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Topic 1: The European and National Parliaments

United Kingdom National Report

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Materially-Constitutional Regulation of the Parliament's Participation in EU Legislation

1.1 Does the constitutional regulation impact directly or indirectly on the relations between the European Parliament and the national parliament?

1.1 .1 There is no constitutional relationship between the Parliament of the United Kingdom ('the Houses of Parliament') and the European Parliament.

1.1.2 There are 72 members of the European Parliament elected for the United Kingdom (England, Wales, Scotland, and Northern Ireland) and Gibraltar from 12 electoral regions. Scotland, Wales and Northern Ireland constitute one region each. Gibraltar forms part of a 'combined region' in the UK for the purposes of elections to the European Parliament[1].

1.1.3 These electoral regions are distinct from the 646 'constituencies' from which Members of the House of Commons ('Members of Parliament (MPs)') are elected. As is the manner of election. Members of the European Parliament ('MEPs') are elected through a regional list system on the basis of proportional representation (as required by EC law); MPs are elected through a "first past the post" system for each constituency.

1.1.4 The United Kingdom and Ireland enjoyed a temporary derogation from the 2002 Council decision[2] prohibiting MEPs from also serving as members of national parliaments after the 2004 European Parliament elections. Eight MEPs were elected to the European Parliament in 2004 with dual mandates: two from the UK (Baronesses Ludford and Nicholson, who were both Liberal Democrat Peers in the House of Lords, the upper chamber of the Houses of Parliament), and six from Ireland. The derogation ended with the election of a new European Parliament in 2009. UK MEPs cannot therefore sit or vote in either the House of Commons or the House of Lords, or in a committee of either House, or in a joint committee of both Houses.

1.2 Did the decisions of the Constitutional Court or the Supreme Court concerning membership touch the problem of relations between the European Parliament and the national parliament?

1.2.1 The Appellate Committee of the House of Lords, until 30 September 2009 the highest court in the United Kingdom, has never been asked to rule on relations between the Houses of Parliament and the European Parliament. (From 1 October 2009, the Supreme Court of the United Kingdom assumes jurisdiction from the Appellate Committee of the House of Lords on points of law for all civil law cases in the UK and all criminal cases in England and Wales and Northern Ireland[3]. (In Scotland, the High Court of Justiciary remains the highest court in

[1] In *Matthews v United Kingdom* (1999) 28 EHRR 361, the European Court of Human Rights held that the UK was responsible for securing the right to free elections to the European Parliament for the citizens of Gibraltar, as the European Parliament formed part of Gibraltar's legislature.
[2] 2002/772/Euratom
[3] See Part 3 of the Constitutional Reform Act 2005

criminal matters.))

1.2.2 That said, in June 2008 the Divisional Court of the Queen's Bench Division of the High Court of Justice was asked to rule on a case with important political and constitutional implications.

1.2.3 In April 2004, and on subsequent occasions that year, the Prime Minister, Tony Blair, announced in the House of Commons that there would be a referendum on the Constitutional Treaty to "let the people have the final say". In May and June 2005, however, French and Dutch voters respectively rejected the Constitutional Treaty, thereby ending its prospects of ever coming into force. Further negotiations led in December 2007 to EU Member States signing the Lisbon Treaty. Shortly afterwards, the Government placed the European Union (Amendment) Bill before Parliament. This implemented in national law the new obligations contained in the Lisbon Treaty. It did not, however, contain a referendum clause; and at the second reading of the Bill the Foreign Secretary stated that the Government would not hold a referendum on ratification of the Lisbon Treaty.

1.2.4 Stuart Wheeler, a significant supporter of and donor to the Conservative Party, subsequently claimed in the High Court that in reneging on its promise to hold a referendum, the Government had frustrated a 'legitimate expectation', enforceable in court, that a referendum would take place. He argued that the Government's promise to hold a referendum on the Constitutional Treaty should also to extend to the Lisbon Treaty, which was so similar that it could be said to have 'equivalent effect'. Mr. Wheeler asked the Court to make a declaration to that effect.

1.2.5 The Court held as follows[4]:

- Whilst the Government had made a promise to hold a referendum on the Constitutional Treaty, this did not amount to an "implied representation" that there would be a referendum in respect of a treaty having equivalent effect.

- In any event, the Lisbon Treaty did not have an effect which was equivalent to the Constitutional Treaty: there were "differences of substance" between the two which could not be dismissed as "obviously immaterial".

- Whilst the Court was able to determine the extent of factual differences between the two Treaties, it could not assess the wider significance of those differences. That was a matter of political perspective and judgment. This same was true of whether the differences were sufficiently material to warrant a different decision on holding a referendum. The promise to hold a referendum "lies so deep in the macro-political field that the court should not enter the relevant area at all"; it was therefore "unthinkable that it could give rise to a legitimate expectation enforceable in court".

[4] [2008] EWHC 1409 (Admin)

- At best the Court should approach the decision not to hold a referendum on the Lisbon Treaty on the basis of a test of (*Wednesbury*[5]) reasonableness, and in doing so it found that the Government's decision was far from unreasonable.

1.2.6 The Court was also asked to consider whether making a declaration either in favour or against the Government would interfere with Parliamentary privilege, given that a decision to hold a referendum lay in Parliament. It held that:

- The law of Parliamentary privilege was based on two principles: the avoidance of interference with free speech in Parliament and the separation of powers. The latter required the executive and the legislature not to interfere with the judicial function, and conversely the judiciary not to interfere with or criticise the proceedings of the legislature.

- The introduction of a Bill in Parliament to provide for a referendum clearly formed part of the proceedings of Parliament, and was therefore protected by Parliamentary privilege. To order the Government to introduce such a Bill in Parliament or to state that it did not have to introduce such a Bill would be to breach that privilege.

1.3 What is the statutory regulation of the relation between the European Parliament and the national parliament?

1.3.1 There is no regulation, statutory or otherwise, of relations between the European Parliament and the Houses of Parliament.

1.3.2 Acts of Parliament (known as primary, or statutory, legislation) and statutory instruments usually in the form of 'orders' or 'regulations' (made by a Minister under powers conferred by an Act of Parliament and known as secondary legislation) lay down the rules for the election and conduct of MEPs. Such legislation covers the establishment of European parliamentary regions, the conduct of elections, common electoral principles, and the level of MEP salaries and allowances. The principal Acts of Parliament are:

- the European Parliament (Pay and Pensions) Act 1979 as amended (by secondary legislation);

- the European Parliamentary Elections Act 2002, as amended (by secondary legislation); and

- the European Parliament (Representation Act) 2003 as amended (by secondary legislation).

[5] The test for the reasonableness of a public authority decision in English public law was first laid down in *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223.

1.4 Is there a by-law regulation of the parliament concerning its functions in respect of the European affairs?

1.4.1 Yes.

- Standing Order[6] (S.O.) No. 143: Orders of Reference of the European Scrutiny Committee (attached as an annex to this paper). S.O. No. 143 establishes the European Scrutiny Committee of the House of Commons to "examine European Union documents" and lays down its rules of conduct.

- Standing Order No. 119: Standing Order on European Committees. S.O. No. 119 establishes three European Committees to which documents considered by the European Scrutiny Committee can be sent for debate, and lays down their rules of conduct.

- Resolution (decision) of the House of 17 November 1998 (attached as an annex to this paper) – 'the Scrutiny Reserve Resolution'. The Scrutiny Reserve Resolution prevents the Government, save in exceptional circumstances, from giving agreement in the Council or European Council to any proposal for legislation under any of the three pillars of the European Union which is still subject to the scrutiny of the House of Commons[7].

1.4.2 As a supplement to the above, the Cabinet Office[8] of the Government has issued and regularly updates a document entitled *Parliamentary Scrutiny of European Union Documents – Guidance for Departments.* This is used by officials in all government Departments as a guide to the actions required to enable the scrutiny of EU documents by Parliament.

