House of Commons

European Scrutiny Committee

Implementing the Hague Programme on justice and home affairs

Forty–first Report of Session 2005–06

HC 34-xli

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Report, together with formal minutes and oral evidence

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The European Scrutiny Committee

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b) to make recommendations for the further consideration of any such document pursuant to Standing Order No. 119 (European Standing Committees); and

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Legal base	—
Document originated	28 June 2006
Deposited in Parliament	6 July 2006
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Previous Committee Report	None
To be discussed in Council	4-5 December 2006
Committee's assessment	Politically important
Committee's decision	(a) and (b) For debate on the Floor of the House (c) Cleared

Introduction

1. In November 2004, the European Council agreed a five-year programme of action on justice and home affairs, including policies on visas, asylum and immigration and on police and judicial cooperation in criminal matters ("the Hague Programme").[1] The European

[1] (25730) 10249/04: see HC 38-iv (2004-05), para 17 (19 January 2005).

Council said that the Programme was based on a pragmatic approach and grounded on the principles of subsidiarity, proportionality, solidarity and respect for the different legal systems and traditions of the Member States. It stressed the importance of evaluating the effects of legislation on justice and home affairs and invited the Commission to produce annual evaluation reports. The Government told the previous Committee that it welcomed the Programme's emphasis on a practical approach and on evaluation and implementation.

2. In June 2005, the Council adopted an Action Plan to give effect to the Programme.[2] The European Council invited the Commission to present a progress report in 2006 on the implementation of the Programme, together with proposals for any necessary modifications to it.

3. The Commission has presented four Communications in response to the invitation:

> The first of them — document (a) — introduces the other documents; summarises the proposals which, in the Commission's view, should receive priority; sets out the case for using Article 42 of the EU Treaty ("the passerelle") to transfer action on police and judicial cooperation in criminal matters from Title VI of the EU Treaty to Title IV of the EC Treaty; and expresses willingness to propose making EC legislation on legal migration subject to co-decision with the European Parliament.
>
> Document (b) is the Commission's annual report for 2005 on the implementation of the Hague Programme by EU institutions ("the scoreboard"). It also reports on action by Member States to transpose EC or EU instruments on justice and home affairs into national law.
>
> Document (c) sets out the Commission's proposals for a comprehensive mechanism to evaluate all EC and EU policies on justice and home affairs.
>
> The fourth document sets out the case for widening the jurisdiction of the European Court of Justice (ECJ) to allow courts of first instance in the Member States to make preliminary references to the ECJ about matters covered by Title IV of the EC Treaty (asylum, visas, immigration and judicial cooperation in civil matters). We considered the document on 11 October.[3] We decided to ask the Government for further information and to keep the document under scrutiny meanwhile.

Legal background

4. ***Title IV of the EC Treaty*** makes provision for Community action on visas, asylum, immigration and specified aspects of judicial cooperation in civil matters with cross-border implications. The procedure for the adoption of measures on these matters (with the exception of measures on legal migration and family law) is qualified majority voting (QMV) and co-decision with the European Parliament.

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[2] (26566) 8922/05: see HC 34-iv (05-06), para 22 (20 July 2005).

[3] (27659) 11356/06: see HC 34-xxxvii (05-06), para 19 (11 October 2006).

5. Article 68 of the EC Treaty defines the jurisdiction of the European Court of Justice (ECJ) in matters covered by Title IV. A court or tribunal of a Member State "against whose decisions there is no judicial remedy under national law" must request a ruling from the ECJ if it considers that a decision on the interpretation of Title IV or on the validity or interpretation of acts of the institutions is necessary to enable it to give judgment. The ECJ does not have jurisdiction to rule on any measure or decision taken pursuant to Article 62(1) of the EC Treaty (measures on the crossing of external borders of the Member States) relating to the maintenance of law and order and the safeguarding of internal security. The Council, the Commission or any Member State may refer a question of interpretation to the ECJ, but in such a case the ruling given by the ECJ does not apply to judgments of courts or tribunals of the Member States which "have become *res judicata*" (that is, where the court or tribunal has finally determined an issue on the merits between the parties to the dispute).

6. The Commission has power to initiate infraction proceedings against a Member State if it does not comply with its obligations arising from a measure adopted under Title IV of the EC Treaty.

7. ***The "opt in"***: Article 69 of the EC Treaty, read with the Protocol on the position of the United Kingdom and Ireland, provides that the United Kingdom does not take part in the adoption of measures under Title IV unless it has notified the Council within three months of the presentation of a proposal that it wishes to participate. If the United Kingdom gives such a notification, it may take part in the negotiations on and the adoption of the measure and will be bound by it. (The United Kingdom may also notify the Council of its intention to be bound by a measure which has already been adopted under Title IV.) This is known as the UK's right to "opt in". There is no power for the UK to "opt out" once the Government has notified its intention to participate in a measure.

8. ***Title VI of the EU Treaty*** makes provision for police and judicial cooperation in criminal matters (such as: terrorism, trafficking in human beings, offences against children, fraud, corruption and illicit trafficking in arms and drugs). Unanimity is required for the adoption of a measure by the Council. The Council is required only to consult the European Parliament about proposed measures.

9. The ECJ may give a preliminary ruling on the validity and interpretation of a Framework Decision or Decision adopted under Title VI and on a measure to implement them only if the Member State concerned has given notice of its intention to accept the Court's jurisdiction to give preliminary rulings in such matters. The ECJ does have jurisdiction, however, to review the validity of Framework Decisions and Decisions in actions brought by a Member State or the Commission on the grounds specified in Article 35(6) of the EU Treaty, such as infringement of an essential procedural requirement. It also has jurisdiction to rule on any dispute between Member States about the interpretation or application of measures adopted under Title VI if the dispute cannot be settled by the Council.

10. The Commission has no power to seek to enforce Title VI measures through infraction proceedings.

11. ***The "passerelle"***: Article 42 of the EU Treaty gives the Commission or a Member State the right to propose that action on police and judicial cooperation in criminal matters should be dealt with under Title IV of the EC Treaty, instead of under Title VI of the EU Treaty. The proposal for the transfer would require the unanimous agreement of the Council, after consultation with the European Parliament. The change would then have to be ratified by every Member State (in the UK, by primary legislation). Article 42 is known as the "*passerelle*" (or gangplank).

Document (a) — the Commission's proposals for "the way forward"

12. The Communication has two parts:

- the first outlines the Commission's proposals for action to implement the Hague programme between now and the end of 2009; and
- the second part argues that decision-making on police and judicial cooperation in criminal matters needs to be faster, more effective and more accountable and states the Commission's belief that use of the *passerelle* in Article 42 of the EU Treaty provides an appropriate tool to achieve this.

13. The Commission proposes action on the following matters:

- fundamental rights and citizenship of the EU (including better information about, and improved cooperation for, diplomatic and consular protection of EU citizens in third countries);
- asylum (including an evaluation of the existing EC legislation; and a Green Paper on asylum policy);
- the management of the EU's external borders (including the creation of rapid reaction teams to help a Member State if it is faced with an unexpected influx of illegal immigrants; and an assessment of the feasibility of creating a new EU information system to record the entry and exit of every third country national);
- mutual recognition of decisions in civil and criminal matters, including the introduction of EU-wide rules on, for example, procedural guarantees and the presumption of innocence;
- access to information so as to counter terrorism and organised crime (including the exchange of information about criminal records);
- an Internal Security Strategy to strengthen cooperation in the fight against terrorism and organised crime;
- Europol (replacing the Europol Convention by a Council Decision and giving the European Parliament oversight of Europol); and
- a comprehensive system for the evaluation of European justice and home affairs policies, as proposed in document (c).

14. The Commission says that there have been numerous "blockages" in the development of policies on justice and home affairs. For example, in the Commission's view, the Council was able to reach agreement on the proposal for a European evidence warrant "only after extremely lengthy negotiations and on the basis of the lowest common denominator".[4] The Commission also refers to the failure to reach agreement, after three years of negotiation, on basic procedural rights, such as the right to an interpreter when arrested.

15. The Commission says that:

> "Decisions on police and judicial cooperation in criminal matters … still need unanimous agreement by all Member States. These matters are dealt with under a particular framework (under Title VI EU), which applies the so-called 'third pillar' method, characterised by:
>
> - specific legislative instruments (Common Positions, Framework Decisions and Conventions) which complicate further its implementation;
> - insufficient powers for the European Parliament in the legislative process;
> - use of unanimity that often leads to agreement on the lowest common denominator basis;
> - a shared right of initiative with [*sic*] each of the 25 Member States that does not favour a true 'European dimension', nor the accountability of the Member States' legislative initiatives, which are not submitted to *ex-ante* impact assessment;
> - a limited role for the [European]Court of Justice … ; and
> - the lack of formal infringement procedures to ensure proper transposition and implementation."[5]

16. The Commission believes that these deficiencies could be remedied by the use of the "*passerelle*" provided by Article 42 of the EU Treaty. It says that the following advantages would be obtained if the *passerelle* were used:

- democratic legitimacy would be increased by making measures on police and judicial cooperation in criminal matters subject to co-decision with the European Parliament;
- the "European dimension" would be guaranteed by giving the Commission the right to initiate proposals for legislation on these matters;
- delays in the legislative process would be reduced by moving to QMV and the quality of legislation would be improved by removing the temptation to adopt the lowest common denominator as the only way to achieve unanimity; and

[4] Document (a), page 11, final paragraph.

