first reading agreement, and
the airport slots is a case in point. That ought to happen. That said, there will be other cases
where you do not anticipate a first reading agreement at the outset, but it will become clear in
the negotiations that a first reading agreement may be on the cards. As soon as we know that,
we will tell the lead department and my understanding is that the lead department needs to tell
the committees that at that stage. Whether they do or not, I am not in a position to say.

Chairman: I think the answer to that is it is very patchy.
Q25 Lord Hannay of Chiswick: You are saying there is nothing that stops the Government doing that because you are actually tipping them off that your best estimate is that a first reading deal is in the offing?

Mr Lebrecht: Correct.

Q26 Chairman: It goes through the filter of the department before it gets to us?

Mr Lebrecht: Yes. The way we operate is any information we pick up here goes to the department and then from the department onwards.

Q27 Lord Trimble: Why do you not copy it to us when you send it to the department?

Mr Lebrecht: It is not as black and white as that. What will happen is there will be a particular meeting of the working group, or possibly COREPER, when, amongst the other information we get, there is a prospect of first reading agreement and we will send a report of that meeting as a whole and that will go to the department.

Q28 Chairman: Can we go on to informal trilogues, how important they are, how they work, who attends on behalf of each institution, what documents are available and how the meetings are conducted. First of all, how vital are they? I suspect they are very vital.

Mr Lebrecht: The trilogues are the central part of the process. They involve the Parliament, the Council and the Commission. The Council is represented by the Presidency of the day supported by the Council Secretariat and the Council Legal Services. This can vary, but the Parliament will normally be represented by the rapporteur and the shadow rapporteurs, those from the other political parties, the chairman of the committee and perhaps some others. The Commission will normally be represented at a senior level, probably by the director-general concerned, and some technical experts. Very occasionally, the Commissioner himself or herself may become involved if it is very political. That is the basic format of the trilogue.
Essentially, the Presidency is acting on behalf of the Council, so in the main it is negotiating on a mandate which has been given to it by the Council, in effect by COREPER. That is the outline to how it works.

Q29 Chairman: Documents that are available? What are they working from?

Mr Lebrecht: If it is a first reading agreement, the core documents are obviously the Commission’s proposal and, if the committee of the Parliament has voted on its amendments, so not the plenary but if the committee has voted, that will be available. If there has been a general approach in the Council, then that will be the Council’s basic position. Sometimes you do get first reading agreements, and the airport slots is a good example, where, because of the time, the committee has not voted and there is not a general approach, so you are then working on the basis of evolving parliamentary and Council positions. The standard document that we get is usually a three- or four-column table which will show, for example, the Commission’s proposal, the general approach or common position, if there is one, the Parliament’s position, and then in the fourth column what will come to COREPER will be the Presidency’s proposals for a mandate, in other words, the Council’s negotiating position. That would come to COREPER and COREPER may well change that and what would then go to the Parliament would be that document, but as amended by COREPER.

Q30 Chairman: This is not just a matter of assembling the various positions, this is about real negotiation, is it not?

Mr Lebrecht: It is very much real negotiation. The documents may be quite long and detailed but on the key negotiating points it will describe the Parliament’s position and the Council’s proposed position. It is a negotiating document. As I say, the Presidency makes a proposal to COREPER and on the basis of that proposal, amending it as necessary, COREPER will give the Presidency a mandate to go and negotiate with the Parliament.
Q31 Lord Mance: I was just looking at the Inter-Institutional Agreement and that speaks about an iterative process, as you say, and exchange at the first reading stage and other stages of draft compromise texts and continuing contacts. The document you described, a three- or four-column table, sounds a rather formal summary document. Would it be right to understand that there would be other preceding, less formal documents that might have been exchanged before such a formal document was prepared?