1.5 How did the statutory regulation evolve and how substantive was the impact of changes on the activity and efficiency of the parliament?

1.5.1 See 2.6 below.

1.6 How structured is the organization of the national parliament in the scope of European affairs (e.g. is there a 'European Committee', is the European Affairs Committee's composition regulated and how &c.)?

Structure

1.6.1 The structure of the European Scrutiny Committee (the ESC) is laid down in S.O. No. 143 (see 1.4 above). The ESC is a 'Select Committee' of the House of Commons whose purpose is to

[6] Standing Orders of the House of Commons are temporary or permanent rules under which the House conducts its business and the behaviour of MPs is regulated.
[7] At the time of writing, December 2009, the Standing Orders and Resolution are in the process of being revised to reflect changes brought in by the Lisbon Treaty.
[8] The Cabinet Office is the government Department that supports the Prime Minister and the Cabinet.

scrutinise 'European Union documents'. It consists of 16 MPs. A quorum is five MPs. MPs are nominated to serve on the ESC by the Committee of Selection (which acts on the recommendations of the party business managers) for the duration of each new Parliament (up to five years). The balance of MPs from each political party on the ESC reflects the balance of political parties in the whole House (of Commons). The ESC has a staff of 14, headed by the Clerk of the Committee. This is substantially more than any other Select Committee.

Powers

1.6.2 The ESC has the usual powers of a Select Committee including to: require the submission of written evidence; examine witnesses; make reports; obtain specialist advice; travel; appoint sub-committees; and sit on days when the House is not meeting. The ESC also has the right to legal advice from the Speaker's Counsel (European Legislation) who is assisted part-time by an assistant counsel. In addition to the normal complement of Select Committee staff – clerk, second clerk, administrative secretariat - the ESC is also served by 'clerk assistants' (usually former senior civil servants) who assist in the expert scrutiny of the very large volume of documents it scrutinises.

Documents subject to scrutiny

1.6.3 'European Union documents' are defined in S.O. No. 143 as follows[9]:

- "(i) any proposal under the Community Treaties for legislation by the Council or the Council acting jointly with the European Parliament"

1.6.4 This includes drafts of Regulations, Directives, Decisions of the Council, together with budgetary documents. It also catches later stages of legislation — for example, any amended proposal, such as Presidency compromise proposals or amendments proposed by the European Parliament.

- "(ii) any document which is published for submission to the European Council, the Council or the European Central Bank"

1.6.5 This brings in a range of documents, usually originating from the Commission, including Green Papers and White Papers setting out proposals for future action (often legislation); Communications to the Council (often seeking endorsement of some action proposed or taken by the Commission); and Commission reports. It also includes draft Council Recommendations, Resolutions and Conclusions, which, though not formally binding, when endorsed by the Council may commit it to policies or action in the future.

- "(iii) any proposal for a common strategy, a joint action or a common position under Title V of the Treaty on European Union which is prepared for submission to the Council or to the European Council"

[9] See footnote 7

1.6.6 This allows scrutiny of the EU's inter-governmental Common Foreign and Security Policy.

- "(iv) any proposal for a common position, framework decision, decision or a convention under Title VI of the Treaty on European Union which is prepared for submission to the Council"

1.6.7 This allows scrutiny of EU inter-governmental action relating to police and judicial co-operation under Title VI of the EU Treaty.

- "(v) any document (not falling within (ii), (iii) or (iv) above) which is published by one Union institution for or with a view to submission to another Union institution and which does not relate exclusively to consideration of any proposal for legislation"

1.6.8 The most important documents in this category are the reports of the Court of Auditors — both the regular general reports and the special reports on particular areas of expenditure.

- "(vi) any other document relating to European Union matters deposited in the House by a Minister of the Crown"

1.6.9 This is a long-stop. It operates at the discretion of the Government (sometimes following a request by the ESC), and it allows documents which would not otherwise have been caught by the Standing Order to be subject to the scrutiny process. It also covers Explanatory Memoranda (see below) on documents for which no official text is likely to be available in time for scrutiny before agreement is reached in the Council.

Scrutiny process

i) Overview

1.6.10 Documents are deposited in the House by the Government within two working days of its arrival in the Foreign and Commonwealth Office in London. "Deposit" means that it is available in the Vote Office of the House and is submitted to the ESC.

1.6.11 Within ten days of the deposit of the EU document, the responsible government Department submits an Explanatory Memorandum (EM) on it. An EM sets out the legal, financial and policy implications of the document, and the procedure and timetable for its consideration and adoption. The submission of an EM is the trigger for the scrutiny process. Although the ESC will already have the EU document and the Commission's explanatory memorandum on it, there is no point in formal consideration until the Government's evidence, in the form of an EM, is also available.

1.6.12 The ESC is required by S.O. No.143 to report its opinion on the 'legal and political importance' of each EU document and to make recommendations as to which should be further considered by the House.

1.6.13 The ESC meets every sitting Wednesday when the House is sitting. On every one of the usually 30 or so items of business (both EU documents and letters from Ministers) each member of the ESC receives a written analysis and recommendation from the ESC staff in advance of the meeting. At the meeting the ESC considers each document in turn, with the help of supplementary oral advice from the staff where necessary, and agrees its weekly Report.

1.6.14 In an average year, the ESC considers about 1,000 documents. It finds about 500 to be of political or legal importance, and reports substantively upon them. It recommends about 40 documents for debate in European Committee, and about three for debate on the Floor. Documents of insufficient political or legal importance are not reported.

ii) What the ESC must decide in each case is:

- *Is the document of political or legal importance?*

1.6.15 Political importance may stem from the sensitivity of the subject matter, the financial implications, or the likely impact on the UK. Legal importance may arise because of a doubtful legal base, an unsupported assertion by the Commission of powers to act, difficulties of drafting, or impact on existing law.

1.6.16 If the ESC finds the document to be of political or legal importance, it reports on it in detail in that week's Report. The Report describes the document and its progress, and sets out any criticisms the ESC may have, as well as further information it is requesting (or has received) from the Government. Each Report is normally published within ten days after the ESC's meeting, both in hard copy and on the ESC's website.

1.6.17 Documents not regarded as of political or legal importance are cleared from scrutiny immediately, and so not reported to the House.

- *Does it have enough information to make a decision?*

1.6.18 If the EM is comprehensive and of sufficient quality, and no doubts or questions arise, the ESC can often clear the document immediately. If not, further information is requested from the Government. On major or problematic proposals, there may be a lengthy dialogue between the ESC and the Government before the ESC is satisfied that it is in a position to take a decision. This dialogue is one of the most important aspects of the scrutiny process. In general it is in writing, but sometimes the ESC takes oral evidence (usually from a Minister). Such evidence sessions are held in public.

1.6.19 If a proposal is likely to be heavily amended, the ESC usually leaves it uncleared until more information is available about the progress of the negotiations or the likely outcome. Sometimes further information is requested even though the document is cleared.

- *Should the document be debated?*

1.6.20 The ESC can choose to have the document debated either in one of the three European Committees (see below) or — for the most important documents — on the Floor of the House.

1.6.21 There is always a debate if the ESC recommends one, but the ESC cannot require that the debate be on the Floor of the House; for that the Government's agreement is needed. If the ESC decides on a European Committee debate, the document is automatically referred to one of the European Committees for debate.

- *… or should the document be "tagged"?*

1.6.22 Documents which may not merit debate in their own right may be tagged by the ESC — that is, noted on the order paper as relevant to a particular debate or any future debate on a particular subject in the House or in a European Committee. Tagging a document has no effect on clearance of that document from scrutiny, which is a separate decision.

iii) Debate in European Committee

1.6.23 There are three European Committees (A, B and C). Under S.O. No. 119, their responsibilities are as follows:

- A. Energy and Climate Change; Environment, Food and Rural Affairs; Transport; Communities and Local Government; Forestry Commission.

