



European Scrutiny Committee

Oral evidence: Scrutiny inquiry: follow up, HC 918

Wednesday 14 January 2015

Ordered by the House of Commons to be published on 14 January 2014

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Members present: Sir William Cash (Chair); Andrew Bingham; James Clappison; Michael Connarty; Nia Griffith; Kelvin Hopkins; Chris Kelly; Stephen Phillips; Jacob Rees-Mogg

Questions [1-66]

Witnesses: **Right hon. David Lidington MP**, Minister for Europe, **Ivan Rogers**, Her Britannic Majesty's Permanent Representative to the European Union, and **Jill Morris**, Associate Director, Europe, Foreign and Commonwealth Office, gave evidence.

Chair: Thank you for coming, Minister. Thank you also, Mr Rogers and Jill Morris.

Q1 Stephen Phillips: Minister, you made a ministerial statement on 20 January 2011 in relation to scrutiny, as you will remember.

Mr Lidington: I presume that this is in relation to justice and home affairs.

Q2 Stephen Phillips: No. Let me tell you what you said. In that statement on 20 January 2011, you said that the Government is “committed to upholding the right of Parliament to hold the Government to account on EU issues”. You also said that the Government was committed 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.”

We are approaching the first anniversary of this Committee's recommendation for a debate on the free movement of EU citizens and other non-scheduled debates, including the rule of law in EU member states and the EU budget. It cannot possibly be that those debates have not happened due to a shortage of time on the Floor of the House, because on at least 10 occasions in the past two months, the House has risen early due to business collapsing. It is a very simple question: what on earth is going on? Is the Government running scared of this Committee? Does it not want to have scrutiny of European matters? What on earth has happened to the commitments you gave in your ministerial statement?

Mr Lidington: I should say at the start, for the record, that I am supported by two officials: Ivan Rogers, our permanent representative to the European Union at UKRep in Brussels and Jill Morris, associate director for Europe at the Foreign and Commonwealth Office in

London. If one looks at the record of the number of Committee and Floor debates, we see that that commitment from the written statement has been delivered. The number of Committee debates has been, I think, comparable with those in the last Parliament—a bit more. They ranged from 40 in the 2010-11 financial year to 38 in 2012-13 and 39 in 2013-14, compared with lower figures in the three financial years from 2007 to 2010. However, the number of Floor debates under this Government's term in office has risen. There was a solitary Floor debate in 2009-10, six in 2010-11, 10 in 2011-12, 12 in 2012-13 and the 2013-14 estimated figure so far is 11 such debates. There has been more or less double the number of debates on the Floor of the House on matters referred from this Committee than was the case in the previous Parliament.

Q3 Stephen Phillips: One year, Minister, to schedule a debate, which is still not scheduled, on the free movement of EU citizens, and which is of concern to every single Member of Parliament's constituents. One year. Can you explain that in circumstances where Parliament, or at least the House of Commons, has had regular occasions over the last few months when business has folded early? It would have been easy to have that debate, which is of such enormous concern to our constituents.

Mr Lidington: I know that the Committee had the Home Secretary and the Justice Secretary here two days ago. As that is a subject on which the Home Office has the lead, I would expect the Committee to take advantage of that.

Q4 Stephen Phillips: You are the Minister for Europe. You are the person who chairs the relevant Committee as to whether or not these debates take place and when.

Mr Lidington: No, I am afraid that that is not the case.

Q5 Stephen Phillips: You chair the European Affairs Sub-Committee of the Cabinet. Is that correct?

Mr Lidington: Yes.

Q6 Nia Griffith: Chair, I would like to put it on record—because Mr Phillips was not there on that occasion—that the Home Secretary and the Justice Secretary indicated a willingness to debate this topic. They suggested that perhaps, if they were asked, they would show willing. I wonder why the blockage is there and what is happening. If they are willing, what is going on?

Mr Lidington: There is obviously an internal Government process to identify the occasions for debate, whether in Committee or on the Floor of the House. It sometimes proves more difficult with some dossiers than others to get that agreement.

Stephen Phillips: Don't you think that it displays—

Mr Lidington: I should be clear: it is not the question that I have any veto or that the Foreign Office has any veto or licence-giving power.

Q7 Stephen Phillips: You said to the House of Lords EU Select Committee in recent evidence that you “frequently remind colleagues of the importance of the scrutiny process.” There is you on the European Affairs Sub-Committee of the Cabinet. There is a Whip on that Sub-Committee. Is that correct?

Mr Lidington: Yes.

Q8 Stephen Phillips: So the Government’s business managers are there. Here is an issue which is of cardinal importance to the constituents of every single Member of Parliament, and a year after we recommended it for debate on the Floor of the House, that debate has not happened. What explanation can you possibly give, Minister?

Mr Lidington: This is ultimately a matter for the lead Department concerned. It is for the Department with responsibility for a particular area of policy, primarily, to engage in discussions with the business managers and others in government about the scheduling of debates when referred from this Committee. The role of the European Affairs Sub-Committee, which, as Mr Phillips indicated, I chair, is to discuss various EU topics as part of the business of that Committee. We do from time to time address the issue of scrutiny generally, and I certainly do use my chairmanship of that Committee to remind all ministerial colleagues who are members of it that scrutiny is important, and that they should try to make sure that the systems within their Departments are up to scratch and delivering what is needed by this Committee.

Q9 Stephen Phillips: You will remember that we asked you about this when you came to give evidence in January 2014 about the scheduling of debates. Just before that session took place, the staff of this Committee were told by a number of Government Departments that a new procedure, in which No. 10 had to approve the date of every debate in the European Committee, was causing delays. Is that procedure, perhaps extending also to debates on the Floor of the House, the real explanation as to why these debates are not being scheduled in the way that Parliament is entitled to expect they should be and in accordance with the commitments that you made about the way in which the Government should be scheduling them?