[5] Document (a), page 11.

- judicial protection would be improved by giving the European Court of Justice jurisdiction in police and judicial cooperation in criminal matters.

17. The Commission notes that Article 67(2) of the EC Treaty empowers the Council, acting unanimously and after consultation with the European Parliament, to decide that all or some of the matters covered by Title IV of the EC Treaty (visas, asylum and immigration) should become subject to QMV in the Council and co-decision with the European Parliament. The power has already been used to make all but legal migration and family law subject to QMV and co-decision. The Commission says that it is now willing to propose the use of Article 67(2) to make action on legal migration subject to co-decision, "ensuring therefore a proper democratic scrutiny by the European Parliament".[6]

The Government's views on document (a)

18. We are grateful to the Parliamentary Under-Secretary of State at the Home Office (Joan Ryan) for her Explanatory Memorandum on document (a). We are also grateful to her for the oral evidence she gave us on 18 October.

19. The Government welcomes document (a) as a useful means to assess progress on the implementation of the Hague programme and to identify any necessary adjustments to priorities. The Minister's Explanatory Memorandum comments on each of the proposals in the first part of the document.

20. Among other things, the Minister says that the Government will want to look very closely at the proposals the Commission intends to present on asylum, internal security and criminal law. Paragraph 12 of the Explanatory Memorandum says that the Government will also want "to examine carefully the forthcoming proposals from the Commission on Euro-consulates and the consular code, since they fall outside Community competence and we believe that they either duplicate or cut across existing arrangements for consular cooperation between Member States".

21. The Explanatory Memorandum notes that the Commission proposes that the forthcoming Green Paper on Asylum Policy should be followed by a Policy Plan on Asylum in 2007 and that it will set out the next steps on the second phase of a Common European Asylum System. The Government is concerned that the Commission proposes to do this before the Procedures Directive has been implemented by Member States.[7] It believes that the review should be postponed until 2009 to allow a fuller evaluation of the existing Directives on asylum.

22. The Minister says that the Government supports practical cooperation between Member States and the exchange of information about best practice. But it is less sympathetic to moves to harmonise Country of Origin information (for use in connection with consideration of applications for asylum) unless it can be done without compromising the standards the UK applies and without undue cost. The Government will also argue

[6] See document (a), page 13, first full paragraph.

[7] Council Directive 2005/85/EC on minimum standards on procedures for granting and withdrawing refugee status: OJ No. L 326, p.1, 13.12.05.

against new legislation to require practical cooperation between Member States unless clear benefits can be shown.

23. Commenting on the Commission's proposed priorities on mutual recognition in civil and criminal matters, paragraphs 21 to 23 of the Minister's Explanatory Memorandum say:

> "The Commission intends to focus on the adoption and implementation of proposals already agreed or under discussion. It will also aim to strengthen mutual confidence by ensuring balanced legislation for both prosecution and defence, including legislation on procedural guarantees and training of the judiciary. … In the longer term the Commission sees value in establishing a single area of justice in civil and criminal matters … .
>
> "The Government agrees that cooperation in civil matters is necessary for business and EU citizens, although we recognise the difficulty of agreeing proposals on family law. We strongly support the reinforcing of mutual recognition as the cornerstone of the Union's policies. However, we do not support harmonisation of substantive civil law as an end in itself, having regard in particular to the value of the common law to the UK legal system.
>
> "Similarly, we believe that extreme caution needs to be exercised on the basis and need for approximating criminal procedural law … There is broad agreement within the EU that cooperation in this area can and should be improved but given the changed circumstances [such as the uncertainty about the Constitutional Treaty] and experience since the adoption of the Hague Programme serious consideration should be given to non-legislative measures as a viable alternative to the current programme."

24. As to the *passerelle*, the Minister's Explanatory Memorandum says that the Government has concerns about the potential impact of any proposal based on Article 42 of the EU Treaty. It believes that any change to the current arrangements should be made only if those concerns can be met and the change is in the UK's national interest.

25. The Minister says that the Government is still considering the Commission's willingness to propose the use of Article 67(2) of the EC Treaty to make measures on legal migration subject to co-decision.

26. When the Minister gave oral evidence to us on 18 October, we asked her to tell us about the Council's discussions of the *passerelle*.[8] [9] She told us that she took part in the Council's discussion in September which, she thought, had "directed the shape of the discussion in October". She said that the Commission is very strongly in favour of using the *passerelle*. She continued:

> "I think it is true to say that there was some very significant opposition to this round the table and significant opposition from some big players as well as perhaps from some of the smaller countries. Our own position that I outlined was that we would

[8] Q 4.

[9] The transcript of the evidence session is reproduced with this report.

> never say we will not discuss an issue, because that is not an approach we should take with partners, but the fact that we discuss something does not mean that we necessarily either agree with it or that we do not have concerns. The position I outlined was that our view is that unanimous voting is not a bar to getting good decisions or getting speedier decisions, though we would agree with the Commission that we do want to see decisions that are able to be made within a reasonable time-frame. The fact that some decisions are would indicate that it is not unanimity itself that is the bar and that there might be something about the content of the decisions that is causing the problem … so we want speedy decisions but we do not think we necessarily have to have QMV for that to be the case."

27. We asked the Minister if the Government would oppose the use of the *passerelle*.[10] She said that it would be premature to reach a decision because the Government's "serious concerns" had not yet been addressed. At this stage she had not ruled out the use of the *passerelle* and she had not ruled it in.

28. We put it to the Minister that this is not a new issue. At the Convention on the future of Europe, the then Minister for Europe said that the extension of QMV to the criminal justice and court system would not be acceptable to the Government.[11] The Minister told us that the Government had not retreated from any previous position. She reiterated that the Government had serious concerns about the proposal, as have some other Member States. But the Government would not refuse to discuss the matter with its partners in the Council. She said:

> "The issue is now at a point where it is for the Finnish Presidency to come back with whether they are going to carry on [with the proposals for the use of the *passerelle*] and take it any further or whether it will remain where it is, which is really that it has made no progress."

29. We noted that police and judicial cooperation in criminal matters concerns issues which are devolved to Scotland. We asked, therefore, if a Scottish Executive Minister was present at the Council's discussion and, if one was not present, what the Minister had said at the Council about the position of the Scottish Executive.[12] The Minister said that a Minister of the Scottish Executive had not been present but that the Scottish Executive had been consulted as part of the Government's preparations for the Council meeting and that it was content with the position the Government had taken.

30. We asked the Minister whether, if the *passerelle* were used, the EC would have external competence over extradition and what effect that would have on the scope for the Government to negotiate bi-lateral agreements with third countries for the extradition of terrorists.[13] The Minister said that this was among the matters about which the Government was concerned and she knew that the concern was shared by the Justice Minister of the Republic of Ireland. If the matters covered by Title VI of the EU Treaty

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[10] Q 6.

[11] QQ13 and 14.

[12] Q 17.

[13] QQ 21, 22 and 23.

were transferred to Title IV of the EC Treaty, the external competence of the Government on police and judicial cooperation in criminal matters could be restricted.

31. Finally, we asked the Minister to tell us the Government's specific concerns about the effect of using the *passerelle*.[14] She told us that its concerns were about the extension of the EC's external competence, the potential effect on national security and the need for safeguards such as "the emergency brake".[15]

32. On 30 October, the Minister sent us a letter about some of the matters which had been raised during her oral evidence. In a passage about the use of the *passerelle*, the Minister 's letter says that it is unclear whether the Finnish Presidency will propose further work on the subject during its Presidency and that:

> "The Government considers the current debate to be over and that we should instead focus on practical measures in the current JHA agenda."

Document (b) — the Commission's report on the implementation of the Hague Programme in 2005

33. This is the first of the annual reports the Commission will make on the implementation of the Hague Programme.

34. The report is in two parts. The first part examines each of the measures which were scheduled for action by the Commission, Council or European Parliament in 2005.[16] It says which were done in that year, which are currently being done and which have been delayed. For example, the Commission presented its Green Paper on economic migration on time, but the evaluation of the European Refugee Fund had to be postponed to 2006. The Commission notes that there were major delays in the adoption of two "flagship measures" — the Framework Decisions on the European Evidence Warrant and on procedural rights.

35. The Commission concludes that progress in dealing with matters under the EC Treaty was satisfactory (but even there the requirement for unanimity for some matters caused delay). By contrast, progress was slow on matters falling within Title VI of the EU Treaty because of the requirement for unanimity and the Council's "uncertainty and hesitations regarding the choice of legal bases".[17] The Commission says that:

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[14] Q 25.

[15] "The emergency brake" is shorthand for the provision in Article III-271(3) of the Constitutional Treaty. It provides that, where a Member State considers that a draft European framework law which defines serious cross-border crimes and sanctions would affect fundamental aspects of its criminal justice system, it may ask for the draft framework law to be referred to the European Council. The measure would be suspended when referred to the European Council. Subsequently, the suspension could be ended or the originators of the proposal could be asked to present a new draft. Article III-270(3) provides a similar "brake" in relation to criminal procedure.

[16] ADD 2 provides detailed supporting information.

