



European Scrutiny Committee

Oral evidence: [The European Investigation Order](#),
HC 1266

Wednesday 30 April 2014

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Members present: Mr William Cash (Chair); Andrew Bingham; Mr James Clappison; Michael Connarty; Geraint Davies; Kelvin Hopkins; Chris Kelly; Stephen Phillips; Henry Smith; Mike Thornton

Questions 1-39

Witnesses: **Rt Hon Theresa May MP**, Home Secretary, **Emma Gibbons**, Head of the European Unit, International Directorate, **Sunil Teeluck**, Legal Adviser, and **Harvey Palmer**, Head of Mutual Legal Assistance Policy, Judicial Cooperation Unit, Home Office, gave evidence.

Q1 Chair: Good afternoon, Home Secretary. First of all, thank you very much for responding so quickly to our request to give evidence. This indeed, as you know and as you are aware, is the second time you have given evidence to us on this extremely significant piece of EU legislation. The object of this session is primarily to examine how the Government has handled the scrutiny of this matter and its broader implications for the scrutiny of the House as a whole. We will also take the opportunity to follow up on the policy concerns we discussed in the first evidence session, but it would now be convenient if you would be kind enough to introduce your officials so that we can get on to the substance of the questions that we want to ask.

Theresa May: Yes. Perhaps, if I may, I will allow the officials to introduce themselves with their titles.

Emma Gibbons: I am Emma Gibbons. I am Head of the European Unit in the International Directorate.

Harvey Palmer: Harvey Palmer, Head of Mutual Legal Assistance Policy and the lead negotiator on the EIO.

Sunil Teeluck: Sunil Teeluck. I am the legal adviser for the EIO.

Q2 Chair: Thank you very much. Home Secretary, is it consistent with the Government's commitment "to strengthening its engagement with Parliament on all European Union business as part of our wider work to reduce the democratic deficit over EU matters"—these words being taken from the Ministerial statement of the Minister for Europe in January 2011—that no debate was scheduled on this very significant piece of EU legislation between the date of our recommendation on 6 November 2013 and the date of the adoption of the measure on 14 March 2014?

Theresa May: Chairman, the delay, as you may know, was in part due to the need to secure agreement across Government, but also was in part due to the lack of a public version of the text. As the Committee is well aware, only a limited version of the final agreed text was available until very shortly before its adoption.

Chair: We will come on to that in a moment.

Theresa May: Yes. We did share the limited text with you. In answer to the wider point, I would simply point out, if I may, Chairman, that the Government has significantly increased the ability for the House to scrutinise European matters through the number of statements and debates that are held. I recognise your concern about the delay here. As I say, there were two reasons: we were securing agreement across Government and there were the problems in relation to the final public text not being available within the sort of timescale that would have enabled an earlier debate to take place.

Chair: We hear what you say. We will consider that one when we are giving it further consideration.

Q3 Andrew Bingham: As a Committee, we produced a report on reforming the scrutiny system for the House of Commons on EU matters, and it recommended that procedures for opt-in debates should be extended by the Government by giving a prior commitment to arrange a floor debate for all measures that attract particularly strong parliamentary interest, and making available time for a floor debate in the House within four weeks of Committee recommendations. Do you think the failure to schedule a timely debate in this case strengthens or, shall we say, dilutes those recommendations? It does not sit correctly with it.

Theresa May: I have indicated the two reasons why there was the delay in this particular instance in relation to a debate on this matter. I do not think you can take one case and say, as a result of that, what the Government's overall policy is in relation to debates in the House on European matters that are of particular concern to Members of the House. As I have said, if you look at the record that we have had over the last four years and since the Minister for Europe made some very clear commitments to the House, we have on a few occasions had debates on European matters that, under prior arrangements, probably would not have taken place. That does not mean to say that in every case debates have been held within timetables that this Committee or, indeed, others might have wished.

Q4 Chair: Have you as a matter of fact had an opportunity to talk to the Minister for Europe about the questions and the concerns that we have, as expressed in our previous meeting, in the context of what he said in his Ministerial statement of 20 January 2011?

Theresa May: I have talked to the Minister for Europe on a number of occasions. I have not sat down and had a specific discussion with him about points that you have raised with me. Points that have been raised by this Committee, however, have been brought to the attention of the Minister for Europe.

Q5 Chair: To put it another way round, he puts in a Ministerial statement that is quite explicit and you make the point that this is a step in the right direction—in fact, more than that; it is actually to enhance the accountability of the House and to reduce the democratic deficit. I would have hoped that you would also, apart from coming to see us, discuss these matters with the Minister for Europe. Would you be good enough to make sure that you do that so that we can then perhaps have a letter from you indicating what view he takes in the light of the Ministerial statement and what has actually transpired?