Mr Lidington: As I said a few minutes ago, there is an internal process within Government to get collective agreement on the scheduling of debates. I do not think it would be right for me to go into detail about how that operates.

Q10 Stephen Phillips: Pause there. What role does No. 10 play in that process?

Mr Lidington: All the documents relating to this would routinely be copied through to both No. 10 and the Deputy Prime Minister’s office.

Q11 Stephen Phillips: But our Committee staff have been told that No. 10 has to approve the dates. Is that right?

Mr Lidington: As I said, it is an internal Government process, and I am not prepared to go into detail about how that operates.

Q12 Stephen Phillips: Why not, Minister?

Mr Lidington: Because this is—

Q13 Stephen Phillips: Sorry, is the Government not answerable to Parliament now?

Mr Lidington: Because this is a matter for the internal workings of Government. I have already said that this is not a matter that the European Affairs Sub-Committee, which I chair, deals with.

Q14 Stephen Phillips: Minister, you are appearing before a parliamentary Committee—forgive me—and I have asked you a very simple question. Does No. 10 have to approve the dates on which these debates take place on the Floor of the House or in European Committees?

Mr Lidington: No. 10 is involved in the discussions, yes.

Q15 Stephen Phillips: Does No. 10 have to approve the dates on which debates take place in European Committees or on the Floor of the House? Yes or no?

Mr Lidington: As I say, I am not prepared to go into detail about this.

Q16 Stephen Phillips: Why not?

Mr Lidington: Because I think it is an internal matter for Government. As is the case with any internal discussion within the Government, the Government come to a collective view and then present that collective view to Parliament.

Q17 Stephen Phillips: You are not prepared to tell me, this Committee, Parliament and our constituents whether No. 10 has to approve the dates on which debates take place in European Committees or on the Floor of the House. Is that your evidence?

Mr Lidington: I am saying that No. 10, the Prime Minister's office, the Cabinet Office and the Deputy Prime Minister's office are involved routinely in decisions about European business, as they are on any other aspect of Government business, so they play a part in those collective discussions in coming to a collective agreement.

Q18 Stephen Phillips: When is the debate on the free movement of EU citizens, which we have been waiting for for a year, going to take place, Mr Lidington?

Mr Lidington: I do not have a date that I can give.

Q19 Stephen Phillips: After a year.

Mr Lidington: I was pleased to hear Ms Griffith's comment that the Home Secretary was open to bringing this to debate in the House in some form, but it is for the Home Office as the lead Department to lead on the discussions with business managers and others.

Q20 Kelvin Hopkins: Could I ask whether the date is likely to be in June, rather than before May?

Mr Lidington: I simply do not know. I would be misleading the Committee if I sought to make a guess on that. That is something to be taken up with the Home Secretary.

Q21 Mr Clappison: Minister, you mentioned in response to Mr Phillips that the Deputy Prime Minister's office plays a role in this. Could you tell us a little more about that?

Mr Lidington: Simply that with the coalition Government we routinely have a system in place in Whitehall. As part of the collective decision-making process, most Government business, if it is copied to No. 10, will be copied to the Deputy Prime Minister's office, to ensure that the heads of both coalition parties were apprised of what was going on, and had the opportunity to intervene, comment or seek changes if they wished.

Q22 Mr Clappison: So this would have gone to the Deputy Prime Minister as well.

Mr Lidington: I would need to check exactly what happened with particular documents. It is certainly the case that both coalition parties are represented on the Cabinet Committee that deals with the programming of legislation. I am not sure it would be a matter of formality but certainly as a matter of regular practice, both coalition parties are involved in the way that business is negotiated and presented and slots are found on the Floor of the House and in Committee. Those are collective Government decisions.

Q23 Jacob Rees-Mogg: Minister, I want to clarify one thing following your answers to Mr Phillips. Can I take it that you know who or what is obstructing the debate on the free movement of people, but that you are not willing to tell us, because that is an internal Government process?

Mr Lidington: I would not pretend to absolute accuracy. I am taking a stand in that I will represent the Government's collectively agreed position to the Committee, but I don't think it is right for me to go into the detail of how the Government has come to a particular position.

Q24 Jacob Rees-Mogg: But you know who is stopping this.

Mr Lidington: I am aware of some of the factors that have been in play.

Q25 Jacob Rees-Mogg: And you are refusing to explain to the Committee how this has been instructed.

Mr Lidington: I am taking the stand that I will try to be as helpful to the Committee as possible, but I don't think it is right for me in an evidence session like this to go into detail about how the Government reaches a collective Government decision on any particular point. That would involve me being drawn into arguments about which individual Minister or Department within Whitehall was taking a particular view within the internal operations of Government. I think that the proper course is for the Government to have its debates, make its decisions and present them to Parliament and it is for Parliament to criticise, question and judge. The constitutional relationship between Government and Parliament is that Parliament looks at the collectively agreed Government position.

Q26 Jacob Rees-Mogg: I am not convinced that is constitutionally right, because I think it is for Ministers to explain the process by which decisions are made. That is to say: is this a decision of the Cabinet? To which the answer seems to be no. Is it the decision of a Cabinet Sub-Committee? To which the answer seems to be no.

Mr Lidington: No.

Q27 Jacob Rees-Mogg: Is it the decision of the Prime Minister?