- B. HM Treasury; Work and Pensions; Foreign and Commonwealth Office; International Development; Home Office; Justice; and matters not otherwise allocated.

- C. Business, Innovation and Skills; Children Schools and Families; Innovation, Culture, Media and Sport; and Health.

1.6.24 Each Committee has thirteen members. A specific membership is nominated by the Committee of Selection for each debate according to the document or documents referred. Where practicable, the nominations include at least two members of the ESC and at least two members from the relevant Departmental Select Committee. Sittings are chaired by members of the Chairmen's Panel. Any Member of the House may attend and speak at a European Committee, but may not move (propose) a motion, vote or be counted in the quorum. Any Member of the House may also table an amendment, and move it if the amendment is selected by the Chair.

1.6.25 At the beginning of the sitting, a member of the ESC makes a brief statement explaining that ESC's decision to refer the document(s) to a European Committee. Proceedings then begin with up to an hour of questions to the responsible Minister or Ministers (who may open with a short introductory statement). The Chairman may allow up to an additional half an hour for questions if necessary. The Committee then debates the document or documents on the basis of a motion moved by the Minister, normally for a further 1½ hours. Amendments may be moved (subject to selection by the Chair), and the Chair puts the questions necessary to dispose of the business not later than 2½ hours after the start of proceedings.

1.6.26 Under the terms of the Scrutiny Reserve Resolution, a resolution of the House (not of a European Committee) is necessary in order for a document that has been debated to be cleared. To this end, a motion, normally the same as that agreed by the European Committee is put on the order paper for agreement by the House the day after the debate in European Committee. The motion can be amended but not debated; it is decided forthwith.

1.6.27 The European Committee format has much potential. It brings together the processes of questions and debate. It is accessible to every Member of the House. It can demand a great deal of Ministers; they answer questions without notice, for an hour or even 1½ hours without the direct participation of civil servants. Yet the opportunities offered by this part of the scrutiny process have tended to be under-used (see further at 2.6.5).

iv) Proceedings on the Floor of the House

1.6.28 Each year the ESC recommends for debate on the Floor of the House about three or four documents which it regards as of particular importance. In the 2006-07 session, for example, there were debates on the implementation of the Hague Programme on justice and home affairs, Galileo, and on a European Union programme for critical infrastructure protection. The most recent debate in the 2008-2009 session was on the European Commission's proposals on European financial supervision in the wake of the credit crisis and the de Larosière report.

1.6.29 As indicated above, debates can take place on the Floor of the House only if the Government is willing to provide time. Standing Order No. 16 provides that debates can last for an hour and a half, but the Government has sometimes agreed to the ESC's requests for a longer period.

1.6.30 As in a European Committee, it is up to the Government to table the motion on which the document is to be considered by the House.

v) Pre- and post-Council scrutiny

1.6.31 Although scrutiny is carried out mainly by examining the Government's policy and actions on each EU document, the ESC also monitors each Council meeting and the actions of UK Ministers there. It does this mainly, but not exclusively, through written reports. Procedures are as follows:

- Three weeks or so before a Council meeting, the government Department with responsibility for the relevant subject area sends the ESC an "annotated agenda". This lists the matters expected to come before the Council, indicating the latest state of play from the UK point of view. The list of matters is provisional at this stage.

- A day or two before each Council meeting, a written Ministerial statement is made, setting out why the items are on the agenda and the Government's general position on them.

- Not more than five days after the Council meeting, a written ministerial statement is made, setting out what happened at the meeting and the part played in it by the UK, including any votes. In recesses, written ministerial statements are replaced by ministerial letters. Written ministerial statements are published in Hansard. Ministerial letters sent during recesses are placed in the Library, where any Member may consult them.

1.6.32 Each of these sources of information is placed on the ESC's agenda for its next meeting. On review, the ESC may decide to request further written information or to take oral evidence from a Minister. Any oral evidence is taken in public.

1.7 What are the mechanisms of cooperation between the 'European committee' and the regular committees of the parliament in cases of overlap of the subject of prospective legislation?

1.7.1 As a general rule, the ESC looks at the formulation of policy and legislation before it is adopted by the Council or European Council. This could be described as an 'upstream' activity – the ESC aims to scrutinize EU acts as early in the institutional process as possible. How adopted EU legislation is then implemented by the UK Government – the 'downstream' activity – is a matter for Departmental Select Committees, which scrutinise the work of government Departments.

1.7.2 Under S.O. No. 143, however, the ESC has the unique power of seeking from any of the Departmental Select Committees an 'opinion' on a document it has received.

- In Parliamentary Session 2005-2006 the ESC requested three such opinions. One from the Health Committee on the testing and regulation of pediatric medicines, and two from the Science and Technology Committee on the 7th Framework Programme on Research and Development.

- In Parliamentary Session 2006-2007 the ESC requested two opinions: one on the White Paper on Sport, on which the Culture, Media and Sport Committee decided to carry out an inquiry, and one on the EU-US aviation agreements from the Transport Committee.

- In Parliamentary Session 2007-2008 the ESC requested one opinion, from the Innovation, Universities, Science and Skills Committee on a Commission Communication which advocated joint programming of national research and development programmes.

- In Parliamentary Session 2008-2009 the ESC requested one opinion - from the Treasury Committee on the European Commission's proposals on European financial supervision in the wake of the credit crisis and the de Larosière report. The Treasury Committee decided to carry out an inquiry into this, reporting in time for a debate on the Floor of the House that had been referred by the European Scrutiny Committee.

1.7.3 Cooperation with Departmental Select Committees can take other forms. The ESC sends the Clerks of Departmental Select Committees copies of the briefings that its advisers produce on all EU documents for each meeting of the ESC. This ensures that through their clerks

Departmental Select Committees are made aware of EU business in which they have an interest. For similar reasons, the ESC also draws its weekly Reports to the attention of Departmental Select Committees where relevant. For example, it regularly draws its Reports on EU development assistance to the attention of the International Development Committee, recognising the work which it does in this field.

1.7.4 The ESC also sends the Commission's Annual Policy Strategy and Legislative and Work Programme to each Departmental Select Committee, inviting views on the items relevant to their work. When the ESC reports on the Legislative and Work Programme, it sets the Commission's proposals out by reference to the responsible Department.

1.7.5 In 2008, the ESC wrote to the Cabinet Office about the fact that government Departments did not ask for the opinion of the relevant Departmental Select Committee when carrying out an external consultation on an EU document, in particular Commission Green Papers. A procedure has now been put in place to ensure that this happens.

1.7.6 The regular informal contact as outlined above not only ensures that the Departmental Select Committees are aware of forthcoming EU proposals at the earliest stage of the scrutiny process; but also leads to decisions by Departmental Select Committees to hold inquiries into an EU policy of concern. The ESC may also conduct joint evidence sessions with other Departmental Select Committees. This happened, for example, in 2007 with the Home Affairs Committee when the Minister for Nationality, Citizenship and Immigration gave evidence on migration issues relating to the accession to the EU of Bulgaria and Romania.

1.8 In cases of a bicameral parliament – what is the division of competences in European affairs between both chambers; what are the procedures of coordination; who has the 'last word'; is there any consensus-reaching mechanism?

Relationship between the scrutiny committees of the House of Commons and the House of Lords

1.8.1 The House of Lords has a parallel but separate system of EU scrutiny, conducted by the House of Lords Select Committee on the European Union. EU documents must clear the scrutiny process in both Houses before the Minister can give agreement to them in Brussels. So, in answer to the question posed, there is no need for either House (Commons or Lords) to have the last word.