Mr Lebrecht: The answer to your question is yes. If I can take a second reading agreement perhaps, it is slightly easier to describe. You have a common position and you have the Parliament’s amendments to that common position and there could be quite a lot of distance between those two documents. The Presidency, Commission and Parliament, possibly at technical level, will go through a process of seeking to align the positions as closely as possible on what one might describe as technical amendments so as to reduce the number of issues outstanding that need to be discussed at political level. Are those done on the basis of documents? I am sure they are, but they are not necessarily circulated to the other Member States. They will be a preparatory process to the Presidency coming to the Council to say, “Look, we have sorted out A-T and they are here in our four-column document, but U-Z are still outstanding and here are our proposals”. At that stage, which is the first stage where they are really coming to us for a mandate, it is open to the Member State entirely to say, “Well, actually on point M or whatever where you said we can accept the Parliament’s amendment, actually we cannot and we want you to fight that”. We have been through that informal process, but it is the four-column document that is effectively the Presidency’s proposal to us which is a request for a mandate.

Q32 Lord Hannay of Chiswick: Presumably it is fair to assume that the Parliament has that four-column document as soon as you have it?

Mr Lebrecht: They are not meant to.
Q33 Lord Hannay of Chiswick: I know, that is not the question I asked.

Mr Lebrecht: The documents are meant to be private to COREPER and the fact that COREPER then amends them means they sometimes only have a life of about 24 hours. This is very much an iterative process. We had a package on telecoms which has occupied much of the Czech Presidency, COREPER probably discussed it virtually every week from the end of January to the end of April, and we will have had a different four-column document for every one of those discussions. In a sense, whether or not the Parliament gets it, it is dead 24 hours later because what they will then get after COREPER will be what the Council’s position actually is.

Q34 Chairman: Does the Presidency get into the position of meeting the Parliament without a mandate?

Mr Lebrecht: At an informal stage they do. Their task fundamentally is to find that compromise that is acceptable to the Parliament and to a qualified majority of Member States. They know from the previous discussions where the sensitive points are and where the less sensitive points are. They almost certainly will try to resolve the less sensitive points, the technical points, without an explicit mandate, so informally with the Parliament, and then come back to COREPER and say, “This is where we think we have got to, can you agree to that?” As I say, if the Council says, “No, we cannot agree to every element of it”, then they have to go back and negotiate something different. They do have that clearing away point beforehand, and it is only when you get to the difficult issues, the political issues, that they look for an explicit mandate from the Council.

Q35 Chairman: What about your ability to influence the process from a UK point of view? I suppose, in particular, how much warning do you get of informal trilogues where you are not directly involved?
Mr Lebrecht: Formally, by definition, we do not. Informally we are talking to the Presidency all the time, we are talking to the Commission and we are talking to the Parliament in the sense of we may well be talking to the rapporteur, we will certainly be talking to other Members of the European Parliament, particularly British ones, on the committee, so we are both gathering information but also trying to influence all parties to this negotiation.

Q36 Chairman: That is an organic process, is it not?

Mr Lebrecht: Yes, effectively, in the sense that the two institutions start out with different positions and they are trying to come closer. Sometimes there will be some issues where there will be very clear red lines that everybody knows you cannot touch, but they tend to be relatively few, so there is scope for influencing throughout the negotiation.

Q37 Lord Hannay of Chiswick: Coming back to an earlier stage, that is to say, when the Commission’s proposals first go to the Parliament and the rapporteurs and so on, how does UKREP monitor things at that very early stage about how the Parliament’s view is shaping up? If you do that, do you report on that to London so that, if the Government wanted to, they could tell our Committee, our sub-committees who were looking at that particular piece of legislation, what they thought the European Parliament’s broad views were likely to be?

Mr Lebrecht: We do monitor and we do seek to influence the committees, both by formal briefing and through informal discussions. It is not just UKREP, it is Government ministers as well, for example. We do keep a close watch. Of course, it is quite difficult in many circumstances to predict what the Parliament’s view is until the committee has voted because it is only at that stage that the various ideas become concrete. Yes, we do keep London informed. It must be possible in theory that, if it became clear before the vote in the committee that a particular policy position was likely to be taken by the committee, I cannot
see any reason objectively why the departments could not inform your committees. The only
caveat I would make is that, until the committee votes, nothing is certain.