Theresa May: I am very happy, Chairman, to undertake to have a meeting with the Minister for Europe on this matter. There is the wider issue of the fact that the Government will be properly responding in due course—I recognise that you will have a concern on the timetable here as well—to the Committee's own comments and observations on the issue of scrutiny by the House. Just to back up the point that I have made both to yourself and to Mr Bingham about the current arrangements, if you look at 2006-2007, there were six debates on the floor of the House relating to these sorts of matters; that had doubled in 2012-2013, when there were 12 debates on the floor of the House. It is the case that improvements have taken place. I recognise that the message you are giving me is that you are concerned and that you do not think that in this particular instance it met the requirements that were set out by the Minister for Europe. I have indicated there were two reasons why there has been a delay: in part the need to secure agreement across Government; and also in part the lack of a public version of the text.

Q6 Michael Connarty: Can I just ask a small supplementary? I was just trying to get to the process whereby a debate is not called. Either it does not reach your attention because you are so busy and there are so many other things you are doing, or it does come to your attention, you consider it and decide not to have a debate. Did you look at this as a request, discuss it with your officials, look at your diary and say, "No, I am not having that debate" or did you just not bother?

Theresa May: No, it is neither of those. There are processes across Government to ensure that all Departments are aware when a debate has been recommended. We take recommendations from the Committee about debates very seriously. Sometimes there are unavoidable delays and it is not possible to schedule debates in the timely manner that the Committee would wish.

Q7 Michael Connarty: So you have considered this issue of the request for this debate and decided not to have it.

Theresa May: We have. We look across Government at all the requests that come forward, and I am aware that in my area there have been a number of issues where the Committee recently has been requesting that there should be an ability to look at these issues. Sometimes the processes are such that it is not possible to schedule a debate in the timely manner that is requested. As I have said, in this instance, part of the issue that we were dealing with for part of the time was not just any internal processes in Government, but the lack of a public text that was going to be available.

Q8 Chair: You mentioned the question of documents being *limité* and you will recall that in our main report of November last year we raised a number of issues and concerns about the value and, indeed, the relevance of *limité* documents. It seems to us that there is an increasing use of this *limité* confidentiality to effectively suppress information that really ought to be out there in the public domain. In that context, have you identified any reason why the outcome of the negotiations with the European Parliament should have remained a *limité* document up to 11 March 2014, given particularly the fact that the text was originally apparently provided for agreement at COREPER as early as 3 December 2013—several months before—and that the Court of Justice itself has recently emphasised again the importance of transparency in the legislative process and has ruled that the risk of revealing the negotiating positions of member states is not sufficient reason to protect a legislative document from public disclosure? In other words, even the European Court is taking the view that you should not use *limité* for the purposes of suppressing information that otherwise would be better deployed in the public domain.

Theresa May: If I may, there are a number of aspects to the points you have made, Chairman. First of all, my officials were very clear with both the Presidency and with the Commission that we believed that a public text should be made available at an earlier date. We pressed very hard for that. That was not successful.

Q9 Chair: Whose fault is that?

Theresa May: Whose fault is it that they chose—

Chair: You made your recommendations and said that it should be available, and you were obviously told to get lost by somebody. Was this the European Commission?

Theresa May: I think it was both the Commission and the Presidency. We think either of them—

Emma Gibbons: The Presidency takes the decision as to which documents it releases. It works with the Council Secretariat to decide which should be classified. At this point the Commission probably would not have been involved, but we would have been talking to the Presidency and the Council Secretariat. Ultimately, they take the decision about what documents to publish and in what form, taking into account the views of the member states in the room.

Q10 Chair: Do they tell you what their reasons are for taking that view?

Emma Gibbons: Not generally.

Theresa May: No.

Q11 Chair: What do you mean “not generally”? Do they tell you at all?

Emma Gibbons: I would say in my experience, no. I cannot think of an occasion where they have come back to me and said, “No, because...” We have had the conversation and then the document has issued or it has not issued.

Theresa May: I apologise, because I referred to the Commission when I should have referred to the Council Secretariat. You referred to the 3 December text, Chairman. I understand that was a proposal from COREPER to the European Parliament for a first reading deal and, as such, it was part of the trilogue discussion, and that is why it was not disclosed and, indeed, arguably was not appropriate for disclosure. In relation to the ECJ judgment, they have recognised that information may be sensitive and merit protection in individual cases, and therefore that any suggestion that the *limité* marking should be withdrawn universally or for all time would not be appropriate—it would be disproportionate—although they did indicate concerns about the extent to which the *limité* protection was being used. The point is it is not our decision whether that document is made public or not. That is the point that we are making. We can make representations, but it is the Presidency’s decision as to whether they listen to the representations of us or, indeed, any other member state who makes representations.

Chair: We made our point in the other report of November 2013 about our reservations about the whole concept of the *limité* system, so we can leave it at that.