1.8.2 The scrutiny processes differ between the two Houses in certain respects. Simply stated, the Lords Select Committee has a wider mandate to scrutinise the merits – rather than only the political or legal importance - of emerging EU policy that it has singled out through a weekly 'sift' (selection) of the EU documents it receives; and it has a greater capacity to conduct in-depth inquiries. By contrast, the ESC reviews all EU documents it receives for political and legal importance without entering into the policy merits, but conducts far fewer in-depth inquiries.

1.8.3 The scrutiny processes in both Houses complement each other well. There is no formal but much informal cooperation, with officials keeping in close contact. The two scrutiny processes being independent of each other, there is no consensus-reaching mechanism between the two Committees.

The Lords Committee

i) Overview

1.8.4 The Lords Select Committee was established in 1974, the year after the UK joined the European Community. It is appointed at the beginning of every Parliamentary session. Its terms of reference are: 'To consider European Union documents and other matters relating to the European Union'. It has 18 Members each of whom (other than the Chairman) serves on one of the seven sub-committees, through which the Committee conducts most of its investigations. Other Members of the House of Lords are co-opted to the sub-committees. A total of over 70 Members are actively involved in the work of the Select Committee and its sub-committees—representing around 10% of the membership of the House.

1.8.5 As with the ESC, the primary purpose of the Lords Select Committee is to scrutinise EU draft legislation and policy documents in draft before it is agreed in the EU, as the opportunities for scrutiny by the Houses of Parliament at a later stage (e.g. when EU law is implemented in the UK) are limited. For this reason, the Lords Select Committee starts its work at the earliest possible stage in the EU decision-making process.

1.8.6 The key activities of the Lords Select Committee include:

- the provision of information on the EU to the House of Lords and to the public as a contribution to transparency;

- drawing the attention of the House of Lords, the Government, EU institutions and the public to significant matters contained within that information and in particular making recommendations—'focusing the debate';

- contributing to the law-making process in Brussels by detailed analysis of draft texts, exposing difficulties and proposing improvements;

- an examination of the Government's role in agreeing EU legislation and, as part of that process, compelling the Government not only to consider its policy but sometimes to account for it; and

- an examination of the Commission and the policies it formulates.

ii) Sub-committees

1.8.7 The Lords Select Committee carries out most of its investigations through its seven sub-committees, which have responsibility for, respectively, Economic and Financial Affairs; Trade

and International Relations; Internal Market; Foreign Affairs, Defence and Development Policy; Environment and Agriculture; Law and Institutions; Home Affairs; and Social Policy and Consumer Affairs. The sub-committees conduct inquiries based either on the scrutiny of EU documents or on wider subject areas chosen by the sub-committees from within their field of activity. They are assisted by clerks, legal advisers, committee specialists and other staff, and by consultant specialist advisers appointed for their expert knowledge of the subject under inquiry. They operate in the same way as other Parliamentary Committees: they invite written and oral evidence from government Departments, EU institutions and other interested bodies and individuals, in order to consider a wide range of points of view before reaching conclusions.

1.8.8 The sub-committees look at the policy implications of EU proposals, including: whether they are matters which the EU (not the UK) should be legislating for ('subsidiarity'); whether they have been subject to a proper cost analysis ('regulatory impact of assessment'); and whether they inappropriately delegate power to EU official committees ('comitology'). Draft Reports setting out conclusions and recommendations are agreed by the sub-committees, approved by the Select Committee and then published. Reports range from major reviews of significant policy issues to shorter analyses of specific legislative or policy proposals. A number of Reports are debated in the House of Lords and the Government has undertaken to reply to all Reports, debated or not, within two months of publication.

iii) Scrutiny process

1.8.9 In terms of process, the Government deposits EU documents and accompanying EMs in the House of Lords in the same manner as it does in the House of Commons. Many documents are routine or of comparatively minor importance (i.e. minor adjustments to existing policies). In any case, as the number is too great for the Lords Select Committee to give detailed consideration to them all, the Chairman conducts a selection procedure known as a 'sift'. The Chairman considers all the EMs, sifts the more significant documents from the less important ones and decides which should sub-committee they should be referred to. About 25% of the documents deposited are referred to the sub-committees. A sub-committee will take note of many of them, choosing a few each year on which to conduct a substantial inquiry and make a Report.

1.8.10 The Lords Select Committee often sets out its views in a letter to the appropriate Minister if views can be expressed succinctly without the need for extensive evidence or where Council decision on a proposal is likely to be reached quickly. The Committee regularly publishes correspondence with Ministers online and in hard copy.

1.8.11 The Lords Select Committee, in addition to considering draft Reports prepared by the sub-committees, also:

- hears regular sessions of evidence with the Minister for Europe after each European Council, and from the ambassadors of Presidency countries;

- scrutinises the Commission's Annual Work Programme and takes a strategic overview of EU issues;

- on occasion acts as an investigative committee producing Reports; and

- plays an active role in the Conference of Community and European Affairs Committees of Parliaments of the European Union (COSAC).

1.8.12 The Scrutiny Reserve Resolution is similar to that of the House of Commons. The scrutiny system originally rested on an undertaking given by the Government that it would not, except in special circumstances, agree to any proposal in the Council until it has been cleared by the Committee. This was formalised in a Resolution of the House of Lords on 6 December 1999. This 'scrutiny reserve' gives the House of Lords an opportunity to influence the position which the Government adopts on the proposal in negotiation with other Member States.

1.9 Are there any regulations concerning specific procedures or modus operandi depending on the area (e.g. the question of the principles of subsidiarity and proportionality, or the issues of vetoing the European Council's initiatives to authorise the so-called 'simplified revision procedure' or proposals for the amendment of the Treaty)?

1.9.1 The Treaty of Lisbon was incorporated into national law by an Act of Parliament: the European Union (Amendment) Act 2008, which received Royal Assent on 19 June 2008. The Act lays down procedures for Parliamentary approval of the Ordinary and Simplified revision procedures and several of the 'passerelles'.

Ordinary revision procedure

1.9.2 The Treaty of Lisbon amends Article 48 of the Treaty on European Union (TEU) so as to provide for an Ordinary revision procedure. Under this procedure proposals for amendments to the EU Treaties may be made by the European Parliament as well as by the Member States and the Commission as at present. It is expressly provided that amendments may serve, inter alia, to increase or to reduce the competences conferred on the European Union. The proposals must be notified to the national Parliaments of the Member States. A decision to examine proposed amendments must be made by the European Council (rather than the Council as at present). The European Central Bank must be consulted in the case of proposed institutional changes in the monetary area. Generally, a Convention must be convened to examine the proposals before an intergovernmental conference is convened. Such a Convention is to be composed of representatives of the national Parliaments of the Member States, the heads of State or Government of the Member States, the European Parliament and the Commission. The European Council may decide not to convene a Convention where the nature of proposed Treaty amendments would not justify establishing one.

1.9.3 Section 5 of the European Union (Amendment) Act ("Amendment of founding Treaties") provides that, in future, every treaty agreed under the Ordinary revision procedure must be approved by an Act of Parliament before the United Kingdom may ratify it. Any increase in the competences of the EU will therefore be subject to prior Parliamentary approval.

Simplified revision procedure

1.9.4 The two provisions for Simplified revision procedures are set out in Article 48 (6) and (7) of the TEU, as amended by the Treaty of Lisbon. Under Article 48(6), the European Council may, by unanimity, make a decision amending provisions of Part Three of the Treaty on the Functioning of the European Union (TFEU) (which deals with Union policies), but not so as to increase EU competences. Such a decision will not come into force unless approved by all the Member States in accordance with their constitutional requirements. Under Article 48(7), the European Council may, by unanimity, make a decision authorising the Council to act by qualified majority voting in areas where Title V of the TEU or the TFEU provides for unanimity, or substitute the ordinary legislative procedure in areas where the TFEU provides for special legislative procedure. In either case, section 6 of the European Union (Amendment) Act provides that where any draft decision comes before the European Council, the UK may not agree to the adoption of the decision, unless Parliamentary approval has first been given. That approval must be signified by the agreement of both Houses of Parliament to motions approving the Government's intention to support the decision.