**Q38 Lord Hannay of Chiswick:** Two other things, perhaps slightly more speculative,
which are concerning us, one backward-looking and one forward-looking. The backward-
looking one is: could you just say a little bit about how this whole process of codecision has
evolved following the very large enlargement of 2004 going from 15 to 27. Secondly, could
you speculate a bit about the way you think Lisbon would have an impact on the codecision
process, obviously with particular reference to the very large areas which have not been
subject to codecision before - immigration, law, agriculture and fisheries and that sort of thing
- because we are trying to feel our way towards how the British Parliament should insert itself
into those matters too.

**Mr Lebrecht:** Just looking backward, obviously the Community enlarging to 27 has affected
both the way the Council operates, but also the way Parliament operates. I think it is fair to
say that the MEPs from the new Member States still have not fully made their mark yet and
are probably still not as effective in pursuing their objectives within the Parliament as the old
Member States, but perhaps that is to be expected and with the new Parliament that is shortly
to be elected perhaps we will see as strong a performance from MEPs from the new Member
States as we see from the old. It is still evolving. In terms of the Council, the enlargement
has inevitably given more power to the Presidency and more power to the Commission in the
sense that it is much more difficult now to put together a blocking minority than it used to be.
For example, the UK, Germany and France together are not a blocking minority, so that
changes the dynamics of the negotiation. I would also say it has given additional influence to
Member States that are more fleet of foot over here and have the resources to be more fleet of
foot because there are a large number of Member States who do not have the resources to do
that. Looking ahead, as you say, JHA and agriculture and fisheries are very big areas.
Personally, I am more familiar with agriculture and fisheries than I am with JHA, so forgive me if I give examples from there. The impact will be felt in a number of ways. Firstly, it will slow down legislation in the sense that, with the exceptions I identified earlier, the normal period for agreeing legislation by codecision can be 18 months to two years, whereas under the consultation procedure it was much quicker. That will force policymakers in the Commission and Council no less than Parliament to be more reflective about the legislation they propose and we may see less of it, therefore. I think we will see the Parliament behaving differently. On agriculture, for example, until now the Agriculture Committee, and some of you are familiar with agriculture, has not had power and some might say it has not exercised much responsibility. Over time I think we will see a change in that. We will see a change in the way the Council has to behave as well. If there is one thing I have learnt, it is that you cannot take the Parliament for granted, you have to work with it, you have to influence it and, if it has views, you have to take them into account because they have a veto on the legislation. I think we will see a slowing down of the legislative process. We will see a need for more resources and behaviour change on the part of the Parliament and the Council.

Q39 Lord Hannay of Chiswick: You did not mention the effect in JHA of the change in the voting base, of course, which is pretty important I assume.

Mr Lebrecht: I think that is right. I have to confess, I am not an expert on JHA.

Q40 Lord Hannay of Chiswick: Secondly, you have not made any reference in your forward look to the new weighting of votes in the Council which presumably will redress to some extent the bias which you saw following the enlargement to 27 towards it being more difficult to make a blocking minority. It becomes slightly easier, I think, under Lisbon.

Mr Lebrecht: That is true, but I do not believe the new voting weights come into effect immediately.
Q41 Lord Hannay of Chiswick: No, that is right, they do not.

Mr Lebrecht: The voting weights under the Nice Treaty sit very oddly with the populations of the Member States, so Lisbon will redress that balance, as you say.

Q42 Lord Trimble: The question I want to ask you is with regard to Presidencies, how Presidencies make clear to the Council which dossiers they intend to complete in their term of office.

Mr Lebrecht: There is a number of ways they do that. Firstly and formally, at the beginning of their Presidencies they publish a written programme of work. For example, at the beginning of the French Presidency it was very, very clear that the climate change package was their top priority. They also publish draft Council agendas in advance of their Presidencies which will say what the March Council is going to do. They are not entirely helpful for your purpose because a lot of the codecision is discussion in COREPER rather than the Council, but it is still important. Then at the beginning of the Presidency they make presentations certainly to the relevant working group and to the key councils, certainly those councils which meet frequently. In addition to that, the normal practice is the Presidency minister will appear before the relevant European Parliament committee at the beginning of its Presidency and give a presentation of its objectives. The totality of that information gives a picture of what their aims are.