Mr Lidington: I will try to explain the process in a little more detail. The European Affairs Cabinet Committee and Sub-Committee—the first chaired by the Foreign Secretary and the second by me—consider and determine the collective Government position within a European-level negotiation, dossier by dossier. The Sub-Committee will also consider from time to time thematic business, for example, how the British Government is collectively engaging with one or other of the EU institutions, how we are managing our relationships with other member states.

When it comes to a question about responding to this Committee's recommendations for a debate, the first responsibility lies with the lead Department in charge of the policy for that dossier. It is for Ministers in that Department then to take a view about what they believe ought to be done and to make their case to the other parts of Government that are involved, primarily the business managers but also No. 10, the Cabinet Office and the DPM's Office, which is also in the loop on this. While the Foreign and Commonwealth Office would be aware of some of this and might or might not have views on a particular topic referred for debate, we have no kind of veto power on this.

Q28 Stephen Phillips: But No. 10 does.

Mr Lidington: No. 10 is involved in the discussions, as I have said.

Q29 Jacob Rees-Mogg: Who has the final say—the Prime Minister or the Foreign Secretary?

Mr Lidington: There is a collective agreement within Government. That involves conversation and efforts at persuasion.

Q30 Jacob Rees-Mogg: And do you take the view that these can override the Standing Orders of the House of Commons, which require either a debate to be given, it to be put into a Committee or a motion of the House to be put forward by the Government to rescind our recommendation, none of which have been done over the course of a year? It is not as if you did not have another option if you did not like our recommendation for debate. It seems that this is bordering on contempt of the House of Commons.

Mr Lidington: I certainly have never argued, and would never argue, that the Government's decisions could, in any way, override the Standing Orders.

Q31 Jacob Rees-Mogg: So they are just being ignored?

Mr Lidington: So far it is a matter of regret that the opportunity to debate that particular measure has not been found.

Jacob Rees-Mogg: They are being ignored.

Q32 Nia Griffith: I would like to raise the issue of timetabling of some of these debates. As Mr Phillips pointed out, business has finished early on many days—there has been slack in the Government programme—and, yet, look at the debates that we have recommended, about the opt-in regulations for CEPOL for example. On one occasion, the debate took place seven weeks after the opt-in deadline and four months after we recommended it. The second one, we recommended in September; the deadline came and went on 24 November. We still have not had the debate and neither have the Government told Parliament about their opt-in decision. What is the problem about scheduling these debates at a time that would be pertinent and relevant and might inform the process, rather than being rather insultingly stuck on afterwards? What is going to happen about the second of these now anyway?

Mr Lidington: I picked up on CEPOL. Was the other one—

Q33 Nia Griffith: They are both related to CEPOL.

Mr Lidington: They are both CEPOL measures, where again, of course, the Home Office is in the lead on this. Personally, I am very strongly in favour of debates taking place—whether in Committee or on the Floor—before the decision comes to a head in Brussels. It

sometimes happens that there is a delay for Government business and management reasons, and at other times you find that the dossier accelerates in the Brussels process in a way that we had not originally expected.

Q34 Nia Griffith: But in both cases, quite a long time was available. We make a recommendation in September and it is not until 24 November and, yet, we still have not had the debate. A fair few weeks could have been used, and likewise with the previous one.

Mr Lidington: I suspect that—again, I am being tempted to speak on behalf of the Home Office, which I am reluctant to do, rather than letting Home Office Ministers speak for themselves—an element of the original delay would have been that the debates and the announcement of decisions on the protocol 36 opt-in to the 35 justice and home affairs measures was still outstanding at the time that the Committee made its recommendation on the CEPOL measures. Clearly, a priority was being given to sort out the Government’s position, and then have the parliamentary decision, on the protocol 36 measures. I am very willing to report to the Home Secretary on the views expressed here that these should be debated at the earliest opportunity.

Q35 Stephen Phillips: How about this, Mr Lidington: why don’t you give a commitment on the part of the Government that everything that is outstanding will be debated before Parliament dissolves?

Mr Lidington: Because I am not in a position to make that commitment from here.

Q36 Stephen Phillips: Don’t you think that it is ridiculous—disgraceful, even—that there is a backlog of debates on extremely important matters that are self-evidently, we all know, not going to be debated before Parliament is dissolved for the purposes of the election? What the Government have really done in the past year is to kick all this into the long grass and wait for dissolution so that they do not have to honour the obligations contained in the Standing Orders of the House of Commons. Isn’t that right?

Mr Lidington: The Standing Orders would not absolve whatever Government is formed after the general election from having to return to these matters—

Q37 Stephen Phillips: At that stage, Minister, it is utterly meaningless, isn’t it?

Mr Lidington: As I say, I am not in position to make a commitment this afternoon of the sort that Mr Phillips would like me to make. I will certainly report back to my colleagues about the strength of feeling that is being expressed on the Committee about this matter.

Q38 Stephen Phillips: What does that mean? Who are you going to report back to?

Mr Lidington: To those other parts of Government that are involved in—

Q39 Stephen Phillips: Is that the blocking mechanism in No. 10, wherever it might lie, which is apparently blocking these debates, or do you mean to the business managers and the Whips?

Mr Lidington: I mean to all those who are involved.

Chair: Astonishing.

Q40 Andrew Bingham: I think, Minister, you understand the strength of feeling in the Committee about the work we are doing here and the way it is viewed. We will turn now to scrutiny of documents and the response by the Government to our scrutiny report, which we—I think I am speaking on behalf the Committee—felt was similarly dismissive. We are going to cover operational aspects here today and we are going to talk about some of our more radical recommendations with the Foreign Secretary next week.