[17] See document (b), paragraph 79,

> "This report reveals that there is room for improvement in the existing framework, in particular regarding the decision-making process in the areas of police and judicial cooperation in criminal matters."[18]

36. The second part of the report is about Member States' transposition into their national law of the EC and EU legislation on justice and home affairs. ADD 1 lists the measures whose implementation was due by the end of March 2006 and comments on Member States' compliance with the requirements for transposing each of them. The Commission says that infringement proceedings are clearly influential in securing timely and accurate transposition of the measures adopted under Title IV of the EC Treaty. It concludes that the most striking deficiencies, in both quantitative and qualitative terms, affected the transposition of measures under Title VI of the EU Treaty:

> "For example, there is no apparent national equivalent of the Union's determination in the fight against terrorism … ."[19]

The Government's views on document (b)

37. In her Explanatory Memorandum on document (b), the Minister says that the Government is broadly content with the details set out in the first part of the report but notes that there are some gaps.

38. Commenting on the second part of the report (transposition by Member States), the Minister's Explanatory Memorandum notes that none of the legislation listed in the Hague Action Plan was due for transposition by the time the Commission wrote document (b) in June.

39. The Minister's Explanatory Memorandum refers to the Commission's view that the requirement for unanimity for the adoption of legislation under Title VI of the EU Treaty probably contributed to delays in the decision-making process; moreover, she refers to the Commission's suggestion that delay was also caused by the Council's uncertainty and hesitation about the choice of legal bases. The Minister says that the evidence underpinning the Commission's views on these points is "partial and open to interpretation". In paragraph 12 of her Explanatory Memorandum, she says that:

> "The Government is committed to proper implementation of EU measures in all areas, including under Title VI TEU. We would be interested to see further evidence from the Commission that implementation is demonstrably quicker under the first pillar. The Government agrees that speed is important but also believes that it is crucial that policies are thoroughly discussed, well thought out and in the national interest."

40. Paragraph 14 of the Minister's Explanatory Memorandum comments on the Commission's statement that there is no apparent national equivalent to the Union's determination in the fight against terrorism. The Minister says:

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[18] See document (b), paragraph 83.

[19] See document (b), paragraph 82.

"There appears to be no basis for this statement, and the Government fundamentally disagrees, given that we remain absolutely determined to fight terrorism and our experience of working with other Member States is that they do too."

Document (c) — evaluation of EU policies on freedom, security and justice

41. The Commission proposes "a coherent and comprehensive mechanism" for the evaluation of EU policies on freedom, security and justice. The mechanism would have two components:

- monitoring the implementation of policies (covering the process for adopting policies at EU-level and then transposing them into national law or otherwise implementing them); and
- evaluation of the impact and effectiveness of the policies in the short and medium-term, providing enough flexibility to tailor the evaluation to the circumstances of each policy.

42. The document outlines the Commission's proposals for:

- involving the EU institutions and others in the evaluation process (including the Council, Member States, the European Parliament, EU agencies and civil society;
- improving the quality, availability and analysis of statistics on freedom, security and justice;
- a three stage process (an information gathering stage; an evaluation report stage; and, in selected cases, an in-depth strategic policy evaluation); and
- the timetable for evaluations.

43. Annex 1 of the document contains fact sheets on existing EU policies on justice and home affairs. They list the objectives of each policy, who is responsible for implementation and indicators of impacts and outputs. Annex 2 summarises the current arrangements for monitoring justice and home affairs policies.

44. ADD 1 contains a commentary on alternatives to the Commission's proposals, and views on the likely impact of the Commission's preferred option.

The Government's views on document (c)

45. The Minister's Explanatory Memorandum says that the Government has long called for proper evaluation of the impact of EU measures on justice and home affairs and supports the concept outlined by the Commission.

46. The Government agrees with the Commission that evaluations should be tailored to the circumstances of the specific policies to which they relate. In principle, it also supports the involvement of all the EU institutions and other stakeholders in the evaluation process. But the Government would want the number of participants to be limited to those whose

contribution is both useful and consistent with the principles of proportionality and subsidiarity. In paragraph 12 of her Explanatory Memorandum, the Minister says that :

> "Many policies in the JHA area fall within the intergovernmental sphere of cooperation and implementation is the responsibility of Member States. The Government will seek to ensure that Member States retain control over who is consulted and to what extent and will stress the importance of respecting the diversity of legal systems, national security and any other areas of national sensitivity. In particular, we would wish to consider very carefully proposals to extend the role of the European Parliament and the Commission."

47. The Minister mentions a number of other matters on which the Government will want to reflect or discuss with the Commission and other Member States, such as the extent to which the Commission should be responsible for evaluating policies in every area, what a process for the validation of evaluation reports might entail and how to identify the matters to select for in-depth strategic evaluations.

Conclusion

48. **The first part of document (a) outlines the Commission's proposals for action on justice and home affairs between now and the expiry of the Hague Programme at the end of 2009. We share the Minister's caution about some of the proposals and about those on further action on mutual recognition in civil and criminal matters, in particular. But we shall reserve further comment until each proposal comes before us for detailed scrutiny.**

49. **In our view, the proposal for the use of the *passerelle* is of constitutional importance. Decisions on, for example, what constitutes a crime, what sanctions there should be for offences, procedural rights and other matters covered by Title VI of the EU Treaty concern national sovereignty. We share the Government's concerns about the implications of the proposal for external competence and national security and about the need for safeguards. We note with alarm that, for example, the UK might not be able to make bi-lateral agreements with third countries for the extradition of terrorists.**

50. **Moreover, there is the question whether it would be acceptable for the European Parliament to have the right of co-decision on measures about police and judicial cooperation in criminal matters when the most of its Members do not represent and are not answerable to the electorate of the UK.**

51. **We have considered whether the "opt in", described in paragraph 7 above, might provide a sufficient safeguard if the *passerelle* were used. We understand that the UK would not be bound by any measure on police and judicial cooperation in criminal matters unless it expressly opted into it. There could be cases where it appeared to be in the national interest to opt into a proposal soon after the opening of negotiations on it. Subsequently, however, amendments to the proposal might be agreed by QMV which radically changed the measure and were unacceptable to the Government. There is no provision for the UK to rescind an opt-in. So, once the Government had opted-in to a measure, the UK would be bound by it as it emerged from the negotiations.**

52. **It appears to us that, on the one hand, the opt-in would provide the UK with some safeguards against the imposition of unacceptable measures. In these circumstances, it might not be reasonable to block the use of the *passerelle* if other Member States — which do not have the opt-in — want to make the change.**

53. **On the other hand, the use of the *passerelle* would give the ECJ a jurisdiction in these matters which is has not got at the moment; the Commission would gain the power to bring infraction proceedings; and the European Parliament would be given a role in deciding matters, such as what is or is not a crime, which are currently preserved for Member States because they affect national sovereignty. Speed of decision-making is not a sufficient justification for over-riding a Member State's concerns about such matters. Moreover, it appears to us that the proposal to use the *passerelle* does not offer significant gains for the UK.**

54. **It seems to us that there are further important considerations which need to be taken into account. At present, because of the requirement for unanimity, the UK takes part, as of right, in the negotiation of all proposals affecting police and judicial cooperation in criminal matters. Other Member States and the Commission have to listen to and take account of the UK's views. And the Government does not have to decide until the last minute whether to accept a proposal.**

55. **If the *passerelle* were used, we think it likely that the UK's negotiating position would be weaker because other Member States and the Commission would be unwilling to take account of the UK's views unless the Government had opted into the proposal. And once opted in, the Government could do nothing if the proposal were subsequently amended by QMV in a way it found unacceptable.**

56. **Seen from this perspective, if the *passerelle* were used, the present certainty about the existence of the means to protect the UK's interests would be replaced by uncertainty and risks which do not currently arise.**

57. **We believe that on a matter of such importance it is vital that there should be no doubt or equivocation about the Government's position. We consider this to be essential despite the Minister's surprising statement in her letter of 30 October that the Government considers the debate about the *passerelle* "to be over". We also believe that the Government needs to know the views of the House. Accordingly, we recommend document(a) for debate on the Floor of the House before the *passerelle* is discussed by the Council of Ministers on 4-5 December. We also recommend that document (b) be included in the debate because it contains information and comment by the Commission relevant to the use of the *passerelle*.**

58. **We share the Government's view about the need for thorough evaluations of measures on justice and home affairs. We note the Minister's reservations about some aspects of the proposals in document (c). We have no questions that we need put to her about the document and we are content to clear if from scrutiny.**

Formal minutes

Wednesday 1 November 2006

Members present:

Michael Connarty, in the Chair

Mr William Cash	Mr David Hamilton
Ms Katy Clark	Mr David Heathcoat-Amory
Mr Wayne David	Mr Jimmy Hood
Jim Dobbin	Angus Robertson
Nia Griffith	Mr Anthony Steen

The Committee deliberated.

Draft Report [Implementing the Hague Programme on justice and home affairs], proposed by the Chairman, brought up and read.

Ordered, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 58 read and agreed to.

Resolved, That the Report be the Forty-first Report of the Committee to the House.

Ordered, That the Chairman do make the Report to the House.

The Committee further deliberated.

[Adjourned till Tuesday 7 November at 4.00 p.m.

List of witnesses

Wednesday 18 October 2006

Page

Oral evidence

Taken before the European Scrutiny Committee

on Wednesday 18 October 2006

Members present:

Michael Connarty, in the Chair

Mr Richard Bacon
Mr David S Borrow
Ms Katy Clark
Mr Wayne David
Jim Dobbin
Michael Gove
Nia Griffith
Mr David Hamilton
Mr David Heathcoat-Amory
Mr Jimmy Hood
Mr Lindsay Hoyle
Angus Robertson
Richard Younger-Ross

Witnesses: **Joan Ryan,** a Member of the House, Under-Secretary of State, **Mr Christophe Prince,** International Directorate, and **Mr Kevan Norris,** Assistant Legal Adviser, Home Office, gave evidence.