Parliamentary control of other paserelles

1.9.5 Section 6(1) of the Act also concerns certain provisions in the TEU and TFEU which enable the Council to act by qualified majority voting in place of unanimity in specified areas, or to change the procedure for the adoption of acts in specified areas to the ordinary legislative procedure in place of special legislative procedure. They are as follows:

- the provision of Article 31(3) of that Treaty (Common and Foreign Security Policy) that permits the adoption of qualified majority voting;

- the provision of Article 81(3) of the Treaty on the Functioning of the European Union (family law) that permits the application of ordinary legislative procedure in place of special legislative procedure;

- the provision of Article 153(2) of that Treaty (social policy) that permits the application of ordinary legislative procedure in place of special legislative procedure;

- the provision of Article 192(2) of that Treaty (environment) that permits the application of ordinary legislative procedure in place of special legislative procedure;

- the provision of Article 312(2) of that Treaty (EU finance) that permits the adoption of qualified majority voting;

- the provision of Article 333(1) of that Treaty (enhanced cooperation) that permits the adoption of qualified majority voting; or

- the provision of Article 333(2) of that Treaty that permits the application of ordinary legislative procedure in place of special legislative procedure.

1.9.6 Again, section 6 provides that where any draft decision under the above provisions comes before the European Council or the Council, the United Kingdom may not agree to the adoption of the decision, unless Parliamentary approval has first been given. That approval must be signified by the agreement of both Houses of Parliament to motions approving the Government's intention to support the decision.

In addition, under section 12 of the European Parliament Elections Act 2002 no Treaty which provides for any increase in the powers of the European Parliament is to be ratified by the UK unless it has been approved by an Act of Parliament – in other words, unless it has been voted on by Parliament.

2. The Document- and Procedure-Based Model and Practice of Parliamentary Scrutiny.

2.1 Would the overall system in place in your country correspond to the document-based or the procedure-based model of scrutiny of EU lawmaking and governments' position?

2.1.1 The Commons scrutiny system is a document-based one: it examines the political or legal importance of "EU documents" (see further at 1.6 above).

2.2 Are the scrutiny procedures sector- or policy-specific (*e.g.* depending on area or voting method?

2.2.1 The Standing Order and Scrutiny Reserve Resolution, revised to take account of the changes to EU legislative procedure introduced by the Lisbon Treaty, will apply uniformly to all EU documents except for those to which the UK has to opt-in under Title V TFEU. For the opt-in procedure, see 8.1 below.

2.3 Is the scrutiny formalized by the possibility of 'mandating the government' or of announcing a 'scrutiny reserve'? How is the government's conduct in relation to the instruments of parliamentary scrutiny sanctioned in law and practice?

2.3.1 Scrutiny of EU affairs in the Houses of Parliament is conducted by means of a Scrutiny Reserve Resolution, as described at 1.6 above. The ESC does not provide the Government with a "mandate" before European Council or Council meetings.

2.3.2 If a Minister gives political agreement to an EU document which the ESC has not cleared from scrutiny, in breach, therefore, of the Scrutiny Reserve Resolution, the ESC may request the Minister to explain his or her reasons in an evidence session before it. The consequence of a scrutiny override will, however, depend on the circumstances. Where the ESC was forewarned, and the timetabling in Brussels was beyond the control of the Government, the ESC may not

wish the Minister to appear before it. Where, however, it considers the breach was avoidable, or reflects a disregard for Parliamentary scrutiny, or the political or legal consequences are particularly serious, the ESC is likely to call the Minister in to give evidence before it. As a general rule, Ministers will wish to avoid coming before an irritated Select Committee; the threat of this sanction in most cases provides an incentive for government Departments to take note of the ESC's concerns.

2.3.3 Every six months the Cabinet Office provides the ESC with a list of scrutiny overrides for each government Department, which is then reviewed by the ESC. This enables the ESC to keep a watchful eye on how Departments are complying with scrutiny obligations, and whether further action from the ESC is required.

2.4 Is there any substantial difference between parliamentary scrutiny over the European and domestic issues?

2.4.1 Yes.

- The Scrutiny Reserve Resolution is unique to the ESC – no other Select Committee of the House has a similar power.

- Whilst Departmental Select Committees concentrate on examining a few topics in depth each year, the ESC reviews all "EU documents" originating from the EU institutions for their political or legal importance. Its scope is therefore wider, but necessarily shallower. The number of documents it reviews means that it has more staff than other Select Committees of the House.

2.5 Does and should the constitutional sensitiveness of Justice and Home Affairs Policy lead to an increased activity of the parliament in this area?

2.5.1 The ESC scrutiny procedures apply to JHA policies in the same way as they apply to other areas of EU policy. But the ESC pays particular attention to proposals which affect the common law of the UK, criminal procedure, human rights, and more generally the rule of law in the UK and within the EU.

2.6 Have there been any proposals to reform parliamentary scrutiny in your country? What are the grounds (reasons) of such proposals? Which are the directions of the proposals? Who presented the proposal – parliamentary committees, the government, the public, legal or political scientists, *&c*?

2.6.1 When the Scrutiny Reserve Resolution was first adopted in 1974, it related only to proposals recommended by the European Legislation Committee (the precursor to the ESC) for debate.

2.6.2 On 30 October 1980 the House passed a resolution stating that no Minister should give his

or her agreement in the Council of Ministers to any proposal for European legislation which had not been scrutinised by its then European Legislation Committee, and if that Committee had recommended that the proposals should be debated by the House, agreement should not be given until the debate had taken place. This is the origin of the Scrutiny Reserve Resolution.

2.6.3 In October 1990 the House passed a further resolution extending the scope of the Resolution in the light of new competences transferred to the EU. It also provided for Ministers to give their agreement to legislative proposals before the completion of scrutiny by the House in certain defined circumstances (reflected in the current Scrutiny Reserve Resolution).

2.6.4 In November 1998 the House agreed a new version of the Resolution to take account both of the growing volume of EU business after the Single European Act and of the wider field of EU activity under the second and third pillars of the EU after the Maastricht and Amsterdam Treaties. The definition of "European documents" over which the Committee had scrutiny was broadened to include proposals for a joint strategy, joint action and common position under the second pillar, and for a common position, framework decision, decision or convention under the third pillar.

2.6.5 Other changes agreed in 2008 included the establishment of two of the three European Standing Committees, now called European Committees. Their membership would be ad hoc, rather than permanent (i.e. Members are appointed for each debate by the Committee of Selection), and a chair would be appointed for each debate. The ESC had argued against ad hoc membership on the grounds that it reduced the quality of debate in these Committees. But an important proviso was added that there should be an opening statement before the debate by a Member of the ESC. For the first time this cemented the link between the work of the ESC and the questioning and debate in the European Committees. And the style of questioning in the European Committees was changed to allow a Select Committee type of questioning whereby a Member would be allowed to pursue a line of questioning. Previously, the questions simply switched between the Opposition and Government benched (speakers).

2.6.6 Further-reaching reforms to the European scrutiny system had been recommended three years earlier in a Report of the House of Commons Modernisation Committee[10]. But the Government had been reluctant to act on them and when the Government's proposals were finally put to the House in 2008 they amounted to relatively minor changes.

2.7 What are the specific measures adopted by the national parliament to meet requirements concerning efficiency of the scrutiny?