In terms of documents, the Government refuses to provide us with a list of *limité* documents, citing that it would be neither practical nor useful, yet other EU Parliaments receive such information as a matter of course. We would find it useful, so will you now agree to send that list?

Mr Lidington: There are a number of reasons why we gave that answer. We provide *limité* documents, certainly where they are depositable, as a matter of course, so what we are talking about is *limité* documents that are not covered by the scrutiny resolution and are not automatically depositable. Some of the *limité* documents—quite a large number—will simply be iterations of existing texts. They change quite rapidly, sometimes at short notice, as part of the normal negotiating process in Brussels. Ivan might want to say a word about that.

As far as a list is concerned, I think I am right in saying—officials will correct me if I am wrong—that there is a list of all such documents that is published online by the European Union. In respect of *limité* documents, the text is not published; just the title of that document is published. To know the title and short description of a document is something that is already possible for the Committee without further action by the British Government. The Committee, if it sees such a document on the list, is welcome to come to the relevant Government Department and say, “We actually think this has a bearing on a scrutiny examination that we are undertaking at the moment. We would like you, in confidence, to share that document with us.” I am sure that the relevant Minister would take that request seriously.

Q41 Stephen Phillips: Minister, I don’t want to interrupt the questioning, but you have got two officials with you. Are you sure that there is a list of *limité* documents that is published in Brussels?

Ivan Rogers: There is indeed a list of *limité* documents.

Q42 Stephen Phillips: The Clerks to the Committee are not aware of it, so perhaps you could write to us after this to tell us where we might find it?

Ivan Rogers: I would be delighted to, yes. Maybe I can helpfully amplify—

Q43 Andrew Bingham: But assuming this list does exist, it is still down to us to go off foraging around the bowels of Brussels to find it when other EU Parliaments are just sent it; they receive it anyway. We are trying to work on the same footing here.

Ivan Rogers: Maybe I can come in on precisely that point. We have done quite a bit of work at the Brussels end—I am sure that Jill, her colleagues and, indeed, other departmental colleagues also have at the London end—on what the practice is in other member states. In all honesty, it is quite difficult to know. I have a number of discussions with my permanent representative colleagues and, particularly with those who are rather more in favour of transparency, we can come to the issue of where the balance is in the Council on transparency and limité documents.

We, with the Nordics and the Dutch, are at one end of the spectrum. Others in the Council are less enthusiastic about removing the limité classification from documents. It is not easy to tell what happens with other member states and Parliaments, though we carry on working on it. My understanding is that our system here is actually very similar to the system that operates in the European Parliament. Just as members of this Committee can request access to limité documents from the UK Government, so the Chair of the relevant EP Committee or other Members of the European Parliament can request access from the Council secretariat. Whether one likes it or not, it is then for the head of the Council secretariat to decide whether or not to share such documents on a case-by-case basis.

It might be helpful if I tell the Committee how they do that. I know that this process is under review. I am not clear where the Council secretariat has got to, but let me say what the Council secretariat's internal guidance says on which documents should be limité and why, as that might be helpful. That guidance is under review, but I would be happy to share the existing staff note with the Committee if that helps.

The Council secretariat's internal guidance says that “the following documents should be limité: an opinion or contribution from the legal service, a document which reflects the position of individual delegations,”—I can come back to that question in more detail—and thirdly, documents where disclosure would “undermine the protection of public interest, the privacy and integrity of the individual, commercial interests, court proceedings and legal advice, inspections, investigations and audits or the decision-making process of the Council.” It then says: “when appraising the potential prejudice to the decision-making process of the Council, the following criteria should be taken into account: the state of the dossier—has agreement already been reached within the Council or is it still under discussion?—the degree of political sensitivity and the content of the document, in particular whether the document gives details about outstanding substantive issues”.

That is the current guidance under which we operate. I do not have a role in setting that guidance, as you will understand. That is for the Council secretariat. I do not think that that guidance is desirable in every respect and I would prefer a system—we work constantly for a system—in which there is more transparency and where fewer documents are limité. But we

are very much in the hands of each successive presidency and the Council secretariat as to which documents they put under limité.

Q44 Andrew Bingham: Without wishing to put words in your mouth, are you saying that you are unsatisfied that the Council applies consistent rules on this classification in a way that gives proper weight to transparency and accountability? It sounds like you are not, from what you just said, but I do not want to put words in your mouth.

Ivan Rogers: I think that one could and should go further. We press for that in conjunction with a number of other colleagues around the table; mostly, I would say, the northern liberal member states—the Nordics and the Dutch. We have had a number of discussions with the Dutch. It may well be that under the Dutch presidency in 2016, we see a different approach to which documents and how many of them go under a limité classification.

The Council secretariat would say—I think that they are right in this, but it is terribly difficult for me to judge—that since the Access Info case, which a number of academics suggested in their evidence to you was important in terms of public access to documents, when an individual MEP, this Committee, other national committees or, indeed, members of the public seek access to limité documents, there is a presumption on the part of the Council secretariat in favour of giving them that access, unless any of those cases that I read out come into effect.

For example, on the “opinion or contribution from the legal service”, the rationale that they would give is that occasionally the Council, in its deliberations on a legislative file, will want its own legal service to give an opinion as to options on the table or views that might be put forward by the co-legislator in the European Parliament. The Council, collectively, would want that advice to be held close because there is always the possibility that subsequently, after the legislation has been passed, a court case will potentially be taken by the European Parliament against the Council. One would not want that evidence by the Council legal service that was used in the preparation of the Council’s position to be used in evidence against the Council if it had taken a decision ignoring that legal advice. That is the rationale.