Q1 Chairman: Welcome, Minister. Can I explain our unusual situation where I am sitting in the chair at this meeting and our chair of the last 15 years Mr Jimmy Hood is not sitting in the chair; in fact his term of office has come to an end because of his length of service and I have been elected the new chair of the European Scrutiny Committee. I hope that I can treat you as gently and kindly as Mr Hood has on any occasion you have been here before. We all owe a great debt to Jimmy for the time he has served the Committee and hopefully I can serve the Committee and the Parliament as well as he did. Can we get on with our questions. I have said to you if there is an early vote that we are likely to ask you to come back because we have many questions to ask you on these very important matters. Firstly on the Hague Programme could you tell us about the meeting of the Justice and Home Affairs Council on 5 and 6 October? What was said about the Commission's Communication on the implementation of the Hague Programme?
Joan Ryan: First of all, Chairman, can I say thank you for inviting me and congratulations on your elevation to the chair of this Committee. I would like to say congratulations to Mr Hood on completing such a length of service. I will do my very best to answer the questions that you are putting to me. I think it is an appropriate time for us to talk about the Hague Programme as we move towards its mid-term review. You asked me about 5 and 6 October and I have to say to the Committee that I was not present at 5 and 6 October. I have now attended one formal Council in Brussels in July and one informal Council in Tampere in Finland in September. However, the debate around the issues within the Hague Programme is alive and kicking and moving along at a pace. Over the two Councils that I have been present and at the Council that I was not present, where we were in fact represented by the Home Secretary and Baroness Scotland and also Baroness Ashton from the Department for Constitutional Affairs, over all three of those Councils there has been substantive discussion around some issues that I know are of great interest to this Committee, not least issues around asylum and immigration, co-operation issues around what is known as the *passerelle*, Article 42, which I think is a key issue for people in this Committee on previous occasions, and also issues around strengthening our borders and stopping organised crime and preventing terrorist attacks. We have had substantive discussion on all of those issues and made some progress, I think, in relation to where we stand on some of those issues. I will leave it there as opening remarks; there may well be more detailed questions.

Q2 Chairman: I am sure members of the Committee will explore those issues with you. Mr Dobbin?
Joan Ryan: I am really sorry, I am being terribly rude to the Committee, I should have introduced my officials to you.

Q3 Chairman: It is my fault for not asking you to do so.
Joan Ryan: I will just say then that this is Christophe Prince who has been acting Deputy Director in the International Directorate of the Home Office and Kevan Norris who is a Legal Adviser within our Legal Advisers' Branch at the Home Office. I am very pleased that they are able to come with me because if there are details the Committee want that I am not able to provide then I will ask the officials to come in and support.
Chairman: Thank you for that. Mr Dobbin?

Q4 Jim Dobbin: Minister, I am not sure whether because you were not present on 5 and 6 October whether you are able to tell us about the Council's discussion about the use of the *passerelle* to make measures on police and judicial co-operation in criminal matters subject to qualified majority voting and co-decision with the European Parliament. You have maybe heard what was—
Joan Ryan: I can talk to you about the *passerelle* and give you some detail because the substantive discussion, I think, that directed the shape of the

discussion in October was held at the informal in Tampere in Finland where I was present and spoke for the Government at that stage. As it was an informal I will not name countries and their positions but I could talk you through some of the discussion which I think was pretty much where the position ended up then in October at the formal Council. There was a very lively debate in Finland, I think it is true to say, around the *passerelle*. It was essentially a good-humoured debate but there were some very serious contributions made, not least our own, I hope. The debate was opened by the Commission and they are obviously very strongly in favour of putting the *passerelle* into effect and moving Article 4 to Article 6, the police and co-operation and justice measures, from unanimous voting into Pillar 1 which is obviously QMV. I think it is true to say that there was some very significant opposition to this around the table and significant opposition from some big players as well as perhaps from some of the smaller countries. Our own position that I outlined was that we would never say we will not discuss an issue, because that is not an approach we should take with partners, but the fact that we discuss something does not mean that we necessarily either agree with it or that we do not have concerns. The position I outlined was that our view is that unanimous voting is not a bar to getting good decisions or getting speedier decisions, though we would agree with the Commission that we do want to see decisions that are able to be made within a reasonable time-frame. The fact that some decisions are would indicate that it is not unanimity itself that is the bar and that there might be something about the content of the decisions that is causing the problem that would need to be addressed, so we want speedy decisions but we do not think we necessarily have to have QMV for that to be the case. And we also think that along with the kind of approach we took at the Hampton Court Council during our own Presidency that we need really to be ensuring that the agenda we are pursuing is the agenda that addresses the issues of concern to our citizens, is seen to be a relevant agenda to the citizens of our countries across the European Union, and that we have a lot of issues on the table that need practical implementation and evaluation. We have had some very good decisions that have the potential to make a huge difference to some of the issues of concern, not least things like the Schengen Information System, the counter-terrorism strategy, the role of Frontex, and that we need to be pressing on with them in the first instance and that we do have some very, and I think the exact word I used was "serious" concerns about the proposal and that these concerns have not been addressed. And that was where our position ended up, but, as I say, there was significant opposition from other countries as well.

Q5 Angus Robertson: Thank you very much, Minister, that was very useful. Just to make things absolutely clear because for the *passerelle* to come into force it takes unanimity for that to happen—
Joan Ryan: Indeed.

Q6 Angus Robertson: If I understand the UK Government's position it is that the UK is opposed and should it come up that the UK Government will oppose the *passerelle* being introduced and that will be the end of it. Have I got that right?
Joan Ryan: No, what I have said is that we have serious concerns and at this point in time those serious concerns have not been addressed, and so making a formal, public decision as to whether the *passerelle* would in any way be acceptable to us, we are not at the stage where we could consider making that decision because the serious concerns we have are not addressed, so we are at an even earlier stage than the one that you are anticipating.

Q7 Angus Robertson: Okay, so theoretically if the Commission and other Member States were able to help answer those concerns, conceivably you would be prepared to support the introduction of the *passerelle*?
Joan Ryan: I would say I do not think it is helpful to talk hypothetically about issues such as this. They are of major importance, as I am sure you realise just from your question, and I think that the position I have outlined is very accurate. I think the situation we are in now is that it is now up to the Finns who hold the Presidency to handle the proposal to decide where we go next. So having expressed those concerns, I assume the Presidency will take these on board, as well as the position of all the other countries which have significant concerns, and we await to hear where this might go next, though, to be absolutely frank with the Committee, it is difficult to see how the proposal itself could proceed further at the moment on the basis of the concerns that were expressed.

Q8 Richard Younger-Ross: Clearly the Minister is saying that she is not ruling it out; therefore she has to be ruling it in. Can I ask the Minister further on the nature of the concerns of other countries so that we have some understanding of whether this is likely to proceed or whether it is dead in the water and we wasting our time talking about it. The other countries, you said significant players: is their objection because they do not wish to see co-operation on police and judicial issues; is it that they do not wish to see qualified majority voting; or is there opposition because they wish to see this as part of another package?
Joan Ryan: Can I just say on your first comment, the fact that I have not ruled it out does not mean that I am ruling it in. It means I have not done either. I would like to be clear with the Committee on that point. It also relates to what I said earlier on about these are our European partners and we have much to gain on behalf of our citizens in having a good and open and discursive relationship with them, so to take a hard-line position at the beginning of a discussion, I think, would be a very unpartner-like thing to do. Expressing serious concerns is I think a serious position to take, and that would be my contention.

Q9 Chairman: Mr Heathcoat-Amory?
Joan Ryan: There is a point in there, sorry, Chairman, if you do not mind, there is a point I would like to address.

Q10 Chairman: I thought you had finished, Minister.
Joan Ryan: I am sorry, am out of order? I have not done one of these Committees before and I have probably given you more information than you actually want! It was just the point about what was the position of some of the other Members. There was a whole range of positions, it is true to say, but one of the concerns that I and others would point to is the issue about the emergency brake. There is no guarantee that within the *passerelle*, although it is apparently possible, that we would have an emergency brake or that it would necessarily work in the same way as an emergency brake would have done in the Constitutional Treaty. So that was one concerns that the Committee might be interested in and we await to see any further information.
Chairman: Thank you for that. Mr David followed by Mr Heathcoat-Amory.

Q11 Mr David: Given that the Government is engaged in quite detailed discussions about the possibility of a *passerelle* being accepted, that does at least open up a theoretically possibility because the Government of course could say, "No, that is the end of it, and we are not engaging in discussions," but they have chosen not to do that. Does that imply therefore that with regard to unanimity you are at least prepared to engage with qualified majority voting on some issues which have been very sensitive in the past, with regard to police and judicial co-operation for example?
Joan Ryan: It is possible, you are right, that some decisions could go to Pillar 1 but not everything has to. You could keep some things as unanimous voting and some other decisions could become qualified majority voting. The reason we want to participate in the debate is because obviously we are interested in ensuring that we get good and speedy decisions on some of these very crucial areas, so to not participate in the debate would be to deny that. That is the context in which the debate is set and that is the whole reason for the debate, so having the debate we might want to look at other ways in which we can achieve that aim. The only way is not, in our view, to give up unanimity and move to QMV. In terms of police co-operation, we are not moving to qualified majority voting on that. That is not the position. We are not moving to qualified majority voting on that and on certain measures within the police co-operation we are seeking to—well, you know there is a draft Framework Decision before us but that has ground to a halt at the moment, and some of that is because of people's concerns about opt-ins and opt-outs on various decisions and who makes what decision about what is on a list and what is not. So that does not imply to me that there is much appetite for moving that to unanimous voting. However, that has not been something that a decision has been made on. I hope that is clear.