Q43 Lord Trimble: Which ones of those do you then communicate to Parliament?

Mr Lebrecht: We will communicate all of them to the departments. We tend to work directly with the departments, so we would inform departments.

Q44 Lord Trimble: It is then left to the departments to decide whether or not to inform committees in Parliament?
Mr Lebrecht: Effectively, yes.

Q45 Lord Trimble: Is there any way that can be improved?

Mr Lebrecht: I would imagine there could be no difficulty in there being a formal ---

Q46 Lord Trimble: Some of those are formal documents. The programmes of work and agendas would be formal documents, would they not? Would we have access to them?

Mr Lebrecht: I am sure they are not limited documents, let us put it that way. Of course, the appearance before the European Parliament committees is publicly available. To answer your question, personally I would see no difficulty in Government ministers being asked to report on the same timescale as Presidencies.

Q47 Lord Trimble: If we have got documents such as the programme of work and the draft agenda which are not subject to any limitations on the publication of them, then surely they should be circulated to the committees.

Mr Lebrecht: I can see no reason why they should not be.

Q48 Lord Trimble: Those are all things that are happening at the beginning of the Presidency.

Mr Lebrecht: Yes.

Q49 Lord Trimble: During the Presidency, is there any way in which the Presidency will indicate that they have got some new ideas or they are no longer to pursue some ideas?

Mr Lebrecht: Firstly, events can happen in the middle of a Presidency and that can drive new developments. In terms of new ideas, a good Presidency has thought well in advance of how it is going to handle its six months and, if it comes up with a bright idea in the middle of its Presidency, then something has gone wrong somewhere and it is not likely to get anywhere.
What it should have done is worked with the Commission to make sure that the proposals are on the table or are going to come on the table, and then it is going to work them through and it will have told everybody. As regards stopping things, clearly if a Presidency runs into a blockage in terms of a strong blocking minority, for example, or the Parliament may throw out a proposal, and it does so occasionally, then it stops. Those are the sorts of developments that can happen mid-Presidency.

**Q50 Lord Trimble:** The reason why we are asking this question is with regard to codecision and particularly things happening at an early stage in the legislative procedure where the timescale could become quite short and, if we could get further upstream and are aware of the things that are going to come before they go into this process, then that gives an opportunity to keep in touch with things. This is why I am asking can anything be done to improve this situation because, if it just goes back to departments, the departments may not be thinking in terms of which are the items which the committees in Parliament would be particularly interested in and which are the items which are going to be seen as significant politically in the overall scheme of things rather than in terms of the department’s individual agenda. You might be in a better position to take that overview than the individual departments.

**Mr Lebrecht:** As I said earlier, I do not see any reason why this information should not be made available to the committees. Quite what the route is, whether it is from an agreement between yourselves and ministers or ministers ask us to send it direct to you, is a matter for yourselves really. There is no secrecy around this information.

**Lord Trimble:** I think what we would all really need is not just the formal documents to be circulated to us, but also to get a steer about which things are likely to be sensitive and important.
Q51 Chairman: I think that is right.

Mr Lebrecht: We would know at the beginning of a Presidency what is really going to matter to the Government. With the Czech Presidency, for example, we had a negotiation on working time, we had a negotiation on telecoms and a negotiation on the energy market because we knew that was going to matter. If what you are suggesting is that ministers might write, or whatever, and say, “This is the programme and these are the ones we care about”, however you would want that expressed, I would not see that as being a difficulty.

Lord Trimble: So if at the beginning of the Presidency we could get the minister at that stage to write to us drawing our attention to what are thought to be the significant items that are coming up.

Chairman: Then making sure that there are good lines of communication during the process, that is the important point. That is helpful.