Q12 Chris Kelly: On 24 February, the Minister for Europe wrote to Lord Boswell that: “We understand that the Council do not currently plan to alter the way in which the *limité* document marking system is used”. Do you regard that as tenable in the light of experience with scrutiny of this matter? What steps are the Government taking to ensure that legislative documents are available at the earliest opportunity for full public scrutiny by Parliament?

Theresa May: What I would say, Mr Kelly, is that this is not a matter where we and the Committee are necessarily at odds in relation to a concern about the extent of the use of *limité* protection on documents. It is not just in relation to the EIO; it has also arisen recently in relation to the handling of the Schengen evaluation mechanism regulation, which was recently debated in the European Standing Committee. This is an issue on which we will respond to the comments specifically in due course that have been made in its report by the Committee, but it is not that I am sitting here trying to defend the extent to which *limité* protection is used within the European environment on Presidency decisions. I am simply saying that we have made representations; those representations have not led to a decision that they are going to, in any sense, limit the use of *limité*. Whether the ECJ decision leads to the Council Secretariat reconsidering this matter and looking again, we may yet see.

Q13 Chair: We seem to be getting close to some form of agreement, at any rate in principle, probably because we as parliamentarians do not really much like the idea of this private transaction of information behind the curtain when it should be in the public domain. We would be more or less on the same wavelength on that, would we not, Home Secretary?

Theresa May: In general. What I would say, Chairman, is that—and this was the point, as I have just said, that the ECJ made—there may be circumstances in which information is genuinely sensitive and it is appropriate to use some form of protection. The *limité* protection does enable some sharing on a confidential basis with Committees.

Chair: But it can be misused.

Theresa May: There is a genuine question for us as to the extent to which it is being used and whether it is always used appropriately. As I say, in relation to the EIO, we expressly suggested to the Presidency and the Council Secretariat that they should be issuing a public text on this particular matter. There is a wider issue here on which we have had discussions on a number of occasions about the question of the speed with which texts are available for proper scrutiny to take place and the willingness of this Committee to look at draft texts. There is an issue there, because in terms of operating scrutiny, availability of texts is a crucial issue.

Q14 Chair: Yes. It can put me personally in a difficult situation occasionally, and has done. I have been given legal advice that I should not disclose information that I have received on a *limité* basis. I also then at that point have to weigh up my responsibilities to Parliament. On one particular occasion I regarded it as so important—it was in relation to bail-outs about a year ago—that I raised it as a matter of an urgent question and the Speaker gave me an urgent question on the back of it. This is important because otherwise we could find ourselves being effectively manipulated by those in the European establishment who did not want to have a debate, and yet it was quite obvious that it affected the United Kingdom and its Parliament and therefore the matter should be revealed. I just put that on the record, because it is a practical question as well as a matter of judgment.

Theresa May: Indeed, Chairman. The only caveat that I would make is that, as I said, as happens with documents within Government within the UK in terms of access to them, it is necessary to have certain documents that can be exchanged internally on the basis of a full and frank and open discussion. Sometimes, that full and frank and open discussion could be damaged or be less likely to take place if it was automatic that all documents became available. There is a judgement to be made here, but, as you are indicating, the question is how far down the line that judgment point comes. On a number of occasions, as I have indicated, we have taken the view with the Presidency and the Secretariat that they took that too far and that texts should have been made available when they were not.

Q15 Kelvin Hopkins: Home Secretary, the Government avoided over-riding the scrutiny reserve three times on this matter by abstaining, even though it clearly supported the measure, as evidenced by its early opt-in. Do you regard this as consistent with the Government's

commitment—and I use the same quotation as the Chairman did in his first question from the Minister for Europe—“to strengthening its engagement with Parliament on all European Union business as part of our wider work to reduce the democratic deficit over EU matters”?

Theresa May: I would first of all return to the point I have made, that we have taken great strides forward in terms of improving the ability of Parliament to scrutinise. I apologise, Mr Hopkins, if I have misunderstood the question, but the Government chose not to over-ride scrutiny by abstaining on a measure. The implication of your question is that you would have preferred us to have over-ridden scrutiny.

Q16 Kelvin Hopkins: It looks like a device to avoid an over-ride by abstaining for something that clearly the Government supported.

Theresa May: That raises some interesting questions for us. One of the concerns that I have expressed personally in the past is about the number of occasions in the past where we saw Government Ministers over-riding scrutiny. We want to have, as far as possible, a proper process such that we do not get into that position. In this instance, where you have not been able to have the debate and the discussion about a particular measure, we chose to abstain on the matter rather than over-ride scrutiny. That was a judgment as to which was more appropriate in relation to the scrutiny process.

Q17 Kelvin Hopkins: Abstaining in such Councils would suggest that there is some doubt about the measure being discussed rather than not voting in that particular way to avoid trouble back home.

Theresa May: You tempt me, Mr Hopkins, to point out that had we voted and over-ridden scrutiny you probably would have been challenging me as to why we had over-ridden scrutiny and not abstained.