Chairman: The division is called and we need to come back after the division.

The Committee suspended from 3.04 pm to 3.28 pm for a division in the House.

Chairman: Can we start again. We have now got a quorum. Mr David wanted to ask a supplementary and then Mr Heathcoat-Amory.

Q12 Mr David: Thank you, Chairman. Minister, you were saying that the lack of progress regarding justice and home affairs decision-making was not necessarily down to the voting system as the Commission allege (that is why they want qualified majority voting) but you seemed to suggest there was a problem that the decision-making process was not as quick as it might be. Have you any suggestion as to how things might be improved so we get to a situation of achieving unanimity much quicker than is the case at the moment?
Joan Ryan: Well, from a position of having attended one formal and one informal Council, I think that it is probably very important that there is a good understanding of what is at the top of everybody's agenda before we reach the stage of this level of decision-making. I think that is a matter for good communications prior to a Council meeting. I think that is a focus for the Commission. I think that is something that they concentrate on and I think the Finnish Presidency is doing a good job on that front. I have not got experience of anybody else's Presidency. I think what we need to have is better preparation for Councils for everybody and perhaps fewer proposals that are better focused on the priorities of the Member States. As I say, we would argue that there are a significant number of very important areas where there has been very good progress. Given that that is the case I think that is a support for our argument that you do not have to have QMV and therefore override somebody's objection in order to get good decision-making.

Q13 Mr Heathcoat-Amory: This decision on whether to move criminal justice and policing matters over to majority voting is obviously very important and you have said, Minister, that you have not ruled it out and you have not ruled it in. You are treating it rather as a new issue that the Government has not made up its mind about; but this is an old issue. Can I remind you that in the Convention on the future of Europe the Government's representative Peter Hain said—and I was sitting next to him at the time—"We have accepted extension of majority voting on everything else in the Third Pillar, but if you look at our judicial system and court system it becomes impossible for us." So why was it impossible on 11 June 2003 but now you are considering it and looking at it and you may be agreeing to it? You have moved a lot in the direction of possible acceptance away from a position of it being impossible. As you have the veto over this I cannot see the problem.
Joan Ryan: What we are discussing currently is a European Commission Communication that was published on 28 June 2006, is my understanding,

which was implementing the Hague Programme *The Way Forward* and this included this proposal to use Article 42 and, at the risk of repeating myself, what I am saying is that we are not going to take the approach with our European partners—and I stress word partners because that is what they are—of saying we are not going to even enter into discussions on this, that or the other issue. The issue is how do we get speedier decision-making on some very crucial areas and we want speedier decision-making not at the expense of good decisions but speedy and good decisions, and we will discuss that. We are saying if the *passerelle* is seen as the only way to get that then we have some serious concerns. I cannot really go beyond that statement at the moment because I have made that statement both here and to my European colleagues and, as I say, the issue is now with the Finns. However, I agree with the hon. gentleman, I agree with you that this is a very important area for us and there are some very clear reasons why, not least the significance of decisions in this area, the reach of them and the difference between our legal systems and the legal systems of some other Member States. So for a number of reasons we would have some serious concerns. I think I need to emphasise to the Committee to say that we have got serious concerns is a serious thing to say, but I cannot take it any further than that at the moment because those concerns have not been addressed. We work on the basis of partnership, so I cannot say we are just going to walk away from the table and not discuss anything because we have got serious concerns about the solution you have proposed to something that we think is an issue; getting speedier decision-making.

Q14 Mr Heathcoat-Amory: If I may just press you, Minister, you say that these are our partners and they are our colleagues and these issues are very important. That was the case three years ago when all these things were discussed in my hearing in the European Convention so these pressures on us to give way have always been around, however, three years ago the Government representative said it was impossible for us. Now you say it is possible. I just wonder why at every stage the Government seems to retreat because what we are talking about here is the possibility of actions being made into criminal offences and interference with our rules of evidence, our courts system, the rights of the accused, the rights of witnesses, and so on, right across the board. These are very sensitive issues which have always been treated by this Government as a matter for national decision-making. You are now saying it is possible we may give way. You have referred to your concerns but what are these concerns? Perhaps you could be a little bit more explicit? If you cannot tell me why the Government has shifted on this, perhaps you can illuminate a little bit more what your concerns actually are and whether they might be overcome?

Joan Ryan: The hon. gentleman talks like it is the case that we will be transferring police and judicial co-operation to QMV. I would not make that assumption and I would not want those words put into my mouth. That is not my position. I have not said that it is possible and I have not said that we have retreated from any previous position. I think it is important to make that absolutely clear. I have said the Commission has brought forward this proposal in June of this year about getting speedier decision-making. That is in everybody's interests. They have proposed one way to do that. We have expressed serious concerns, as have a significant number of other Members around the Council table. The issue is now at a point where it is for the Finnish Presidency to come back with whether they are going to carry on and take it any further or whether it will remain where it is, which is really that it has made no progress. None of the things that the hon. gentleman has implied I have said have I actually said. I am sure he is just probing because of his concern about what is a most serious issue and I am just trying to be absolutely clear about my position and the Government's position on this matter. As you rightly say, this is about our criminal law. This is about issues of sentencing. This is about issues of police and judicial co-operation. This is about some very serious issues. I have mentioned the issue about the emergency brake, for instance, and these are some of our serious concerns. I think I have been very open with the Committee about the concerns and what they are.

Q15 Mr Borrow: Thank you, Minister. If I have got it right, the UK position is that the UK Government has got serious concerns about the use of the *passerelle* but in order to ensure that discussion about streamlining or speeding up decision-making continues in an atmosphere of harmony, then our Government has not threatened to use the veto and also other governments have got serious concerns about the use of the *passerelle*. Have any of those governments threatened to use the veto or have they all adopted the same position as the UK Government in continuing to contribute to discussions but making it clear that they have serious concerns about the use of the *passerelle* to solve decision-making?

Joan Ryan: You sum up the position that I am attempting to outline very succinctly, David. What I would say is that you are right, other Members have expressed that they have serious concerns, however, it was a grown-up discussion and we did not threaten to use the veto because we were not in a situation where any voting was going to take place in any shape or form and we did not think to do that would be conducive to any kind of conversation or debate when we are saying we have serious concerns. If we have serious concerns it is only right that we have those concerns discussed and others might want to outline how they would address those concerns. Obviously we would then make a decision about what would happen if this went any further. I think it is premature for us to try and make that decision on the basis of no further information. It would also be true to say that some of the Members at the table were indicating in diplomatic language, should we

say, that they might themselves feel they would have to use the veto at a later stage. I think that was kind of where the discussion ended up.

Q16 Jim Dobbin: Just to follow that response, Minister, I have listened very carefully to what you have said and you have given your personal view and that of the Government, but I think the Committee would welcome an assurance that if the Government were not satisfied in the end that the use of the *passerelle* would be in the national interest, that the Government would block its adoption?
Joan Ryan: The Government, I can absolutely assure the Committee, would not do anything that was not in the national interest.

Q17 Angus Robertson: Obviously when we are talking about judicial systems and we are talking about the police, these are devolved areas and the Home Office does not decide on Scots law and it does not make decisions about policing in Scotland. Could you tell the Committee whether a Scottish Executive minister was with you when these issues were discussed and, if they were with you, what they said at the meetings? If they were not there what was it that you said that was of particular note to the position of the Scottish Executive because this, as you have said, is a very serious issue so I am sure they must have their own views on this too.
Joan Ryan: Yes. There was not a member of the Scottish Executive present at the meeting but they had been consulted with beforehand so that is seen as important consultation that has to take place before discussions such as the one to which I am referring. I should just say in terms of who said what, at an informal Council meeting there is not a verbatim report of who said what because I am sure Members understand it is important to be able to have as open and frank a discussion as possible and also to be able to have an informal discussion knowing that formal discussions will be on the record but informal discussions are not in the same way.

Q18 Angus Robertson: Can I follow up and press you on content. What was it that came out of the consultations with the Scottish Executive that you were asked to bring up at this meeting?
Joan Ryan: My understanding is that—and I will ask one of the officials to come in on the detail of that—the position I was putting forward was on behalf of the United Kingdom and was acceptable to all on the basis of that, but I will ask Christophe Prince.

Q19 Chairman: Mr Prince, do you want to add something?
Joan Ryan: If that is all right with you, Chairman.
Mr Prince: The Scottish Executive was consulted as part of preparing the UK Government's position in advance of the meeting and they were content with the position that was taken at the Council. I cannot give you details on the position that was taken by them, I am afraid, at the moment.

Q20 Angus Robertson: Because?
Mr Prince: I cannot recall the exact position that was taken by them. I know they agreed with the final position that was taken.
Joan Ryan: I did check because I was aware that I was speaking on behalf of the UK, so I did know that everybody was happy with that position, but perhaps we can look at whether there was anything of greater detail said.
Chairman: It is a position of great sensitivity obviously since there is a separate legal system in Scotland which everybody is very aware of. Mr Gove, you have a question.