2.7.1 Beyond the Parliamentary and legislative procedures mentioned in answer to the questions above, the ESC has made agreements with the Government on matters of procedural detail: for example, which documents need not be deposited, the time limit for submitting an EM, and the contents of an EM (see further at 3.2 below). These are recorded in a Cabinet Office Publication circulated to all government Departments: *Parliamentary Scrutiny of EU Documents – Guidance*

[10] Select Committee on the Modernisation of the House of Commons: *Scrutiny of European Business*, Second Report of Session 2004-05, HC-465 I (22 March 2005)

for Departments. This is regularly updated and is a *vade mecum* for government officials dealing with the scrutiny committees of the two Houses of Parliament (see also at 1.4 above).

2.8 How can the practical effects of parliamentary scrutiny be assessed? What criteria should apply in such assessment? What lessons – if any – can be drawn from such assessment?

2.8.1 The ESC has established a template for assessment of Parliamentary scrutiny in quantitative terms (see 2.9 below), but not qualitative terms. An assessment of the qualitative impact of scrutiny would need to include a review of how many of the ESC's questions were sufficiently answered and recommendations followed.

2.9 Are there any mechanism of checking the effectiveness of the scrutiny within in the national parliament? Is there any formal regulation in this respect (by-law of the parliament; regulations of the European committee, *&c.*)? What would be the criteria that could apply to checking the effectiveness of scrutiny?

2.9.1 The Cabinet Office produces a six-monthly report on scrutiny overrides. That way the ESC maintains an up-to-date appreciation of which Departments are performing well and which badly. It can then take action, for example calling in the Minister to explain the reasons for a Department's poor performance and what action will be taken to remedy it.

3. The Government-Parliament Informational Asymmetry

3.1 What were the deficiencies of the mechanism of submitting the Commission's legislative proposals to the parliament by the government in your country?

3.1.1The deposit of Commission proposals by the Government in Parliament, followed by the submission of an EM, on the whole works well.

3.1.2 An issue of greater concern to the ESC is the ambitious timetables set in Brussels by rotating presidencies anxious to achieve particular legislative goals, which rarely allows sufficient time for effective Parliamentary scrutiny. The ESC has raised this concern regularly with the Government without, to date, a satisfactory outcome.

3.1.3 Added to which there has been a large increase in the volume of legislation which is agreed by the European Parliament and the Council through "first reading deals". The balance to be struck throughout the co-decision procedure, but especially in a negotiated first reading agreement, is between transparency, accountability and efficiency. Shortening the number of readings to which a proposal is subjected inevitably reduces the number of opportunities for national parliamentary scrutiny. It can also accelerate the legislative process at the expense of

effective scrutiny, as happened during the 2008-09 Session on the draft Directive on ship-source pollution[11].

3.1.4 The ESC is particularly concerned about the use of "informal trilogues", a forum for confidential and binding negotiations, in first reading deals. Informal trilogues consist of a representative of the relevant European Parliament committee (usually the rapporteur), the Commission, and the Presidency. No other Member State is present. So it is difficult for governments to follow the course of trilogue negotiations and to feed in their views, let alone informing national parliaments when to do so. It is difficult for the Council and the European Parliament to change a text agreed in an informal trilogue. In practice, the ESC is often not told of trilogue changes until too late – once the negotiation is concluded.

3.1.5 The problem posed by first reading agreements for national parliamentary scrutiny is unlikely to go away. The EU's *Joint Declaration on Practical Arrangements for the Co-decision Procedure*[12] places an emphasis on first reading agreements: "The institutions shall cooperate in good faith with a view to reconciling their positions as far as possible so that, wherever possible, acts can be adopted at first reading".

3.1.6 The ESC shall, therefore, be inviting the Government to reflect on how to ensure that sufficient opportunity is given for effective Parliamentary scrutiny of first reading deals.

3.2 Based on the regulation that legislative initiatives should be sent directly to national parliament, how effective is the mechanism of requiring the government to submit additional information deemed essential to take a proper decision or issue an opinion by the parliament and its bodies?

3.2.1 As stated above, within ten working days of the deposit of a document, the responsible Department should submit an Explanatory Memorandum (EM) on it. In agreement with the ESC, the Government has undertaken that an EM should cover:

- a description of the subject matter, together with the scrutiny history if the document has been before Parliament already;
- where ministerial responsibility lies — both for the lead Department and other Departments that may have an interest;
- the legal base (usually the Treaty Article on which a proposal relies);
- the legislative procedure;
- the voting procedure;

[11] See ESC Report: HC 19-xix (2008-09), chapter 15 (10 June 2009).
[12] OJ C 145 30.6.2007, page 5.

- the impact on UK law;
- whether the proposal complies with the principle of subsidiarity;
- the Government's view of the document's policy implications;
- a Regulatory Impact Assessment if the proposal imposes burdens on business (this is sometimes submitted separately);
- when required, a risk assessment and scientific justification;
- what consultation has taken place (either in the UK or in the EU as a whole);
- the financial implications for the EU and the UK;
- the likely timetable for consideration of the proposal.

3.2.2 The EM is an essential part of the scrutiny process:

- one is submitted on every document (except, by agreement with the Scrutiny Committee, the most trivial);
- the EM is signed by a Minister, and constitutes the Minister's evidence to Parliament;
- the process of submitting an EM concentrates minds — both in the Department that produces it and of the Minister who signs it;
- it is a public document and a useful source of information for businesses and the public. EMs are available from the Vote Office.

3.2.3 If a proposal is substantially amended or circumstances change, the Government must submit a supplementary EM.

3.2.4 Although the scrutiny system is based on documents, scrutiny does not have to await the deposit of an official text of the EU document. If the official text of an EU document is unlikely to be available in time for scrutiny before a decision is reached in the Council, the Government submits an "unnumbered Explanatory Memorandum" (so-called because it does not relate to a numbered EU document)[13]. This describes what is likely to be in the document and stands proxy for it: a proposal can be cleared on the basis of an unnumbered EM, and the EM may even be debated in place of the document. This procedure is most commonly used for non-legislative CFSP documents and ensures scrutiny can take place in good time.

3.3 How and to what extent is the government obliged to explain the detail

[13] This was a recommendation of the Modernisation Committee in 2005 (see footnote 10).

of a legislative initiative both for the country and for European integration? Are there any criteria applicable to such explanations? Is there any mechanism to force the government to present more detailed information and explanation?

3.3.1 The effect of the legislative initiative on the UK is covered by several of the EM sub-headings, listed in the bullets points above.

3.3.2 There is no sub-heading focussing on the effect of the legislative initiative on European integration. That said, the "subsidiarity" sub-heading should address both the necessity for the initiative and the advantage to be gained by legislating at EU rather than Member State level.

3.4 Is there a formal hearing of the Ministers before the Council's meetings?

3.4.1 No.

3.5 In case of 'instructions' for the Ministers on voting in the Council, what are and what were the criteria of this kind of decision of the parliament or its committees?

3.5.1 As above. The ESC does not give instructions to Ministers.

3.6 Do parliamentarians have access to relevant administrative research, diplomatic services' information, or other relevant policy-making props?

3.6.1 MPs currently[14] have a staffing allowance of over one-and-a-half times their salary. This means they can employ well qualified researchers, and many do. MPs have access to all departmental documents that are in the public domain. They can also table questions on subjects not in the public domain through 'Parliamentary questions'. Parliamentary questions play a significant role in the House of Commons. They allow MPs to hold the Government to account by asking either oral questions to Ministers on the Floor of the House or tabling written questions.

3.6.2 In addition, the House of Commons Library provides research, analysis and information services for MPs and their staff, Select Committees, and staff of the House. Library staff produce a wide range of briefing material and other services, including:

- confidential answers to enquiries on the full range of subjects of interest to MPs and Select Committees;
- research papers and other briefings on Bills (draft legislation) and other topics of public and Parliamentary concern;

[14] As at December 2009

- material via the Parliamentary intranet; and
- talks and informal face to face briefing.