I do not want to go on at excessive length on the Access Info case, which I think was an important case. That was specifically about public access to documents, and the issue there was whether individual positions by member states, which can be sensitive, as you can imagine, during a negotiation, were in and of themselves a reason not to divulge those positions in a court case. In the Access Info case, the Council lost that judgment, so it is clear that that alone is not sufficient grounds on which to withhold a document as limité.

Q45 Andrew Bingham: I did not like to interrupt you—you were flowing—but you mentioned applying for the removal of limité classification. Do you know how many times our Government have applied for removal of limité classification on scrutiny grounds in the last six months?

Ivan Rogers: I am aware of two such cases.

Q46 Andrew Bingham: Were they successful?

Ivan Rogers: I think not so far in the Turkmenistan partnership and co-operation agreement case. We were successful on the port service regulation case. Again, to be clear, the request can be made either by the Department or by me in Brussels, but, evidently, I would make the request for declassification only if Ministers and Departments had so decided. It is not for me as the permanent representative to decide the circumstances in which we would want a document declassified. That is for Ministers and Departments to decide.

Mr Lidington: The other thing that has altered is that following the Committee's report and the comments on *limité*, I have asked officials—it is to be the Cabinet Office with the FCO in the lead; it requires collective Whitehall agreement—to draft a new set of guidance for all Government Departments to follow in terms of sharing *limité* documents with the Committee so that we have some criteria that we can try to get Departments to apply consistently. Secondly, we need some criteria that we can use for making requests to the Council secretariat to remove the *limité* description on a particular document. I am advised that we are quite near to final draft stage, and I am more than happy to share the draft guidance with the Committee when we have cleared it internally.

Q47 Andrew Bingham: When you say “quite near”, is that days, weeks, months?

Jill Morris: We have a draft that we could share now. As the Minister said, it sets out a number of criteria for the sharing of *limité* documents to ensure best practice, transparency and consistency across Government Departments.

Q48 Andrew Bingham: So you are happy to share that draft with us?

Mr Lidington: Yes.

Q49 Andrew Bingham: And would you accept comments and thoughts from this Committee on that draft?

Mr Lidington: I would certainly take them seriously. I am not going to promise to accept any change, but I will look with an open mind at any suggestions.

Q50 Andrew Bingham: No, I would not tie you down, but, if the Committee has some submissions, may I ask you to give them fair consideration?

Mr Lidington: Yes.

Andrew Bingham: Thank you.

Ivan Rogers: May I amplify on one point, which might be helpful to the Committee? There is one issue we have here. I mentioned the Dutch deliberately, because they have a presidency coming up in 2016, as ours does in 2017. I know from discussions with my Dutch opposite number that they are concerned about the number of documents that remain *limité*. I

hope, therefore, that under their presidency they will try and take forward a different approach to how many documents are marked *limité* in what can be, as the Minister said, a very fast-moving negotiation.

One problem here is that our other main allies on transparency operate a different style, as the Committee will know, on scrutiny. They operate a mandating system. They are therefore less preoccupied by removing *limité* classifications. The Nordics in particular operate under a mandating system, so it matters less to them to remove the classification. Candidly, their scrutiny system operates in a different fashion. If you are operating on a mandating system, it matters less to the parliamentary Committee, seemingly, to remove the *limité* classification.

Q51 Jacob Rees-Mogg: I just want to come back to this point on the list. As our Clerks understand it, there is a list, but the list is not publicly available and therefore we cannot get access to it unless we are given access to it by the Government. If that is the case, it would be helpful if the Government were to pass it on to us.

Mr Lidington: The advice I have is that all public *limité* and EU-restricted Council documents are listed on the public register of Council documents available through the Council secretariat's website. The full texts of those documents that are public can be easily accessed through the register. For those that are *limité* or EU-restricted, only the title of the document is given. We are happy to provide you with the exact access details.

Q52 Jacob Rees-Mogg: On the *limité* documents that will be made available to us potentially, they will obviously only be ones that relate to the documents already under scrutiny. They will not be depositable in themselves—is that correct?

Mr Lidington: Yes, that is right. If they are required under the terms of the scrutiny resolution to be deposited, they should have been deposited from the moment of publication.

Ivan Rogers: As the Minister says, in a fast-moving negotiation with a huge number of working groups and iterations that come through COREPER, you can have an enormous number of *limité* documents, which essentially look quite alike. The Committee would not want to be bombarded with 30 or 35 different versions in the space of a week.

Equally, I can see that, if there has been a substantial change from the document originally proposed by the Commission, the Committee would want to know that. If the scrutiny process is working properly you ought to be getting any document with significant change from the original proposal on the table.

Q53 Jacob Rees-Mogg: This was a particular issue with the ports regulation, where the documents seem to have changed in the process as they were coming to scrutiny. When it came to the debate, there was such a lack of clarity about which document ought to be debated that the session was suspended. Do you have any thoughts on that and how that could have been better handled?

Mr Lidington: Ultimately, it is the responsibility of the Department in charge of the policy to make a judgment as to whether the content of the measure has changed significantly in a

way that would oblige the Minister morally, if not procedurally legally, to write to the Committee to notify them of that. To be honest, I have thought through, because of the debates on things such as the ports directive, whether there would be a way of requiring greater automaticity in this. I don't think there is any escape from the need for a ministerial judgment ultimately.

Q54 Kelvin Hopkins: I have some questions about the scrutiny reserve and agreements at COREPER. We are increasingly seeing effective decisions of the Council being taken at COREPER, particularly on texts for negotiation with the European Parliament. Those are then agreed in the Council as what are termed general approaches, without discussion or even, in some cases, being formally considered by the Council at all. That has important consequences for parliamentary scrutiny, yet the Government response to our report rejects the recommendation that agreement in COREPER, when the Minister does not intend to challenge the decision at Council, should be taken as a breach of the scrutiny reserve, if a document is still under scrutiny. Isn't the existing scrutiny reserve in danger of becoming something of a convenient fiction, instead of what it should be, in my view: an inconvenient—for Government—holding of Government to account?