Q18 Kelvin Hopkins: Perhaps we are still challenging somewhat. Do you consider that this example strengthens the recommendations in our report on reforming the scrutiny system of the House of Commons that, first, an over-ride should be regarded as having occurred when the Government abstains on a vote on a document held under scrutiny, not just when it votes in favour?

Theresa May: As I said earlier, we will in due course be responding fully and properly to the report that the Committee produced and to the proposals within that report.

Q19 Chair: Is that going to be before the European elections, by any chance?

Theresa May: I am afraid I do not have a set date for it, Chairman. I am not able to give you a set date.

Q20 Kelvin Hopkins: The second component of that from our report was that agreement or acquiescence by Government in reaching a consensus in COREPER on a document held under scrutiny, when the Government does not intend to object to the matter being raised as an A point in Council, should also trigger an override.

Theresa May: Sorry, could you run that—

Kelvin Hopkins: We believe it should trigger an over-ride in those circumstances, and clearly the Government does not quite take that view.

Theresa May: Where the Government was not intending to object to an A point?

Kelvin Hopkins: Yes, where it does not intent to object to the matter being raised as an A point in Council. Again, it is part of the same kind of device, if one likes. We are saying in our report in all these circumstances an over-ride should be triggered rather than avoiding the problems that an over-ride raises.

Theresa May: I return to the point I was making in relation to this particular over-ride, but I will pass by that. We do take the view that there is a difference between decisions that are taken in the Council of Ministers—Ministers have a responsibility, as the Minister for Europe has pointed out in correspondence with the Committee, in terms of accountability to Parliament on policy issues—and those matters that are taken outside of the Council of Ministers meeting, which should not be considered a breach of the scrutiny reserve.

Kelvin Hopkins: I could go on, but I will leave it there.

Q21 Michael Connarty: I want to turn to the impact of what happens if we take up the European Investigation Order. It clearly repeals earlier legal assistance instruments. I will put on the record what we are advised will happen. Article 35 provides for the European Investigation Order to replace the corresponding provisions of the following, as far as I understand: the 1959 Council of Europe Convention on Mutual Assistance in Criminal Matters, its two additional protocols and bilateral agreements made under that; the Convention implementing the Schengen Agreement; and the 2000 EU Convention on Mutual Assistance in Criminal Matters and its protocol. The EIO replaces Framework Decision 2008/978 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters, which has never been implemented by the UK at this moment; and Framework Decision 2003/577 on the execution in the European Union of orders freezing property or evidence. Except for the Council of Europe Convention, these are all pre-Lisbon instruments to which the UK block opt-out applies in accordance with Protocol 36. Protocol 36 provides that any amendment to a pre-Lisbon measure by an instrument to which the UK is a participant will remove the measure from the UK block opt-out. These seem to be serious implications that have never been explained by the Government to Parliament of what will happen if we take up that European Investigation Order.

There seems to be some uncertainty. We are told that in your Ministerial responses of 16 December and 5 March, the Committee was told there was uncertainty about the extent to which the European Investigation Order will affect the pre-Lisbon mutual legal assistance measures, due primarily to the position of Denmark and Ireland, but the explanatory memorandum of 20 December 2013 indicated that a draft annex providing the relevant details

was removed from the order in the Council agreement to gain agreement as soon as possible and the issue would be dealt with in a future non-binding, what is going to be called a “handbook”. These things have never been explained even properly by the Council in the agreement that you have signed up to.

There appears to be a good deal of uncertainty about the technical issues and the extent to which the European Investigation Order will repeal earlier legal assistance instruments. This is unsatisfactory for reasons of legal certainty and because it affects the extent of the UK block opt-out, of which we have heard a lot of discussion over the last year and a half. Can you now tell us how many measures you have categorically written down that you can tell us will be removed from the UK’s block opt-out policy by virtue of our decision to participate in the European Investigation Order, which you seem to have withheld from Parliament up to this point?

Theresa May: We have not tried to withhold something from Parliament, Mr Connarty. I have been very clear with Parliament when I made the first statement—it was one of the very first statements I made on a European matter—in relation to our decision to opt-in to the European Investigation Order. I am very clear—I have got the list; I think it is exactly the list that you read out—in terms of the measures that the EIO will replace. That is, as you say, according to Article 34 of the EIO. The issues around some of these aspects and their Lisbonisation are not perhaps quite as simple as you suggest in your question in terms of in/out and so forth. It is a complex issue. We are discussing these as part of the 2014 discussion that is taking place with the European Commission and the Council.

Q22 Michael Connarty: I thought I put them down very simply indeed. There was no equivocation in what I read out. Do you disagree with the things I read out?