Q52 Lord Mance: Can we move on one stage to the actual process by which first or early second reading deals may be reached. Forgive me if I am not completely au fait, but, as I understand it, the trilogue procedure can take place at any stage and is essentially an informal procedure where there is an attempt to negotiate a common position based on another column table, but of a slightly different nature from the one you have described because the one you were describing was designed to get authority for the Presidency. As I understand it, this is a table which sets out the position of the Council, the Parliament and then has a proposal which is intended to represent a possible compromise between those positions. Is that right? Would that be the basis on which trilogue discussions commonly take place?

Mr Lebrecht: Yes. Just to be absolutely clear, we are almost talking about the same thing. The document that will come to COREPER will have the previous positions of the Council and the Parliament and a proposal, the fourth column, will say, “This is what we want to put to Parliament”. COREPER will discuss that, it may agree it or it may change it, but at the end
of the COREPER that fourth column will be amended and it then becomes the Council’s proposition to the Parliament, which is what you were describing.

**Q53 Lord Mance:** So the trilogue document will probably have Parliament’s counterproposal and the aim will be to use that document to arrive at some sort of common compromise.

**Mr Lebrecht:** It gets a bit murky here. Just to be clear, the document that will come to COREPER we will see and we will agree what goes to the Parliament, but the Member States may never see that document that goes to the Parliament because it is a trilogue document.

**Q54 Lord Mance:** At the trilogue stage it leaves your sphere to some extent, this is happening without your being directly involved.

**Mr Lebrecht:** Yes, exactly. We are entrusting the Presidency as our negotiator, if you like, to take forward our position and negotiate with the Parliament. If it is helpful, I will tell you what happens next.

**Q55 Lord Mance:** Yes, that would be helpful.

**Mr Lebrecht:** After the trilogue the Presidency will come back to COREPER and they might say, “The Parliament has agreed everything you have asked for”, or they might say they have agreed most of it but are not prepared to agree X and also they are insisting on Y, and we will have a new four-column document reflecting that. We will decide in COREPER whether and to what extent we want to revise the Presidency’s mandate by responding to X and Y, then the Presidency will take that back to the Parliament and will negotiate that. At the end of all this process, if it has worked, and it does not always work, the Presidency will come back to COREPER with a new fourth column and they will say, “The Parliament are prepared to accept this. If COREPER can accept it, we have a deal.” If a qualified majority in
COREPER is prepared to accept that, then the Presidency will go back to the Parliament and say, “We have a deal” and the Parliament will take it forward and vote it through.

**Q56 Lord Mance:** So there should be no possibility of an agreement being reached between the institutions without COREPER having either beforehand authorised it or having the opportunity to see it afterwards and authorise it?

**Mr Lebrecht:** Correct.

**Q57 Lord Mance:** On that basis, if parliamentary scrutiny were appropriate in relation to the agreement, it should at one of those stages always be possible, given the information?

**Mr Lebrecht:** It should be possible. The only caveat I would give is there is often very little time between the various stages.

**Q58 Lord Mance:** Perhaps you can give an indication because that may be part of the problem. How quickly can the stages go?

**Mr Lebrecht:** It depends on the negotiation. Sometimes they can be spread out and sometimes they can be very concertinaed. At worst, and we had this, for example, at the end of the French Presidency when we had a lot to get through in a very short time and we had it in March and April of this year at the end of the Parliament, you might be talking about two or three days, a maximum of a week.

**Q59 Lord Maclennan of Rogart:** I wonder if you could help me by way of preliminary. You said that sometimes there is not time to give us much detail, but also you spoke of the normal period for codecision being 18 months to two years. Does the speed at which this process takes place, and you cited some examples of where there was speed for economic reasons like slots at airports, lay very much with the individual Presidency? Are there no conventions about lapse of time between different phases? Why is it that, despite this longish
period of time, which you say is normal, there is suddenly a rush in some cases which makes reporting difficult?