3.7 What kind of timing and management mechanism and instruments are to be implemented to avoid the risk of EU documents overflow?

3.7.1 Within ten working days of the deposit of an EU document, the government Department which takes responsibility for it should submit an EM upon it. This timeframe ensures that the ESC is able to review the document soon after it has been issued from Brussels. The EM will also contain a "timetable" for adoption by the Council; this guides ESC staff in knowing how quickly a document must be scrutinised. As mentioned at paragraph 3.2 above, in urgent cases an EM may be submitted before the official text of the EU document is deposited.

3.8 What are the requisites for the parliament to be able to perform the new tasks effectively, *e.g.*:
human and material resources (including access to communication, *&c*.);
improvement of the dialogue between the national parliament and the national government;
new procedures that would allow for influencing the content of the European legislation and policy at an early stage;
extensive use of information-flow as a basic instrument of influence on legislation and policy-making?

3.8.1 The answer to this is necessarily subjective, but the following are, in the ESC's view, essential ingredients - *sine qua nons* - for effective Parliamentary scrutiny of EU affairs:

- a constitutional settlement that respects the scrutiny role of the legislature over the executive, and that facilitates it;
- equally, government Departments that respect the scrutiny role of the legislature over the executive, and that facilitate it;
- Parliamentary conventions and rules of procedure that give an EU scrutiny committee leverage over the Government – such as a Scrutiny Reserve Resolution or a mandating system; and
- sufficient resources to manage the workload of scrutinising EU policy and legislation: the ESC is administered by a clerk and second clerk; assisted by two lawyers (one full- and one part-time) and four senior policy advisers covering the breadth of EU affairs; and supported by a secretariat of five staff, and a National Parliament Office in Brussels. The ESC has the largest staff of all Commons Select Committees.

3.9 What consequences will the changes adopted in the Lisbon Treaty have on the organization of parliamentary scrutiny in your country?

3.9.1 At the time of writing, the ESC is consulting with the Leader of the House and the Minister for Europe on reforms to the scrutiny system required as a consequence of the Lisbon Treaty. These will include:

- the operation of the Protocol on the Application of the Principles of Subsidiarity and Proportionality: reasoned opinions and appeals to the European Court of Justice;
- the operation of the "opt-in" procedure under Title V of the TFEU as set out in the Protocol in the Position of the UK and Ireland in respect of the Area of Freedom, Security and Justice;
- the deposit of Council Conclusions, and European Council conclusions given its new status and powers;
- the deposit of non-legislative EU acts as well as legislative EU acts, as defined in the Lisbon Treaty.

4. Democratic Legitimacy of European Governance

4.1 Does the new role of the national parliaments increase the democratic legitimacy of the European Union? What kind of criteria might be useful to assess the quality of those changes?

4.1.1 See 5.1 below.

4.2 Are there in your parliament any proposals to change procedures of cooperation with other parliaments in order to meet the requirements of the Lisbon Treaty?

4.2.1 In 2008 the ESC conducted an inquiry into the role of national parliaments and the principle of subsidiarity under the Lisbon Treaty. In the subsequent Report, *Subsidiarity, National Parliaments and the Lisbon Treaty*[15], the ESC stated that, given the short timetable, it would not be in a position to act on behalf of the devolved assemblies in spotting what — for them — might be objectionable proposals. For example it might not be apparent to the ESC that a proposal contained material which was likely to be objectionable to one of the devolved Assemblies or Parliaments but not to others. The ESC considered therefore that it:

[15] Thirty-third Report of Session 2007-08 (HC 563)

- should place the onus on the devolved Assemblies or Parliaments to obtain draft EU legislation, vet it and tell the ESC as quickly as possible if they have objections; and

- should invite the comments of the devolved Assemblies or Parliaments on the ESC's drafts reasoned opinions where the draft includes reference to a matter on which one or more of them have expressed a view. If a devolved Assembly or Parliament were not ready to express its views until after the ESC's Motion to approve the reasoned opinion (see further at paragraph 6.3) had been proposed, or if the ESC disagreed with the views, the Assembly or Parliament should be invited to send its views to the ESC for onward transmission to the Government.

4.2.2 Similarly, the ESC did not believe the eight-week time limit would make it possible to formally consult other national parliaments before it had decided whether a reasoned opinion was necessary. The National Parliament Office in Brussels would, however, act as the Committee's focal point with other EU national parliaments and would be able to give it early warning of proposals about which other national parliaments had concerns regarding non-compliance. Any reasoned opinion will also be logged on the IPEX database.

4.3 How far may the requirements of the Lisbon Treaty concerning relations between the European parliament and the national parliament influence the mechanism of parliamentary (political) accountability and control of the government?

4.3.1 It is not clear which provisions of the Lisbon Treaty this question addresses.

4.3.2 The European Parliament already enjoys broad co-decision powers; it unlikely that an extension of these powers will lead to a closer association, formal or informal, between the European Parliament and the House of Commons.

4.3.3 Under Article 7(3)(b) of the subsidiarity Protocol, however, the European Parliament and the Council (jointly "the legislator") act independently when deciding whether a proposal is compatible with the principle of subsidiarity. In so deciding they have to take "particular account of the reasons expressed and shared by the majority of the national Parliaments". If the circumstances leading to Article 7(3) arise, this may lead to closer cooperation between the House of Commons and the European Parliament.

4.4 Does the new role of the national parliaments increase the efficiency of the process of enhanced integration in the European Union?

4.4.1 It is likely to mean that the 27 national parliaments will cooperate more closely and in so doing create a new dynamism in the EU architecture. But that cooperation is unlikely (in the view of the House of Commons) to lead to enhanced EU integration, because national parliaments will be cooperating only to ensure that the principle of subsidiarity is respected. The focus will therefore be on protecting the interests of the nation state and its electorate; not on a European polity.

5. Democratic Legitimacy of National Governance

5.1 May the new role of national parliaments increase the level of scrutiny of national governments (*viz.* lead to strengthening, as a side effect, the overall parliamentary control over the government)?

Relevant provisions

5.1.1 The Lisbon Treaty asks national parliaments to:

- "ensure compliance with the principle of subsidiarity in accordance with the procedure provides for in the Protocol"[16]; and

- "see […] to it that the principle of subsidiarity is respected in accordance with the procedure provided in the Protocol"[17].

5.1.2 The second recital of the Protocol on the role of national parliaments recalls that Member States wish:

- "to encourage greater involvement of national Parliaments in the activities of the European Union and to enhance their ability to express their views on draft legislative acts as well as on other matters which may be of particular interest to them".

5.1.3 The Protocol on the Application of the Principles of Subsidiarity and Proportionality (the subsidiarity Protocol) sets out procedures for challenging draft legislative acts on the grounds of subsidiarity. And the Protocol to the Treaty on European Union on the Role of National Parliaments in the European Union, as amended by the Lisbon Treaty, places obligations on EU institutions to send documents to national parliaments and to wait eight weeks in certain circumstances before adopting legislation.

ESC inquiry

5.1.4 The ESC decided to consider in depth what practical changes to the role of national parliaments the above provisions would actually bring. So in 2008 it conducted an inquiry into the role of national parliaments and the principle of subsidiarity under the Lisbon Treaty and published a Report, *Subsidiarity, National Parliaments and the Lisbon Treaty*[18].