Theresa May: No. I thought I had said, with due respect, Mr Connarty, that the list you read out was the list that I had. It is in Article 34 of the European Investigation Order. But there are complexities. This is part of the argument that I have been trying to get across in various statements and debates in the House about the 2014 decision and about the discussions we have on the 2014 decision. Some of these issues are legally and technically complex and are a matter for discussion and negotiation with the European Commission as to the impact that they would have and the extent to which some of these measures are effectively Lisbonised—i.e. they come under this—or not. Those are discussions that we are currently having within Brussels. You referred to the European evidence warrant, which you said we had not implemented. I do not think anybody has implemented the European evidence warrant. It is not that there is a situation with the UK on some of these issues that is different from others. The extent of participation from other member states on all of these measures is variable, notwithstanding Denmark and Ireland, which have got their own particular relationship in relation to these matters.

Q23 Michael Connarty: We did not have a debate and I do not recall—and I would love to go and look at Hansard—that you explained this complexity and the effect of the European Investigation Order that blocked out debate when you were discussing that question before Parliament, when you did not, as you promised, debate issue-by-issue the negotiation

strategies of the Government. These are the things that Parliament wants to know about. These are the things that the public that we represent want to know about. You in the Executive may be getting legal advice on these complexities, but the public want to know about these. None of this has been explained to anyone.

Theresa May: For the record, Chairman, if I may simply point out that I do not think at any stage the Government said there was going to be a measure-by-measure debate in relation to the 2014 opt-out. We indicated there would be debates. There have been two debates so far and there will be a further debate. It is not that we have gone back on a promise that we had made. If I have misunderstood the comment that you made, I apologise, but I just want on the record to make it absolutely clear.

Michael Connarty: No, not at all. It was my interpretation that you were offering something that everyone thought you were offering us, but it turns out you were not offering us. I accept that.

Theresa May: I do not think everybody did think we were offering that.

Chair: I would like to just mention in the full flight of your remarks just now you were rather suggesting that it had all been going swimmingly from the moment when you first made the statement on the floor of the House. If you recall, I said at that point that I thought you were making a very serious mistake and that problems were going to emerge from the way in which you were handling it then. That was then subsequently endorsed by two other Select Committee Chairmen and all three Select Committees in relation to the report. Without going into the past, I just simply would like to put in a corrective to the suggestion that somehow or other everything had gone so smoothly. I would like to ask Stephen Phillips if he would like to ask a question at this stage.

Q24 Stephen Phillips: I just wanted to follow up, if I may, Home Secretary, on Mr Connarty's question. Mr Connarty suggested that the public are very interested in all of these technical issues and want to know what the answers are. They are much cleverer than I am. I wanted to ask about the position of Ireland and Denmark in particular. The position of Ireland is particularly important to the United Kingdom because of its geographical proximity, and assistance in criminal matters is particularly important between our authorities and those in Ireland. Given the uncertainties surrounding the previous provisions that Mr Connarty has identified, what is the current position in relation to criminal assistance between our authorities and those in Ireland and Denmark when we want their help or they want ours, given the legal uncertainty, which we have not had a straight answer to?

Theresa May: The situation currently is that the Irish, as I understand it, are considering their position in relation to the EIO. I do not think they have taken a decision on that yet. They have not opted in at this stage, but they have yet to take that decision. Denmark is excluded by its own protocol to the treaty, as you will be aware, Mr Phillips, in relation to these particular matters. We take very seriously the issue of co-operation across borders, particularly with Ireland, for very obvious reasons—we are close by; we share a land border. We take those issues very seriously, and the Irish Government had raised concerns when we opted out under Protocol 36 about the EAW.

Q25 Stephen Phillips: I do not want to stop you, but we are on process, really, and I am interested in substance, because much of this hearing so far has been about process. What happens tomorrow if, in order to prevent a terrorist attack happening or to properly investigate one that has happened, you want the assistance, as the Secretary of State for the Home Office, of the Irish authorities, or the police do? At the moment, it seems to me there is a national security problem here that has been generated by this, because what is being said on the back of your answers so far is that nobody knows whether the Irish have to give that assistance if we ask for it or whether we have to give it if they ask for it.

Theresa May: I apologise if I did not answer your question in the form you would have wished it to be responded to. I was not talking about whether or not there was a lack of co-operation; what I was saying was that the Irish had not yet indicated whether they were going to opt-in to the EIO. At the moment they are not, but they have an opportunity to take a decision on that.

Q26 Stephen Phillips: Are they proceeding on the basis that all of the existing provisions—and you have identified them as being the same as those that Mr Connarty enumerated—continue to apply as between Ireland and the United Kingdom?

Theresa May: We currently co-operate with Ireland and a number of other member states using the 1959 Council of Europe convention and the first additional protocol.

Q27 Stephen Phillips: Even though your own Department says, “In fact, they may have no effect. It is all a bit legally complicated. We do not know. It may be unlawful to request that assistance.”

Theresa May: They have not fully implemented the MLAC, and it is in the fact that they have not fully implemented the MLAC that the previous arrangements that are related to mutual legal assistance are still in operation for a number of countries where they have not signed up to that Mutual Legal Assistance Convention.