Q21 Michael Gove: Minister, you have quite rightly explained that because the Council meeting was informal you cannot say too about the position of other governments but other governments can speak for themselves, and the Irish Justice Minister, Michael McDowell, has in giving evidence to the Lords EU Committee outlined some of his concerns. One particular area relates of course to extradition. As you are aware, if the EU acquires competence over something internally then the EU becomes the single, unified body which deals with all the external negotiations relating to that matter. We have already seen that happen of course with trade, and it is central to how the EU operates. Given that we have harmonised internal procedures over extradition with the European arrest warrant, can you tell us whether the consequences of what we are considering would mean that we would have unified EU negotiations over extradition and, if so, what effect would that have on the capacity of the Government to negotiate unilateral extradition arrangements such as those we have negotiated with certain Middle Eastern countries in order to ensure that we can extradite terrorist suspects? Is there not a risk that if the EU exerts externally the competence that is required internally we will no longer be able to do that and that will be a direct blow to our capacity to extradite people who are a risk to our citizens?
Joan Ryan: Indeed and I have spoken with the very same Minister who I think is Deputy Taoiseach but it is now a different word than Taoiseach.

Q22 Michael Gove: Tánaiste.
Joan Ryan: I have indeed spoken with him myself on these issues and, yes, you are right, that is a concern that he has and it would be one of our concerns also and it would be a concern that it is possible that if the EU had this competency it would negotiate extradition treaties that we are currently negotiating bilaterally or multilaterally outside of the European arrest warrant arrangements beyond the EU borders, so for instance with Middle Eastern countries or with the United States or with anybody else and, yes, we would have concerns about that. At the moment it is considered that would be possible. As to whether we have had enough discussion or detail around that, I think we have not. I think it is a risk and I think it is something that would cause us concern, pretty much along the lines that the Irish Government is concerned as well. So you are right,

it is a concern; you are right that we are concerned it is possible; and it is one of our concerns that are on the table to be addressed. I do not know, if with your permission, Mr Norris—

Q23 Chairman: Mr Norris, you wanted to add something?
Joan Ryan: It is his area of expertise; you might find his contribution helpful.
Mr Norris: I agree with what the Minister has said that if these matters were moved over to the Community Pillar then the normal rules on external competence would apply. That could restrict the external competence of the UK in these areas of police and judicial co-operation, as the Minister said.

Q24 Michael Gove: In the interests of maintaining the capacity of the Government and the Home Secretary to take the appropriate decisions in the interests of the security of our citizens, he could not allow this to happen because he would lose powers which currently he is exercising in all our interests.
Joan Ryan: That comes back to my original position that we have serious concerns. I understand that it is possible that some things might be moved from the third to first pillar and other things might not be moved, but that is not a debate that has occurred. I do not think we can go down that road unless the serious concerns raised by ourselves and others were addressed. I can only confirm that the concern that you have raised is indeed one of our concerns.

Q25 Chairman: Minister, before we move on to the next section I am very conscious of the fact that when we read this text and review it, the generic term "serious concerns" will come up upon dozens if not more times. The question by Mr Gove has elicited a specific serious concern and how that concern is viewed by the Government. I will give you one last chance to try to explain to us, if you can, and, if not, you may give us a date or time or occasion on which you may in fact illustrate what those serious concerns are. You named some areas. What are the Government's concerns in those areas? We all know the topics that may be moved into Pillar 1 but what are the Government's concerns about moving any specific item into Pillar 1? If you can give us some more information at this time it will help us when we review this evidence. If not, then it will be very useful to know when the Government will start to tell the Parliament and through the Parliament the people of the United Kingdom what their positions are and what their serious concerns are on what specific issues. If not, then I think our evidence will be missing an item on which to evaluate what you have said to us.
Joan Ryan: I accept what you have said there, Chairman. The other concern that I could add to those that we have just been discussing are concerns that featured prominently in the negotiations on the justice and home affairs aspects of the Draft Constitutional Treaty, where the UK identified a number of substantive concerns, including the potential impact on national security, the extension of external competencies and the need for safeguards such as the emergency brake, and they are essentially the concerns that we are referring to and our view is that they remain as valid now as they were then.

Q26 Chairman: Thank you very much. We will move on at that point and I am sure people will look at the evidence when it is printed. If we move on to the question of the European evidence warrant and the draft decision on police co-operation at internal borders, what is normally referred to as surveillance and "hot pursuit"; can you explain why is it so important to maintain dual criminality for the proposal of the Council decision on improving police co-operation but not for the European evidence warrant, when both instruments involve the exercise of police powers in this country, in the UK?
Joan Ryan: On the European evidence warrant, we are already dealing with a crime that has happened, so, for instance, both the European evidence warrant and the European arrest warrant relate to a crime that has already occurred. It is about how we get evidence, investigate it, find out who did it, so to speak, and bring them to justice. And also on the European evidence warrant in terms of dual criminality we operate on the basis of a list where we have agreed mutual recognition. However, if the crime has happened on UK soil (a crime according to another Member State) but it is not an illegal act in the UK then we can opt out on that basis and refuse that arrest warrant. That is my understanding.

Q27 Chairman: That is my understanding.
Joan Ryan: I am going slowly just to make sure that I get this right. When we come to an issue such as surveillance, and the same applies to hot pursuit although we are not participating in Article 41 so we are talking about Article 40 which is surveillance, that is a matter of gathering surveillance to see if a crime has been committed. It is an investigation at an earlier stage than the evidence warrant is applying to, so you could end up with a situation where police officers from another Member State come to this country to use powers that UK police do not actually have, to investigate something that at the end of the day might not even be an offence in the UK. So that is the difference; we are talking about an act that has already happened as opposed to an act that has not happened, and our concern is that the provision should effectively be the equivalent to dual criminality in the respect of urgent surveillance or normal surveillance because of the difference in powers that police from another state could be exercising in our own country.

Q28 Chairman: A small supplementary, Minister. As a Minister and as a Government, are you not concerned that in both of these cases that the allegation is that a crime may have occurred, in the sense that unlike the European arrest warrant it is all about evidence and that someone may be a party to a criminal act. In surveillance it is also the same, that it is seeking to find out if someone has committed a

crime, whereas in the arrest warrant case it is someone who has been deemed by a court or a police authority to be charged with a crime. Is it not a concern of the Government that if these powers are used in a case where there is only an allegation there will be great infringements of human rights by not insisting on dual criminality?
Joan Ryan: In terms of the European evidence warrant?

Q29 Chairman: The European evidence warrant. It seems the evidence warrant and surveillance are both the same, they are both alleged crimes but not crimes.
Joan Ryan: The European evidence warrant is investigating matters in relation to a crime that has been committed.

Q30 Chairman: It is seeking evidence against someone who is not yet charged with a crime.
Joan Ryan: But we know an act has occurred and it either falls into the list on which we have agreed mutual recognition or we have the ability to opt out if we do not think it is neither in the list and there is not dual criminality.
Chairman: I do think you are missing the point. Mr Heathcoat-Amory?

Q31 Mr Heathcoat-Amory: Just following that up, I think, Minister, you are trying to make a most extraordinary distinction here. You are saying that you are willing to enforce the dual criminality requirement when it involves police doing surveillance activities in advance of a possible crime but you are willing to drop the dual criminality requirement when they are gathering evidence for an event that may or may not have happened. In other words, if there is an alleged offence and still nobody has been charged but evidence must be gathered, you are willing to override the dual criminality requirement but you will enforce it if the police are carrying out some activities slightly before that. This is sophistry, frankly. You are moving away from a key safeguard that the alleged offence should be a crime in both countries and I really do not understand your reasoning. It seems to be based on sand.
Joan Ryan: Let me try and be clearer, maybe I have confused the hon. gentleman. The European evidence warrant prompts an investigation by UK police in the UK on behalf of another Member State but it is an investigation by our police here in the UK, whereas urgent or normal surveillance could involve police from another Member State coming on to our soil. If we did not have dual criminality, they could be coming to investigate something and exercise surveillance for something that ultimately would not prove to be an illegal offence in this country, and therefore they could be exercising powers that UK police do not have. That is the difference. So in the evidence warrant we have the agreed list, we have outside of that list the ability to operate on dual criminality, and it is an investigation undertaken by UK police on UK soil. That evidence warrant has to be agreed in our courts and has also to go through a process in our own courts. So I think that is significantly different to the issue of police co-operation in relation to surveillance, Article 40, and that is why there is this differences. I think it might be the opposite of what you thought I was saying. I am saying for surveillance we must have the dual criminality issue because of the police powers issue and the fact that it is a foreign police force potentially coming on to our soil, whereas in the evidence warrant it is our own police and our own courts in relation to that request from another Member State.

Q32 Chairman: I have to say, Minister, that is not my understanding nor is it the understanding of the legal adviser to this Committee. I understand that it does not have to be validated by a court in this country.
Joan Ryan: Pardon, I am sorry, Chairman?

Q33 Chairman: I know, I am always being advised by experts but I understand from advice given to this Committee that it does not have to be validated by a court in this country so you are not correct on that matter.
Joan Ryan: My understanding is that we will implement it so that it does have to be validated by our courts, but what we will not do is check behind that in terms of what the Member State is saying.

Q34 Chairman: So you are saying that you will instruct our courts to rubber-stamp them without investigating their validity? You will not look behind this. That seems to be what you are saying.
Joan Ryan: I am not saying that we will rubber-stamp it.