Mr Lidington: I want to say a little in response to Mr Hopkins, but will then ask Mr Rogers to give more detail on how this operates. My first point is that the permanent representative and his team operate strictly within the mandate that they have been given by Ministers through the European Affairs Committee of the Cabinet. The mandates allow for some flexibility in negotiation but the team at UKRep are expected to, and do, refer back to officials and to Ministers within the lead Department for each particular dossier, for guidance where there are significant changes proposed or some amendment is proposed out of the blue that might alter the character of the document.

If the negotiations take a course, either in Council or through the European Parliament's process, so that the text goes beyond the bounds of the mandate set out by the European Affairs Committee, the Minister back home is obliged to write round again to the European Affairs Committee to get a further mandate. Referring back to Mr Rees-Mogg's earlier point, I would certainly expect at that point any Minister to write to the Committee to tell them that there had been such a change. There has to be a mandate for Ministers within which Ivan and his team are free to operate. Ivan, why don't you say a bit more about how this operates?

Ivan Rogers: I am delighted to. As the Minister said, I and my teams operate entirely within instructions from Ministers. Those instructions are set in the normal way via the EAC write-round process and are translated—often into line-by-line instructions to us as to what our negotiation objectives are. If, in a qualified majority voting context, we look as though we will not be able to achieve some of those objectives, and I am flagging that we will not be able to, we would automatically have to have a new process; that is in circumstances where it looks as though we are unable to achieve something that was clearly agreed by Ministers as the UK's desired outcome. That is how we operate.

I would always, when representing the UK in COREPER, know the status in parliamentary scrutiny terms as well as the mandate from any relevant Cabinet Committee. Whenever an item appears on the COREPER agenda, I always know where it stands in the scrutiny process. In the very rare examples where that is not in my briefing pack, I always ask

the relevant desk officer and councillor where it is, and I very often intervene in COREPER to make that clear. For example, I looked, in preparation for this evidence session with the Committee, in COREPER 1 and COREPER 2 since September. In the four months since September my deputy and I have put 33 parliamentary scrutiny reserves on items that have been taken in our meetings, and on very many of those I have intervened orally to make the point and explain why we have a parliamentary scrutiny reserve.

I think that the question that you may be driving at is: is it, nevertheless, possible for dossiers to get to the position where the Council ultimately agrees them as A points without there having been a substantive discussion at ministerial level and only a discussion at COREPER level? Again, it is very difficult to get to the bottom of the figures. That is, in principle, possible, and I can give you some data from past presidencies. Taking decisions as A points in Council can be an efficient way of agreeing matters that do not actually require ministerial discussion, but the Council's rules of procedure stipulate that if a Minister wishes to discuss a matter that has been put forward for agreement as an A point, it has to be withdrawn from the agenda or, if the Council so decides, taken as a so-called B point, which would ensure that it was discussed.

The UK can always stop an A point from being agreed as an A point. If that happened, it would have to be discussed as a so-called B point or deferred to another Council. For example, if, on a transport matter, the process has ended and it is put forward as an A point to the AGRIFISH Council, for example, which can happen because the Council is a single body so A points can go to whichever instance of the Council comes next in the week, we can then take it off the AGRIFISH Council agenda and say that it would have to go to the Transport Council and, therefore, discussion because my Minister wants to intervene and make a point. I say that quite often at COREPER—that it is not acceptable for us to agree something as an A point.

On numbers, in preparation for the Committee, I asked my desk officers for information on files that they or—as you can imagine, given the pace of turnover—their predecessors worked on. From a sample of 68 pieces of legislation of the 92 that were completed under the Lithuanian presidency in 2013, the majority—we think 48—were discussed at ministerial level. That, of course, means that 20 were not. Six of those 20 were Lisbon alignment files, as they are called in the jargon of Brussels—essentially, updating regulations to bring them into line with the Lisbon treaty but with no real substantive change, or minor amendments to existing legislation. In the time available, I have not been able to go further than that, so I have not got details of the remaining 24 of the 92 and I cannot totally guarantee that it is a completely representative sample because it is very difficult to track all the legislation and, inevitably, desk officers are more familiar with files on which Ministers have said that they want to intervene and they need a Council discussion than they are with those that are rather technical files. If it is helpful to the Committee for me to do some further research at some point and come forward with more data, I am very happy to.

Q55 Kelvin Hopkins: Obviously, COREPER—the permanent representatives—act under strict ministerial instruction, according to what we have been told. That is my next question. In that sense, we still believe that the scrutiny reserve should apply to COREPER decisions. You mentioned the proportions and the numbers. It all sounds very reasonable, but the reality is that decisions are being made that are not being subjected to scrutiny by

Parliament. We find that worrying. Who knows? It may be used as a device for avoiding scrutiny if something is slightly more difficult.

Those are our concerns, but there is another question here. The Government have rejected our recommendation that agreement in COREPER should be taken as a breach of the scrutiny reserve. The Government also rejected our proposal about abstentions triggering an override if the document is still under scrutiny. On how many occasions in 2014 did the Government abstain to avoid overriding scrutiny when they knew that abstention would not prevent the adoption of the measure? This definitely looks like a device for avoiding coming back to this Committee and having the inconvenience of our scrutiny.