Q28 Mr Clappison: I want to ask you about costs, Home Secretary, but before I do that, following on from that question, can I take it that it is the case that the same arrangements will continue with the 20 member states of the Council of Europe who are not also members of the European Union?

Theresa May: Yes.

Mr Clappison: They are obviously not subject to any laws of the European Union. I think that answers in part the point that has just been put to you.

Theresa May: Yes.

Q29 Mr Clappison: It will be the same position for them. I want to ask you about costs. In July 2011 we raised with you the problem that UK authorities could not refuse an incoming request to obtain evidence, with its associated costs, even if it considered the request to be disproportionate. You very fairly accepted that there was “more room for us to be working on this issue of minor offences”—in your words. This remains an issue because Article 6 of the Investigation Order requires the issuing member state to assess the proportionality of a request, but the executing member state that considers the request to be disproportionate may only consult with the issuing state. Can I take it that we will be very willing to consult with issuing member states if we consider that their request to us will incur disproportionate cost for the UK taxpayer?

Theresa May: Yes. This was an issue that we took up in the discussions and negotiations on this particular measure. There is an ability to refuse requests on certain grounds. You are right to say that it is the issuing authority that now has to look at proportionality, whereas under the MLA arrangements it does not have to look at that proportionality. There has been a step forward in that, in terms of introducing that concept of proportionality, and there is a possibility of a process for withdrawal of requests. We have taken a step forward in terms of that proportionality, but we are very clear and we have been in relation to other measures—notably the European Arrest Warrant—that we believe that proportionality is an important issue and that we would be looking to do everything we can to make sure that we are not having to respond to trivial requests.

Chair: Geraint Davies, you have got some general questions you would like to put.

Q30 Geraint Davies: I was just wondering, Home Secretary, if you shared some of my concerns about the EIO in terms of fair trials and the rights of defendants, suspects and witnesses. There is the disproportionality that we have just touched upon. My understanding is that is decided by the issuing state. By way of example, if I was on holiday in Romania, say, and there was a murder, then because I was a suspect there could be demands for my DNA, telephones, personal relationships, and even the transfer of me and my children, perhaps, to inappropriate prison conditions. There could be a situation where they were gathering evidence without me knowing. There could be situations where I gave telephonic or video evidence that was not passed to the trial judge and my defence and in fact was just minuted, and there might be problems with translation. There are problems more generally of different standards of evidence, justice and law between, in this case, Britain and Romania. In totality, it seems to me that there is enormous scope to breach the rights of defendants to a fair trial. It is the case, in a nutshell, that there is not a consistent code of minimum standards of evidence gathering and uniform standards being applied. What is more, the whip is in the hand of the issuing state.

Theresa May: No. The question, as you phrased it, suggested there are no safeguards in the executing state, but for some of the measures that you have identified, there are the normal safeguards in the executing state that would apply to domestic requests of the same sort. There are certain requests for evidence—coercive elements of obtaining evidence, for example—that can only be achieved on application to a court, exactly as it would be if it was purely a domestic request from a police force in relation to this. Safeguards exist in the way that they exist in the domestic arrangements for a number of those areas that you refer to. What we are talking about is not a request for individuals to be detained and

removed to the issuing state—to the requesting authority. What we are talking about are requests for evidence to be gathered. We need to be very clear that that is just what this is about, as the mutual legal assistance arrangements are at the moment.

Q31 Geraint Davies: Who decides that those requests are reasonable and proportionate? It is not us; it is the issuing state.

Theresa May: It is now a requirement that the issuing state will look at the proportionality of a particular request. It is possible for the executing authority to challenge that and to raise the issue of proportionality. There are other grounds on which it is possible for a request to be refused. There are fundamental rights grounds on which it is possible for a request to be refused, which we were very keen on ensuring were within the arrangements for the EIO and have been accepted within that. It is not the case that you are never going to be able to refuse a request that comes through, but this is about asking for evidence, and where there are particular forms of requests for evidence, it will be necessary for that to be done under the same arrangements as they would be domestically. Effectively, it is in a sense all under the same arrangements; i.e. if something does not require, for example, a warrant, then it will be as the police would collect evidence in a domestic circumstance.

Q32 Geraint Davies: In the circumstance I mentioned, that I am on holiday in Romania and there is a murder; they say, “Well, he was there. Nobody does anything wrong where we are; it must have been this foreigner from Wales, or wherever it was” and they ask for my DNA. Would that be provided?

Theresa May: No. That would have to go through the normal processes that would be here in the United Kingdom.

Q33 Geraint Davies: But, as I said, my understanding is that the proportionate or otherwise request is decided by the issuing state and it is not decided by the executing state. This is what Fair Trials International are telling me, for example, and also these other issues I have mentioned about the quality and type of evidence and what happens to it. All I am getting at is whilst I in general agree it might be a good idea to have cross-border justice, it seems to me there are not common codes of standards and the whip is in the hand of the issuing state, which might be an undeveloped judicial system.