Mr Lebrecht: A lot of the time is spent pre-first reading, so the initial negotiation both of the Parliament’s first opinion and the Council’s common position, and only when you get to that stage does the clock start ticking. Why does it happen quickly? There are a number of reasons. One, and I guess the most common, is the cycle of Presidencies. As you know, with a six month cycle there is always pressure, the Presidency wants to complete as many negotiations as it can in its term.

Q60 Lord Maclennan of Rogart: That will change with Lisbon, will it not?

Mr Lebrecht: It will and it will not. Obviously with Lisbon you have the President of the European Council and a High Representative, but they only affect certain Council formations, they do not affect the majority of Council formations that deal with codecision, and you will still have the six-monthly Presidency. I think that will continue. There will be the usual pressure as you get towards November and December and May and June, there will be pressure from a Presidency to get completion. That is one reason. The second reason is I have certainly known examples where the Parliament quite deliberately has wanted to put pressure on the Council and has said, “We will have a plenary vote on, let us say, our April session. If you want to have a first reading agreement, you need to get your act together in order to meet that deadline”. That is a second example. The third reason will be in second reading agreements clearly there are clocks ticking. As perhaps is often the case in any negotiations, the real pressure on a negotiator only arises towards the end of the process, so it tends to be in those last few weeks when you are nearing a deadline that the real movement happens. There are those reasons why it happens.
Q61 Lord Maclennan of Rogart: We have been shown the Cabinet Office’s Guidance to Departments on keeping us informed and we were told that there was a provision which was intended to move this process more from a document-based process to a process where reports were made when there was significant progress. On the face of it, that seems to be a difficult and not wholly objective process. How do you decide whether something is “significant” or not?

Mr Lebrecht: I think the Government made that change in order to try to be helpful in a context in which it was quite difficult to identify fixed points in the negotiation.

Q62 Lord Maclennan of Rogart: I did want to come back to the point about fixed points.

Mr Lebrecht: Inevitably, defining what is “significant progress” or “substantial development”, which I think was another expression, involves some subjective judgment. Clearly, if the system is going to work, then departments have to be sensible in terms of helping the committees and making sure you are kept informed. I can understand that there is a degree of feeling uncomfortable with that element of discretion, but it does come back to the point about fixed points, I accept that.

Q63 Lord Mance: Can I just intervene and ask why is the element of discretion necessary because, by definition, if an agreement has not been reached and there is a document which sets out differing positions and authority is given perhaps by COREPER to the Presidency to put forward another position, that seems to be a change by definition. Similarly, if something comes back which is outside the ambit of what has been authorised by COREPER, that seems to require recognising a change and one which requires further authorisation. In other words, why is the test of disclosure not simply whatever requires to be authorised by COREPER at any particular stage which is, by definition, something new?
**Mr Lebrecht:** There are two observations I would make on that. First of all, this is very much an iterative process, it is happening all the time. As I said on the telecoms package, for example, it was happening week by week, so, if the documents were to be made available, you would be swamped.

**Q64 Lord Mance:** There would be a lot, yes.

**Mr Lebrecht:** I promise you, you would be swamped. The second point I make to reflect upon is the significance of the changes. Certainly we feel very comfortable in a negotiation - we the UK - if this iterative process of negotiation is happening around an area of the legislation about which we care nothing or is well within our negotiating mandate, for example. The question I would pose in that circumstance is: is every small change a significant development in the context of the work you are doing?

**Q65 Lord Hannay of Chiswick:** But you will understand that aficionados of bureaucratese regard the two adverbs of “significantly” and “substantially” as taking away with the left hand most of what the right hand has given. If you look at the sentences without the adverbs, they do not actually mean an enormous amount different, but they do reduce the degree of subjectivity.

**Mr Lebrecht:** There is a dilemma. On the one hand, unlike in the previous world, there are not normally fixed points on which you can say, “Yes, this document matters and that one does not matter” and we know that objectively and in advance. On the other hand, if committees were to get every single document, you would be swamped and it would be meaningless, I suspect. It is a question of how we find a way of identifying those documents, or perhaps less documents, as those developments arise when there is something new and useful about which the committees need to be informed. It is a question of how you identify that.
Q66 Chairman: Also, it is who is identifying what. There is identification going on with you and then there is identification going on within the department.