Q35 Chairman: What does it mean that you will not look behind it?
Joan Ryan: It is a bit like the mutual recognition issue, is it not? If it is a crime in another Member State and it is on the list, we do not look behind that, we accept that.
Mr Heathcoat-Amory: That is outrageous.
Chairman: Can I turn to Nia Griffith.

Q36 Nia Griffith: Yes, we are covering a lot of the same ground here. I think the real question is this business about the "in part" and whether the "major or essential" part is going to make a tremendous amount of difference to this legislation. I think that is the important bit; when we talk about the European arrest warrant where a Member State may refuse to execute a warrant if it relates to an offence committed "in whole or in part" in the territory of the executing State where such conduct is not criminal. Why was the corresponding reference in the evidence warrant changed to a "major or essential part"? The "in part" and the "major or essential" part seems to be quite a difference. It seems to be quite a discrepancy?
Joan Ryan: I am sorry, Nia, I am not sure I am getting the focus of the question. I am sure it is my fault.

Q37 Nia Griffith: Perhaps if we go back then to how exactly do you see territoriality working and how do you see that exception actually working in terms of the European evidence warrant? Perhaps if we look at that first and then perhaps we can move on to this business of the changing of the wording.
Joan Ryan: My understanding of territoriality is that if the crime has been committed either in whole or in major part in the state that is applying for the arrest warrant, they have the territorial—and I am not quite sure what the right term would be—but the territorial rights over making an application to us for us to execute an arrest warrant and extradite somebody to them. The territorial rights are about where the crime is committed. However, I do not think that precludes the situation where a crime is committed on UK soil but the impact of that crime is in another country, and we were not going to prosecute, and it is either on the mutual recognition list or there is dual criminality because then we could execute a properly applied for evidence warrant. In terms of our own courts, on the issue of police co-operation as opposed to executing a European arrest warrant or an evidence warrant, which clearly goes through a legal process, in terms of the evidence warrant we would be looking not to rubber stamp it, not to have a process that just rubber-stamps it; it is about assessing fundamental rights, as I understand it.

Q38 Chairman: Minister, I may be of some help to you. I understand that this Committee in a previous report suggested that an order should be validated by a court and the Government responded to say it did not agree with this. I will for the interests of the Members read out the procedures and safeguards on recognition and execution in the Working Party report from the Council of the European Union which said that "the executing authority shall recognise a European evidence warrant, transmitted in accordance with Article 7, without any further formality being required," and it then goes on to say "and shall forthwith take the necessary measures for its execution," et cetera, et cetera. We did suggest in this Committee that that was not an adequate safeguard and that there should be a proper validation process and the Government rejected it. Yet you said earlier in your evidence, which you can see when it comes out, that in fact there would be a validating process by our police and our courts. If that is the position of the Government then I am sure this Committee will welcome it.
Joan Ryan: I will respond to that but then perhaps I could ask Mr Prince or Mr Norris to add a word in the interests of clarity. My understanding is that the courts will have to issue a search authority and we will agree it but we will check it against fundamental rights. That is my understanding. Perhaps I could ask Mr Norris.

Q39 Chairman: Mr Norris, if this is your area of expertise you might want to come to the Minister's rescue.
Mr Norris: I can comment generally on mutual recognition but not specifically on this instrument. I think the essence of mutual recognition and as exemplified by the European evidence warrant—

Q40 Chairman: Maybe you could speak more slowly and more distinctly and then I am sure we will all follow you.
Mr Norris: The essence of mutual recognition is that you have the transmission of a judicial decision from one Member State to another. The mutual recognition aspect is generally that the court does not go behind another court's decision-making process. That is what mutual recognition is. So for the European evidence warrant the position will be that because we are receiving a decision from another judicial authority, the UK courts will recognise that decision and will then make the necessary arrangements for that European evidence warrant to be enforced, so it will go through our judicial courts but they will effectively recognise it and then do whatever is required to accede to its execution, whereas hot pursuit and surveillance is not a species of mutual recognition at all. There you have a situation in which there is not a judicial authority involved. There you have police officers of one Member State wishing to cross into the territory of another Member State and exercise certain functions in that other Member State, so it does not go through a judicial authority, and so I think these are two very distinct situations.

Q41 Angus Robertson: I think it would be helpful, Minister, because we are talking theoretical terms, to perhaps talk about something very practical just so that we can understand it better. In Austria it is a crime to deny that the Holocaust existed, it is a very serious offence; but it is not a crime here. How would it operate if an Austrian court sought to pursue surveillance opportunities in the UK in regards to an offence which is not a crime within the UK but appears on the list under racism and xenophobia as agreed by all Member States?
Joan Ryan: Just so you know my understanding of it in my early days here, I think we would apply dual criminality on that, I do not know, and please feel free to contradict me, Mr Norris—
Mr Norris: Not at all, Minister. My understanding of the Government's position is that we are advocating that dual criminality ought to apply to those hot pursuit and surveillance cases.
Angus Robertson: But not in the evidence warrant.

Q42 Chairman: Would it also apply if they came to seek evidence under an evidence warrant? Surveillance we did hear was different from the evidence warrant but if they came seeking evidence? I think that is what Mr Robertson is asking.
Mr Norris: But the Austrian police would not be coming to the UK to seek evidence. There would be a transmission from the Austrian court to the UK court.
Michael Gove: British police would be investigating—

Angus Robertson: I am just drawing a distinction between a police force in the UK which may be through a legal instrument asked to provide evidence for something which in the case of surveillance you are prepared to apply the dual criminality rule but not in the former. I do not understand why there is this difference. The Minister mentioned fundamental rights. Do not get me wrong, I do not like people denying the Holocaust or being racist or xenophobic but, quite frankly, when we are talking about fundamental rights, freedom of speech is one of them and that is why I brought up this very specific issue because the Government is approaching it with double standards.

Q43 Nia Griffith: Chairman—
Joan Ryan: I think the answer is if they are looking for evidence we can collect that evidence but only if that crime is committed in Austria. It is an opt-out really, is it not, if it is not a crime here, so if they are accused of that crime in Austria and the crime has occurred in Austria but for some reason we can seek evidence in the UK then we could seek evidence but only if the crime occurred on Austrian soil. This is quite complex, I agree with you, and very important. I think the answers I have given to the Committee are correct, but I am very happy, because I am not sure we are going to get any greater clarity around this exact issue this afternoon, to look back at the evidence and write to the Committee to clarify these points if that helps, Chairman.

Q44 Chairman: You can see how exercised this Committee has been every time we have discussed this. The European evidence warrant is not something this Committee has warmly welcomed and we wish to see the Government share our views. We are taking evidence from you because we want to find out where the Government is going in its thinking. I am not sure that everyone is quite clear at the moment exactly where the Government is going in its thinking, so people may still want to pursue—
Joan Ryan: I think we are clear on our support for the evidence warrant and on the position that we have taken on it, but I am happy to clarify that to the Committee in writing as well as what I have said here today.

Q45 Nia Griffith: If I could ask if the Minister would include in that written response a paragraph addressing this issue. In one bit of the documentation we have wholly or partly. "Partly" is quite clear to me is "any part of" but once it becomes a "major or essential" part then it seems to me that that immediately opens a whole range of interpretations, and I think it very important we understand which is being used for what reason and why there is that difference because obviously in practice it could make a very significant difference to the interpretation.
Joan Ryan: Could I ask Mr Prince to comment on that.
Mr Prince: Thank you, Minister. It is true that there is a difference between the territoriality text in the European arrest warrant and the European evidence warrant and it is true that in the case of evidence, the purpose and the intention of that text is to say that evidence should not be refused simply because part of an offence occurred in your own territory, so in that sense the grounds for refusal are lesser than those would be in the arrest warrant.

Q46 Michael Gove: Following on from Nia's question and Angus's, just to clarify, a British citizen could have committed an offence which is not a criminal offence in the UK but might be a criminal offence in another EU country, and the British police could be instructed by a foreign court to gather evidence against that individual even though his actions are not criminal in the UK. Angus mentioned Holocaust denial. It is certainly the case that David Irving or some other Holocaust denier could be responsible for printing material which would be legal in this country but which could be disseminated either electronically or in published form in Austria. The Austrians consider that he is guilty of an offence but he is a British citizen exercising his freedom of speech here. There must be a series of other offences in the eyes of other countries which an individual could commit here and be completely convinced that he was within the rule of law in this country and yet there would be no protection in the courts and the British police would be compelled by a foreign court to investigate something that was not a crime in the UK.
Joan Ryan: I will put that kind of complex example to one side for a moment.

Q47 Angus Robertson: It is not complex at all.
Joan Ryan: Michael, my understanding is that, yes, if a British citizen had committed that crime whilst in Austria we could, on the request of the Austrians, execute an evidence warrant on that basis. We could not if, although it would be an offence in Austria, the act occurred in the UK. It would be outside of that jurisdiction.

Q48 Chairman: I am trying to move on to other subjects at this time.
Joan Ryan: In terms of the internet issue, I am not certain of the answer to that. That is very complex and I would have to come back to the Committee on that particular example. It is an important example in this day and age with where we are with the internet. I would ask the Committee's patience on that.