Theresa May: What I would say, Mr Davies, is that we have these arrangements already under mutual legal assistance, but at the moment there is nothing about proportionality in relation to mutual legal assistance. There will be under the EIO. I take your point that, as it has been finalised, it is a request on the issuing authority, but what we are talking about in the EIO is processes that are already undertaken—those processes already undertaken under mutual legal assistance arrangements. What will happen in future under the EIO is that will be done on a standardised basis and it will be done to deadlines, which will be beneficial to police and law enforcement.

Q34 Geraint Davies: Do you think there are adequate protections for people who are in custody or subject to transfer under EIO? In other words, should there be a requirement that similar prison standards prevail where they are being transferred, say, to Greece—and, indeed, maybe their children are as well—where clearly such standards do not exist?

Theresa May: The EIO is a request for evidence, not a request for transfer of individuals. To transfer the individuals a European Arrest Warrant would need to be issued, and we have made some changes to how we would implement the European Arrest Warrant here in the UK. Interestingly, when Sir Scott Baker and his panel were looking at the question of extradition arrangements, one of the conclusions they came to was that they thought the operation of the EIO could very well result in fewer European Arrest Warrants being issued.

Geraint Davies: My understanding is Article 11 states that the transfer may be refused if the individual state does not consent, but this is not mandatory grounds for refusal, so people could be transferred.

Theresa May: Sorry, I am slightly talking at cross purposes. The individuals have to consent to transfer. There has to be the consent of the individual concerned to transfer, as I understand it. It is possible to refuse a transfer of a prisoner if the consent is not forthcoming.

Geraint Davies: I had better leave it there. Thank you very much, Home Secretary.

Chair: We have now got a vote in the House, if you will forgive us. There are only two questions to come, and maybe a third, but that is all, so if you would not mind we will now adjourn until we have finished with the Division. We will come back at half-past three. We will make is 25-past.

Theresa May: 25-past would be helpful.

Chair: Okay; 25-past.

Sitting suspended for a Division in the House.

On resuming—

Chair: We can get straight on, because we are quorate, Home Secretary. We are now moving to the next question. Henry Smith.

Q35 Henry Smith: Home Secretary, in 2011 you indicated that you hoped that negotiations with the European Parliament would limit the exceptions to dual criminality. It appears as though that has not been as successful as was hoped for. I would be grateful for your perspective on that and your view of how those negotiations have been carried out.

Theresa May: Yes. We did work hard and fight quite hard in the discussions for a full dual criminality requirement in the EIO and kept pressing throughout the negotiations. Unfortunately, we were something of a lone voice; we were not able to get the support

from other member states in relation to this. The Germans did initially give some support, but that reduced as the negotiations progressed. Our reading is that the impact in practical terms is likely to be minimal. In current memory, we have not refused an MLA request solely on dual criminality grounds, and it is offset by the fundamental-rights and extraterritoriality grounds for refusal that are now in the measure. We did fight hard for it, we did not get it, but there are some other parts of the measure that are mitigating in relation to this.

Q36 Henry Smith: What provisions of the EIO require changes to existing UK legislation? Can you say a little bit about what those measures may be and when possible changes to domestic legislation might take place?

Theresa May: Yes. There will be three years from—I think it is—mid-June to implement the EIO and we will go through a process of consultation with practitioners and others about how we are going to implement it. It will be necessary to bring forward legislation. Given particularly that one of the reasons for the EIO is to speed up the process of evidence gathering compared to the process under MLA, I am very keen that we make sure that when it is implemented we are able to do that properly. That is why it is right that we have a proper consultation. I think the date when it comes into force is June. I am looking to my officials for confirmation.

Emma Gibbons: We are waiting for publication in the *Official Journal*, which will then trigger the entry-into-force date.

Theresa May: Right.

Henry Smith: But around June.

Emma Gibbons: It is imminent, given it was adopted in March. It would be fairly soon.

Henry Smith: And then there is a three-year period.

Theresa May: A three-year period to implement it, yes. It will mean changes, for example, to the Crime (International Co-operation) Act of 2003, and there are then the practical issues of making sure that the courts, the prosecutors, the police—everybody—is aware of it and able to use it when it does come in.

Chairman, I wonder if I might crave your indulgence and just perhaps clarify the exchange that I had with Mr Davies earlier, because we were perhaps slightly talking at cross purposes. The EIO does not allow for the transfer of suspects but it allows for the transfer of witnesses, but only where there is the consent of the witness, so it can be refused if the witness does not consent.