Mr Lidington: I cannot quite let Mr Hopkins's comment pass about something that goes through COREPER not being subject to scrutiny. I go back to the point that the document will have been deposited on publication and is available to the Committee so that the scrutiny process at Westminster can take place. The measure, even if it is adopted through a first reading process, has to be adopted by Ministers at a Council meeting. That safeguard is built into the system. If it is a contentious matter which would rightly attract the interest and concern of this Committee, in my experience it is very unlikely that British Ministers would want to remain silent on it. If it is contentious, it is almost certainly going to be contentious at the Brussels level as well.

On abstentions, there are a number of reasons for British Ministers abstaining. We do not keep statistics of how often we abstain. Those decisions will sometimes be taken on the spot at Council meetings if Ministers are engaged in the final discussion and negotiation about a particular option. Sometimes, we will do it for scrutiny reasons. I have certainly done that on several occasions. Almost all the European measures I handle require unanimity because they come under common foreign and security policy. There have been occasions where the Government has been completely in agreement with the content of a measure but it has not gone through the process of parliamentary scrutiny. I have therefore said at the Council meeting, "We are going to abstain on this. We agree with the content but, for scrutiny reasons, I cannot vote in favour."

Sometimes, we abstain because although we are not wholly satisfied with the way the dossier has come out, we think that abstaining would keep our powder dry for subsequent negotiations involving the European Parliament. It is a political judgment that we make about a tactical advantage that might come from abstention rather than voting against. Sometimes, it is because concessions have been made in the course of negotiations in the Council that go a sufficient distance towards our position for us to feel that we do not have to vote against, but we still do not think that we can exercise a positive vote in favour. That is a situation with which most Members of Parliament are familiar when it comes to deciding how we vote at the end of debates here.

Q56 Kelvin Hopkins: But we do have the opportunity to vote on all these things, whereas this is not being referred back. As far as I am concerned, I still have a suspicion that, with many of these things, the Foreign Office, or whoever it might be, want to get these things through. They know that there might be a problem if it was referred to this Committee, so they say, "Let's go along and come up with some reasonable arguments"—as indeed you have now, Minister—"and then abstain. It will go through on the nod and we won't have any

more problems about it.” That is what it looks like to us. Indeed, many of these possibilities could be referred well before the Council meeting and before decisions are taken so that we can look at them before. I should say that it is not for us to go hunting for documents to look at, but for Government to refer them to us.

Mr Lidington: The document will have been deposited and, therefore, referred by the Government to the Committee at the start of the process when the Commission has published the document. Whether it is COREPER or the Ministers in person at Council who are engaged in the negotiation, they have to stay within the framework established by the agreed European Affairs Committee of Cabinet position. I cannot, as a Minister, stray beyond that without going back to the EAC, initiating a further write-round and asking for that.

My suggestion would be that it is in the Committee’s consideration of the document that’s on here on deposit and it is perfectly reasonable to be exploring with the Government Department concerned where the objections are. We try to put those in explanatory memoranda—the bits we don’t like about a published measure and what we are going to seek to have taken out. I certainly try—I am not saying we always live up to this—in Foreign Office matters to write to the Committees to say where we have got to where there have been significant shifts in the content of a measure.

Q57 Kelvin Hopkins: When needs must, we can have pretty short-term reference to European Standing Committees. It has been done in a couple of weeks on occasions.

My last question is just to confirm what I said before. On how many occasions in the past year did the Government abstain to avoid overriding with scrutiny?

Mr Lidington: We don’t keep statistics on that and I would dispute that the motivation is to avoid overriding scrutiny. It is much more for the other reasons that I have given. Again, the political culture of the European institutions tends to be more consensual and less adversarial than the way in which, culturally, we tend to address politics at Westminster. That sometimes means, particularly if you have secured concessions in a negotiation within the Council, it helps you if you then recognise that through abstention, while still not pretending to be completely satisfied, rather than vote against. The tendency in the culture at European level is to think, “Well, if they are not prepared to do anything that says they recognise we have made some concessions, why should we bother doing that in future?”

Kelvin Hopkins: I have taken more than my time, but one point I would make is that a consensus in Brussels might be regarded as controversial here. We want our say and we are maybe not part of that consensual culture that appears to operate in Brussels.

Q58 Jacob Rees-Mogg: As a very brief follow-up to that, Minister, everyone is always impressed by your manners, but sometimes we wish you might be a little ruder in the European Councils.

I move on to Europol and where we hope you will be taking a particular interest in the relationship of national Parliaments and their involvement. The European Parliament has proposed amendments that would effectively direct how Parliament should conduct itself,

which is obviously contrary to constitutional principles, but would give the European Parliament a pre-eminent role. I wondered what discussions you might have had with Home Office colleagues and your opposite numbers across Europe about the provision the European Parliament has put in.

Mr Lidington: I would say very quickly to Mr Rees-Mogg that, in my experience, rudeness does not work. I am very willing to use frankness and directness, but always use the retort courteous to my European colleagues.

Jacob Rees-Mogg: This, Minister, is why you are in the Foreign Office and I am not.

Mr Lidington: On Europol, there is no difference of substance between the Government's position and the Committee's position on this. We think that we have got to get a text that properly accounts for the role of national Parliaments in scrutinising Europol. We are still hopeful that we will ultimately be able to achieve a more balanced, compromised text, but we are at a pretty early stage of the trialogue negotiation and a final text is not expected until the summer at the very earliest, possibly not until the second half of this year. As the Committee knows, it is a Home Office lead. Knowing that this might come up this morning, I spoke yesterday to Karen Bradley, as the Home Office Minister directly responsible. She saw the rapporteur of the relevant European Parliament Committee, Mr Agustín Díaz de Mera, in September to talk about the matter. She told me yesterday that she has this very much on her agenda. I have said to her that if there is more that we can do at the FCO, either through my personal intervention with ministerial counterparts, or simply the Home Office using our network of posts, we would be happy to do that.