Mr Lebrecht: There is, although I would hope that we and the departments are as one.

Chairman: I think that is the blocked filter problem, quite honestly.

Q67 Lord Maclennan of Rogart: May I just come back to this for a moment or two. You have mentioned the changes or the progress in terms of the mandate, but presumably in the course of negotiations issues arise which may not have been foreseen.

Mr Lebrecht: Yes.

Q68 Lord Maclennan of Rogart: In such circumstances, you have to go for a new mandate presumably. Where does the decision come as to what the reaction should be to the development? Is it lying with you or is it lying within the office?

Mr Lebrecht: Firstly, you are absolutely right, new elements do come along. We would obviously inform the department of that and our expectation would be that the departments would make the judgment that this development is such as to notify the committees. I have to say, we do not monitor that, we do not see that as part of our responsibility. What is our responsibility is to make sure the departments know what is going on, certainly know if it is significant and if it is new.

Q69 Lord Maclennan of Rogart: Going back to an earlier answer, you said that sometimes the Parliament might time the debate to put pressure on. Presumably the Council would also use timing as a means of trying to concentrate minds. You said the Presidency uses time sometimes to rush things through at the end. Is it utterly Utopian to look for a legislative system which has more conventional spaces in which these talks can take place if, as you put it earlier, you have 18 months to two years to get this sort of legislation with codecision?
Mr Lebrecht: I do not think it is Utopian, but it may be difficult. In the early stages of the negotiations on what was then the EU Constitution, the UK Government was pushing hard to get rid of the six-month Presidencies across the board because it is the six-month Presidencies which are probably the biggest driver in terms of these deadlines. As we saw, the eventual compromise was for many of the councils the six-month Presidencies would be retained. If you translate your question to the question would a Presidency in May/June, for example, let matters drift into September/October for the sake of good order and good legislative practice, I think the answer is, if a blocking minority of Member States insist on it, yes, but, if they see an opportunity of getting a qualified majority and agreement, they will normally go for it. That is the dynamic of the six-month Presidency.

Chairman: We are under a bit of time pressure. We have three more questions to look at, but the most important one of those is the one dealing with the confidential nature of some documents and I will go straight to Lord Mance.

Q70 Lord Mance: We have got an understanding of the classification LIMITE which appears to be, or is described as being, a distribution classification rather than a security classification, but is sometimes treated as a reason for limiting disclosure to parliamentary scrutiny committees. What do you understand by the classification and what do you understand its significance to be in relation to disclosure to persons outside the Council and COREPER?

Mr Lebrecht: Our understanding is that those documents are available to administrations and to the institutions of the Community as appropriate, so the Commission and the Council and sometimes the Parliament. How do you define “administration” or could they go beyond that? As I read that document, the critical thing that the Council is concerned about is public access more generally, so the world at large.
Q71 Lord Mance: Yes.

Mr Lebrecht: I think the Government is largely guided by that. I know that, when you saw the Minister, she talked about the possibility of some kind of understanding around confidentiality and I suspect that is the key point of concern to the Council. There are two reasons why I think LIMITE documents are LIMITE, particularly in the case of the four-column documents, that they are negotiating documents and we would not always want our partner in a negotiation to see what our thinking is. There are other documents which have details of Member States’ positions on them and it may well be that Member States would be uncomfortable in having that information put into the public domain.

Q72 Lord Mance: Can you just put the classification in the context of what is, I suppose, the relevant Regulation, which is 1949/2001 on access to documents. Does the classification have significance in terms of that Regulation which deals with documents drawn up for internal use or received by an institution and says that disclosure should be refused only if it would seriously undermine an institution’s decision-making process, and then only if there is not some overriding public interest? Are we to take LIMITE as a conclusion in relation to every document so marked that disclosure would seriously undermine the decision-making process and there is no overriding public interest? Is that the significance which is being given, in which case it is a security classification one might add?