Q49 Mr Heathcoat-Amory: I hope what you have said is right, Minister. You said in the example given of the Holocaust denial that it is a question of where the actual offence was committed, whether it is Austria or here.
Joan Ryan: That is right.
Mr Heathcoat-Amory: And if it was committed here, we would not have to trigger the evidence warrant. However, there are provisions for where it is part-given effect in one country or another and it is this grey area that concerns me. We have heard from your assistant that there is a weakening between the arrest warrant and the evidence warrant and a

further weakening if we are going to try and trigger the territoriality defence, which is that we have to get permission, as I understand it, from Eurojust. This is new again. In other words, if we were to say that the crime in question was largely committed here, we do not have total authority to refuse the warrant. We have to go along and ask Eurojust, which is a body not under the control of this House, indeed under no obvious democratic control, I do not know who it answers to. Why are we further weakening the safeguards on citizens who may be accused of very serious crimes and having evidence gathered against them against their will by the policemen of the country at the behest of a foreign court, and our defence, if we object to this, depends on whether we can convince Eurojust? Who is Eurojust?

Q50 Chairman: We have slightly moved beyond the question we were asking. It is another area. Do you wish to answer?
Joan Ryan: It is another point and I think I can address it. We consult Eurojust, we do not have to seek permission, as you put it, the obligation is to consult with Eurojust. Eurojust is accountable to the Justice and Home Affairs Council which, as you are well aware, we are a part of. I think the crucial part of what I am saying is that we consult, which is not the same as the way in which I think you understood it.

Q51 Ms Clark: Minister, I am moving on to a slightly different area, although it still concerns Eurojust, and it is really to ask why it was that Eurojust was given a role in deciding whether or not a Member State could rely on the territoriality exception. Surely, that is an improper interference with judicial functions?
Joan Ryan: Sorry, what did you say?

Q52 Ms Clark: The first point really is why did Eurojust have a role at all in any way? I appreciate you talked about consultation.
Joan Ryan: I think that is to help in very complex cases. I think their role is to give assistance in what are complex and often cross-border cases.

Q53 Ms Clark: A criticism that can be made of that is that is an improper interference with what should be judicial functions. Do you not accept that is the case, that is a criticism which can be made of the role which they play?
Joan Ryan: No, I do not think they are there to interfere. I think they are there to assist and support. At the end of the day we are talking about bringing people to justice and respecting each other's laws within the European Union. We can see just from the discussion we are having here today none of these things happens on a whim or just a kind of quick, easy agreement, which I am sure you are not implying, but I think that is a really important aspect of this. Long and detailed discussion goes into making these kinds of decisions and the whole focus of these decisions is to prosecute people who commit crimes, to be able to work together across our borders in a time when crime is much more global, much more European, much more organised and much more of a threat to the state in that sense, both at that level and at the level of individual victims of crime. It is about bringing justice and Eurojust are there to support that process, be helpful, give assistance and ensure that we can get to the position where justice is done. They are not there to interfere and I hope that when Member States look at the work Eurojust does, they would be able to reach that conclusion.

Q54 Chairman: Could I underline, Minister, earlier you made a light-hearted comment that you consult Eurojust, but my understanding is from reading again the same regulations where a competent authority considers to use the grounds for refusal under Article 15(2) sub-section 3, "it shall consult Eurojust", but then it goes on to say, "where a competent authority is not in agreement with Eurojust's opinion, Member States shall ensure that it will motivate its decisions and that the Council will be informed". In other words, that it will, in fact, prove that it has taken Eurojust's opinion into consideration which means to be a lot more than light-hearted consultation. It is much stronger than that. It gives Eurojust a substantial influence in this role.
Joan Ryan: My understanding of that, Chairman, is that we will consult. If Eurojust is not in agreement with us, then we will have to justify our position.

Q55 Mr David: Minister, I just want to move on from discussion about Britain to Germany, because my understanding is that Germany has been able to negotiate a derogation which is quite substantial. Germany has preserved the right to fight the principle of dual criminality on terrorism, computer-related crime, racism, xenophobia, sabotage, racketeering, extortion or swindling, and I was wondering why. Why was Germany able to do that and why did Germany think it is necessary for it to do so?
Joan Ryan: I think you are right, they have negotiated a derogation on six offences and that will last for the next five years and then will be reviewed. Yet they did not negotiate the same thing on the arrest warrant, this is on the evidence warrant. I can only speak for the UK and our view is that we are satisfied with the list and the dual criminality measures. That satisfies our judicial process here and it satisfies our policy in relation to these matters. We viewed it as a really important measure with which we could find a way forward on the evidence warrant given that this is about, as I said, prosecuting those who commit crime and those who would be a threat to others and, therefore, bringing people to justice. We talked earlier on about getting good and speedy decision-making and then making it operational and implementing it, and this is one of the areas where we very much want that to be the case. Germany does have its difficulties, but they are not difficulties that we feel apply to us. We would expect in the normal course of events, or we would hope at the five-year review, that derogation would no longer be deemed necessary. On the six areas they list, in most

instances, they are a crime in most places but they obviously had an issue with them. I am afraid I cannot answer what the detail of their issue was, but it is quite clear to you and others that we did not feel we had that same issue.

Q56 Mr David: It is just very interesting that the British position should be so different from the German position. I realise that is way beyond your brief, but it would be very interesting if that information could be provided to the Committee.
Joan Ryan: I would be very happy to see what information we have about what the German position was in relation to those six areas and provide it to the Committee.
Mr Borrow: Following on from Wayne's point, it would help the Committee if we had clarification as to why the German Government felt it necessary to have derogation in this area. We did not feel it was important or did not feel able to get derogation for the UK or to support Germany in seeking to implement the part of the derogation in the policy of the EU generally. We are asking questions really out of ignorance at the moment. In making a judgment in terms of UK policy in this area, it would be helpful if we had a bit more information as to what the German position was, what the UK position is and why we should support the UK position and not the German position.

Q57 Chairman: Minister, I am sure people reading the evidence will take a particular interest in finding out why the UK felt it did not have to ask for dual criminality in those same six areas because the question will be out there: does our Government not think dual criminality is important in these areas even though the Germans do?
Joan Ryan: We do not accept that we should make judicial co-operation conditional in all circumstances on the offence being a crime in both countries. We expect others to respect our laws and our view is we should respect theirs. If people break our laws, we should co-operate to bring them to justice, we expect our partners to do that and we expect to do that ourselves. I am sure that my hon. friend was not implying that we would think the six areas of the German derogation were not important, they are very important areas, but we were satisfied for those areas to be in what we might call "the list of mutual recognition". Mr Prince has something to add about the German position.
Mr Prince: Just to add to what the Minister referred to. The German position, as we understand it from the negotiations and as they explained, is during the negotiations they sought to introduce binding criteria for those particular six offences, seeking to partly define those offences. The rest of the Council felt that this was inappropriate for this instrument and, indeed, was not in line with the principle of mutual recognition, and it was on that basis that, at the end of the tract of negotiations, it was the Council which decided to give Germany the right to verify dual criminality in those six cases. They also, of course, made a statement. There is a statement in the minutes of the Council on 1 and 2 June reflecting in part that position and that is what we understand the German position to be as put to negotiators both in the Council and the working groups, if that helps.

Q58 Mr Heathcoat-Amory: You referred to the principle of mutual recognition of crimes, but surely that requires definite and defined crimes which can be understood by all? What we are talking about here, and what the Germans clearly could not accept, are general categories, not specific offences at all. The list includes sabotage, swindling and computer-related crime. These are not specific offences and, indeed, I do not think swindling is a crime as such under British law. We have many statutes on related issues of false accounting and so on, but swindling is a very general word indeed. How can we mutually recognise each other's criminal justice systems when we are talking about generality? I can entirely understand why the Germans wanted to be more specific, but we are talking about people who may be facing criminal offences and if they are going to have any faith in the judicial system, surely people have a right to know exactly what crimes they could be investigated for? I am really puzzled as to why you did not go along with the Germans in wanting more precision on behalf of the people we represent.
Joan Ryan: One of the reasons why is because, as Mr Prince said, the Germans wanted this to be much more defined, down to a single offence. That would make a European evidence warrant very difficult to enact or for it to have any value because, particularly for us, our judicial system is different from many European ones, the difference being between, I suppose, Napoleonic systems and common law systems. If you make it more binding in that way, then you could end up with a situation where lots of crimes related to these areas fall out and do not come within the scope because you have identified a specific issue that might have a specific definition in Germany but does not have that definition here. As we do not want to move to a situation of harmonising everything on this, we want to have mutual recognition, that is helpful to us and the idea of a European evidence warrant is helpful too in the interest of justice and fighting crime. If we want mutual recognition, that helps us; if we want to work in the interest of justice and fighting crime across the European Union, then that is why we have the agreement which we have and that is why we support it. We are very hopeful and optimistic that in five years' time when that derogation comes to an end, Germany will be in the position of having seen the evidence of how this works and will not feel the need for the derogation, though of course I cannot speak for Germany. They must and do speak for themselves. I think what I am saying is that mutual recognition allows us to co-operate and to respect diversity between legal systems, and that is very important to the UK. To define all crimes would not respect the diversity of systems.

Q59 Chairman: Could I thank you, Minister. You are quite good about making clear how the Government understand these matters and I am sure

when people read the evidence they will be able to evaluate whether the Government is doing the right thing according to your analysis. Thank you for what was an unfortunately long session given that we had two votes but, as you said, they are very detailed subjects and you are working hard to master them and sustain your brief so you do not have to learn another set of complicated matters to do with government. Thank you.

Joan Ryan: Thank you very much.

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