Jacob Rees-Mogg: Thank you.

Q59 Mr Clappison: Do you accept that this sets a precedent as far as the European Parliament is concerned? That Parliament is always on the lookout for extra fields to exercise scrutiny over. We do need to stand up for parliamentary scrutiny here.

Mr Lidington: I completely accept that. I think a very important principle of the European treaties is that of the conferral of powers. The treaties say expressly that the European institutions have only those powers that are expressly conferred upon them by the treaties. The treaties do not confer any power whatsoever on the European Parliament or other institutions to direct national Parliaments.

Q60 Mr Clappison: Can you give us an idea of what action you might be prepared to take if the European Parliament persists with its amendments?

Mr Lidington: The first objective has to be to try to persuade the European Parliament that this is not a course it should go down. There are a fair number of MEPs who would be chary of trying to exert purported control over national Parliaments in this way. Were that not to work, the next stage is that any amendments passed by the European Parliament have to go back to the Council, so one is talking to other Governments at that point. There is perhaps an interesting question about subsidiarity here as well, where one would need to lobby the Commission. I think that the British Government needs to be prepared to engage with and

lobby strenuously every part of the European system and 27 other member state systems that are going to be relevant or helpful in this case.

Q61 Chris Kelly: Minister, I have some questions around departmental Select Committees and European Committees. You continue to repeat the mantra that departmental Select Committees should “play a much more active part in investigating how the Government and...the EU have applied policies”. Don’t you recognise that this does already happen to a significant extent? Witness the recent work by the Business, Innovation and Skills Committee, Environmental Audit Committee, Treasury Committee and Science and Technology Committee, and the scrutiny work conducted by the Home Affairs Committee and Justice Committee on the 2014 block opt-out.

Will you acknowledge the progress that has been made, led by this Committee and the Liaison Committee attended by our Chairman, and also acknowledge that while this is work in progress, other reforms, particularly to the European Committee system, are now urgently needed?

Mr Lidington: I am happy to acknowledge the role played by the departmental Select Committees. Their terms of reference are explicit in that they have European responsibilities. On the protocol 36 point, it is not the case with every Select Committee, but for some it has been a question of seizing every now and then on a particular European issue, rather than seeing the European aspect of their Government Department as being a mainstream part of Select Committees’ normal business. It is a cultural change that I am looking for. When it comes to the European Committees, the Government set out its position in its formal response to this Committee’s report. Yes, there is a case that the Committee made for permanent membership of those European Committees. The Government’s experience of when this operated before—this is something that business managers have told me about in detail—was that it was very difficult to get Members of Parliament to volunteer to serve on those Committees. That was why the move was originally made—I think under the previous Government—away from permanent membership towards the ad hoc system that we have now.

We said in the Government response to this Committee’s report that if we see evidence that there is genuine buy-in by Members of Parliament as a whole to the idea of permanent membership, we would be open-minded about looking at this again, but we do need to be convinced that there is an appetite for it, and that we are not simply going to find that we are struggling to staff those Committees.

Q62 Chris Kelly: You have offered a six-monthly oral evidence session with relevant departmental Select Committee Chairs. What do you mean by “relevant” in this context, and do you envisage a session with the full Liaison Committee?

Mr Lidington: I am very much in the hands of Parliament there. I am happy to sit down with Committee Chairs—this Committee, the Liaison Committee or others—to talk about how we might make a reality of this. One option would be the Liaison Committee. Another would be a kind of Sub-Committee of the Liaison Committee, bringing together either the

Chairs or perhaps designated representatives from each relevant Select Committee that has significant European business.

Q63 Chris Kelly: What do you mean by “relevant”?

Mr Lidington: One way of doing it would be to look at the Commission’s work programme or at a presidency’s priorities, which they publish when they come in, see which British Government Departments were most obviously affected by those programmes of activity, and have a session between me and people from those departmental Select Committees. Another way of doing it would be for me to offer myself with an occasional session of evidence in front of a particular departmental Select Committee that had important European business and wanted to discuss a number of European topics.

Q64 Chris Kelly: Can you give a simple formal commitment today that if a European Committee amends a motion, the Government will respect the decision of the Committee and table the amended motion for consideration by the House?

Mr Lidington: If the motion is amended in the European Committee, my understanding—I am willing to be corrected if I am not right—is that that motion as passed by the Committee has to be reported to the House and put on the Order Paper. I cannot give a guarantee this afternoon that the Government would allow time for a further debate—

Q65 Chris Kelly: But will the Government respect the decision of the Committee?

Mr Lidington: The Government always respect the decisions of the Committee. They do not always promise to agree with them.

Q66 Chris Kelly: Thank you. Given that the Government have rejected our recommendation for permanent membership of European Committees, what ideas do you have to reform them?

Mr Lidington: I would like the opportunity to have a conversation with members of this Committee and perhaps other interested parliamentarians about how we could agree on a set of proposals that would give the Committee some of the things that they have been asking for, and also give the Government some of the things that we signalled in our response to the Committee’s report that we would be keen to see.

There are the makings, if one looks at the Government’s response, of a package of reform measures whereby the Government would agree to some of the things where we have indicated that we are sympathetic or open-minded, but we would hope in return that we could get agreement, for example, on a system of categories of documents that did not in future always require the full process of an explanatory memorandum. We published in our response to the Committee’s report some indicative ways in which that might be addressed.

Chair: Thank you.