Mr Lebrecht: I think what the Council will say is that they would want decisions on publication of them to be on a case-by-case basis. It may be that the answer to your question depends on timing. Clearly a document that is sensitive vis-à-vis the Parliament we would not want to be on the website two days before a negotiation with the Parliament, that is clear. Whether it became available six months later is a more difficult line to defend. You may find the Council defending that line.
**Q73 Lord Mance:** I just wonder if I can ask whether if in fact there is any considered decision in relation to each and every document in accordance with the Regulation as to whether it should be so marked or whether this is not an almost automatic process of marking this type of document as LIMITE.

**Mr Lebrecht:** The Council will mark all four-column documents as LIMITE because they are negotiating documents. You will have an opportunity to check this this afternoon, but I think they interpret the process as being that the Council defines them as LIMITE. Whether or not they should be released will be dependent on a request. There would need to be a request from someone for publication and the onus would be that way round.

**Q74 Lord Mance:** In practice, it would not be regarded by you at any rate or, it would seem, by the Minister as an obstacle to their disclosure to Parliament if that disclosure were on the understanding that at any rate they would not be broadcast in the *Daily Mail*?

**Mr Lebrecht:** That is a decision for Ministers obviously.

**Q75 Lord Hannay of Chiswick:** On this point, I think it is fairly well agreed common ground that a number of parliaments are receiving LIMITE documents currently: the Finnish Parliament, the Danish Parliament, the French Senate and so on. I do not think there is any doubt about that frankly. Have you any reason to believe the Finnish, Danish or French Governments ask for authority before giving their parliaments those documents? Have there ever been any protests made by other Member States about the fact that these documents have been passed on to those Parliaments?

**Mr Lebrecht:** I am not aware of there ever having been problems.

**Q76 Lord Hannay of Chiswick:** Or that they have ever asked for authority?

**Mr Lebrecht:** I do not know the answer to that question, I am afraid.
Chairman: Sauce for the goose, sauce for the gander.

Q77 Lord Hannay of Chiswick: Very frankly, occasionally this is met by the view in Whitehall that the British Government would be something improper if it gave these documents to its own Parliament and we, equally frankly, doubt this very strongly because it seems to us a number of governments have decided to do that to their parliaments without asking anybody’s authority because it is not a security classification, it is a distribution one, and because presumably they have satisfied themselves that there is not going to be publication of these things of a wholesale kind. I just ask you those questions to find out whether you were aware of anyone having asked for authority or being taken up on doing it without authority.

Mr Lebrecht: As I said, I do not know the answer to that question. I am sure, when you see the representative of the Council this afternoon, he must be in a position to answer that question.

Q78 Chairman: Would it be significant if the representative of the Council this afternoon said they were quite content with the process that is going on in these other parliaments?

Mr Lebrecht: Forgive me, but I think that is a question for ministers as well. When the Minister for Europe spoke to you, she was relatively open.

Q79 Lord Teverson: Given that the Council is a legislative assembly, I find it strange that formal documents are not publicly available in that way. From that point of view, does that not seem very strange that they are not available or public?

Mr Lebrecht: They are not formal documents in a sense, they are negotiating documents. The formal documents are what goes to Council to vote upon. Perhaps that was a slightly trite answer. The dilemma we face is the two institutions are negotiating and neither the
Parliament nor the Council can afford to negotiate entirely in public, it does not help the negotiating process, so there needs to be a certain amount of negotiating space. That is one side of the argument. The other side of the argument is precisely the one that you put, that both the Council and the Parliament are legislative bodies and there should be openness.

**Lord Trimble:** What about in each House of Parliament when amendments are tabled and the two Houses may take different views on amendments? Is that not exactly the same situation?

**Lord Teverson:** Can I apologise for arriving late after coming out from London this morning. I do apologise to you for not being here at the start.

**Chairman:** We have gone over our time. Thank you very much and thank you in anticipation of lunch.