Q37 Chair: Thank you very much for clarifying that. Turning to a slightly different subject, the Government has also urged the scrutiny committees in both Houses to “take full advantage of their existing right to call a debate on an amendable motion on any opt-in decision” and has expressed its willingness to “participate in these debates to ensure full

transparency and accountability of opt-in decisions”. At our first meeting after the Christmas recess, on 8 January, we recommended that the Government’s opt-in decision concerning the draft regulation for the relocation of the European Police College (CEPOL) should be debated in European Committee, but that debate has only taken place today, which is nearly four months after we made our debate recommendation and more than six weeks after the Government notified us that it had decided to opt-in. Do you not agree that a debate after the Government has decided to opt-in is quite clearly contrary to the spirit of the undertakings made by the Minister in January 2011 and does remove the tools needed to enable Parliament to do its job effectively? Why was the Government unable to schedule an earlier debate?

Theresa May: As I indicated earlier, Chairman, when requests come through there are a number of decisions Government has to take in terms of the business of the House in its various forms and in terms of scheduling any debates that are taking place. As you say, the debate did take place this morning. I understand it lasted for a little over half an hour and the motion was passed that supported the opt-in decisions that we had taken on that particular measure. I return to the point I made earlier. I recognise the Committee has some concerns about the way in which the processes have been operating in relation to some specific measures, but we have seen a significantly increased ability for Parliament to debate and scrutinise measures that are going through the European processes compared to what happened before May 2010.

Q38 Kelvin Hopkins: I was at the Committee this morning. I was a member of it. I questioned the Minister about the delay, and I made the point that I thought it was somewhat unconvincing about the problems with business given that Government business has been fairly light for some time now and that there are Backbench Business Debates, there are plenty of Opposition Days and we often finish early. It does not look as if there is a problem with timing of business; it looked to me as if there was some resistance by the Department about bringing the business forward. I just wondered if you would like to comment on that.

Theresa May: There has been no intention on the Department’s front to resist debates on any of these matters. You make the point yourself, Mr Hopkins, that in terms of the floor of the House there are Backbench Business Debates and Opposition Day Debates. A certain number of those are required and are offered. For what it is worth, when I was on the Modernisation Committee of the House of Commons when I was Shadow Leader of the House, I took the view that Backbench Business Debates should be on Fridays, which would extend the time available to the House overall for debates, but that is not the way in which things have developed.

Q39 Geraint Davies: I do not mean to bog us down, Home Secretary, but I do not know whether you are familiar with this organisation called Fair Trials International, which is an NGO. If I may crave your indulgence, I am just going to read a note that I have got from them on transfers of people in custody. It reads: “The adopted text contains inadequate protection for the people in custody who are subject to transfer under an EIO”. These are people already in custody. “While Article 11 states that the transfer may be refused if the individual does not consent”—as you said—“this is not mandatory ground for refusal. Further, there is no requirement for similar or improved prison conditions to be guaranteed

following transfer and the inappropriateness of transfer of minor or vulnerable suspects is not acknowledged.” I just wondered whether you could comment on that—whether this is simply untrue or not. Do you see what I mean?

Theresa May: Yes. I entirely see that. I had not seen the Fair Trials International commentary before.

Geraint Davies: Yes. I am not trying to catch you out.

Theresa May: What I might suggest, Chairman, is that we perhaps write to the Committee on this point, because my understanding was that there was a right of refusal where the individuals did not consent. There is obviously a difference of opinion on that. Perhaps it is better for me to go away and clarify that and write to the Committee on this point, if I may.

Geraint Davies: Thanks. Yes, okay.

Chair: Just one last thought before we finish this afternoon. As you know, we issued our first report in November. There is another report on the Charter that is also under consideration by the Government. The very radical report we produced in November goes to the heart of the whole question of how European business is conducted. There are some very radical proposals in it as well. It was a unanimous report, as you know. I did indicate that we would be interested to know when we would get a response to that. I appreciate that you are one Secretary of State and, although it is an indivisible function, there are some others as well.

The fact is, however, that it would be useful just to indicate that this report is extremely important in the light of the goings on in the United Kingdom, let alone throughout the whole of Europe, where there are major issues being raised in every country—not just in the United Kingdom—about the nature of dealing with European legislation and the scrutiny of it and, in addition to that, the democratic deficit. All these very deep questions about the future of Europe and the future of our own Parliament are integrally involved in this entire process.

If I could use this as an opportunity, as I may not have the opportunity to see you again in this context between now and the response, and given the fact that you are one of the most senior Secretaries of State, to suggest that you might be kind enough to have regard to the fact that this is a very important report and, not only that, that we would like to see it as soon as possible. Furthermore and lastly, we would be gravely disturbed if we did not get the kind of positive response to our suggestions for a unanimous report of the kind that we would hope for. If I could leave you with that thought. I am not asking you to respond at this stage, but just to bear in mind that these are very serious matters and that the whole future of our democracy and that of Europe as a whole is integrally involved in that process.

On that note, I will simply say thank you very much for coming this afternoon.

Theresa May: Thank you.