5.1.5 The Committee took evidence from Professor Alan Dashwood CBE (Professor of European Law, University of Cambridge), Professor Simon Hix (Professor of European and Comparative Politics, London School of Economics), Commissioner Margot Wallström (Vice President of the

[16] Article 5(3) TEU
[17] Article 12(b) TEU
[18] See footnote 15 above

European Commission with responsibility for relations with national parliaments), and Mr Jim Murphy MP (Minister for Europe at the Foreign and Commonwealth Office). It also received written memoranda from Richard Corbett MEP, Labour Spokesman on Constitutional Affairs in the European Parliament, Andrew Duff MEP, Spokesman on Constitutional Affairs, Alliance of Liberals and Democrats for Europe (ALDE), and Diana Wallis MEP, Vice President of the European Parliament and Representative of ALDE on the Working Party on Reform of the European Parliament.

Information for national parliaments

5.1.6 The Protocol to the Treaty on European Union on the Role of National Parliaments in the European Union as amended by the Lisbon Treaty requires the Commission to send national parliaments: its consultation documents (green papers, white papers and communications); its annual legislative programme and other planning documents; and its draft legislative acts.

5.1.7 The Protocol also states that national parliaments should be sent: draft legislative acts originating from the European Parliament, a group of Member States, the European Court of Justice, the European Central Bank or the European Investment Bank; the agendas for, and notice of the outcome of, Council meetings; and the annual report of the European Court of Auditors.

5.1.8 In addition, national parliaments should in most circumstances be given eight weeks for scrutiny before a legislative act is adopted, and advance notice of any intention of the European Council to amend the Treaties under Article 48(7)(1) and (2).

5.1.9 The ESC considered that there was little new in the revised Protocol. Since 1997, the EC Treaty had required the Commission not only to send all consultation documents "promptly" to national parliaments but also to make legislative proposals "available in good time so that the government of each Member State may ensure that its own national parliament receives them". Moreover, since September 2006, under what has become known as the "Barroso initiative", the Commission has voluntarily sent parliaments its proposals for legislation and consultation papers.

5.1.10 In conclusion, the ESC welcomed the requirement in the Lisbon Treaty for the transmission of documents to national parliaments because, in some Member States, the government does not automatically bring EU proposals to the attention of its parliament. The requirements will, however, not affect scrutiny in the House of Commons because all EU documents covered by Standing Order No. 143 are deposited by the Government.

The Principle of Subsidiarity

i) Evidence

5.1.11 The ESC asked Professor Dashwood whether the principle of subsidiarity was capable of objective assessment. He did not think a set of objective criteria could be developed and said that whether a measure complies with the principle "is bound to be a matter of judgment". Professor

Hix agreed, saying that it was "impossible to define in purely legal terms subsidiarity criteria and it is really ultimately a political question". Commissioner Wallström said that she thought that the overall assessment has to be political. And the then Minister for Europe (Mr Jim Murphy) told us that he did not think that a set of criteria was needed to assess compliance with the principle of subsidiarity.

5.1.12 The inquiry then focussed on the role of national parliaments' in overseeing the principle of subsidiarity in Articles 5(3) and 12(b) of the EU Treaty (as amended by the Treaty of Lisbon) and in the subsidiarity Protocol. In so doing, the ESC noted that even if national parliaments trigger the yellow or orange card procedures, the decision on whether a proposal is compatible with subsidiarity will continue to rest with the EU institutions.

5.1.13 Some of the evidence the ESC received suggested that the 'yellow and orange card' procedures would significantly enhance the role of national parliaments in the EU decision-making machine. For example, Professor Dashwood told the ESC that he was enthusiastic about it. It seemed to him that use of the early warning mechanism would have "a real impact on the political dynamic within the Community". He added that, if there were a significant number of national parliaments which took the view that a proposal infringed the principle of subsidiarity: "that is bound to have an impact on the prospect of the measure being adopted, whichever of the procedures applies. I think it would also make a difference … to any proceedings that might eventuate in the [European] Court of Justice …".

5.1.14 Others disagreed. For example, Richard Corbett MEP said "in practice, I do not think that the 'yellow' and 'orange' card mechanisms will be extensively used". He cited the experience of the Finnish Parliament. It has had a subsidiarity control mechanism since its accession to the EU in 1995 and "in that time has hardly ever found a case where they felt that a Commission proposal violated the principle of subsidiarity". Mr Corbett said that the principle is taken seriously by the Community's institutions and that the Commission's legislative proposals can be adopted only if they have the support of the overwhelming majority of Member States.

5.1.15 Andrew Duff MEP went further. He said that: "there is a danger that, in assessing the Treaty of Lisbon, national parliaments become obsessed by the early warning mechanism on subsidiarity. It was understood by those of us involved in its drafting and, then, re-drafting that the mechanism, although a necessary addition to the system of governance of the Union, was not really intended to be used. It is, in Bagehot's terms, more a dignified part of the European constitutional settlement than an efficient one."

5.1.16 Professor Hix had doubts about the effect of the early warning mechanism but could also see some potential benefits. On the one hand, he was sceptical that the mechanism would make any real political difference in parliamentary systems, such as the UK's, where the governments have a substantial majority and so the extent to which national parliaments can actually constrain what their governments are doing in Brussels is limited. On the other hand, there would be major benefits if use of the mechanism led to an increase in transparency about what happens in the Council of Ministers. Professor Hix also suggested that the "thresholds" attached to the yellow and orange cards were too high. The threshold for the orange card procedure, for example, was a majority of national parliaments. Professor Hix contrasted this with the actual practice of the

Council of Ministers. He said that: "It is very, very rare that legislation gets passed [by the Council] with more than three Member States opposed".

5.1.17 The ESC asked Commissioner Wallström for her views on the thresholds. She said, importantly, that the Commission should listen to the views of national parliaments even if the number of votes did not reach the threshold.

ii) The ESC's views

5.1.18 Reviewing documents for compliance with subsidiarity was not new: Ever since the principle of subsidiarity was introduced, the ESC has scrutinised EU documents for compliance with it. This is an essential part of its evaluation of the political and legal importance of an EU document. Where the ESC has concerns about compliance with subsidiairity, it seeks to persuade Ministers to take up the concerns with the European Commission and other Member States in the Council.

5.1.19 The ESC agreed with the evidence given that the question whether a proposal complies with the principle was unlikely to be capable of an entirely objective assessment but was also a matter of political judgement. It was reinforced in this view by an article written by Dr Stephanie Rothenberger and Dr Oliver Vogt[19], former members of the COSAC Secretariat, based mainly on their analysis of the way national parliaments had interpreted the principle in checks coordinated by COSAC. They concluded that it was: "clear that parliaments seem to interpret the principles of subsidiarity and proportionality in very different ways. Naturally the National Parliaments' assessment whether new European legislation would bring added value is based on historical, political and social experience at home."

5.1.20 In addition, in the ESC's experience, it was very rare for the entirety of a proposal for legislation to be inconsistent with the principle of subsidiarity. It was not uncommon, however, for one of the provisions not to comply. The introduction of a procedure for considering the views of national parliaments did not, of itself, alter the likelihood of subsidiarity issues emerging. There was therefore no reason to expect that there would be more non-compliant proposals in future than there were in the past. On the other hand, the Lisbon Treaty would expand the EU's legislative competence into fields that might give rise to greater subsidiarity concerns, such as sport, civil protection and broader areas of criminal justice. However, the House of Commons might not want to give a reasoned opinion unless the breach of the principle were on an important matter. It seemed unlikely to the ESC, therefore, that the House's procedure for considering whether to give a reasoned opinion would need to be used frequently.

5.1.21 In relation to the thresholds required to stop a proposal when national parliaments have triggered the orange card procedure, the ESC reiterated its earlier finding, contained in its first report on the Intergovernmental Conference that adopted the Lisbon Treaty: "... since this degree of opposition [in the European Parliament and the Council] would in any event be sufficient to prevent adoption of a measure by co-decision, we consider that the procedure adds very little by way of democratic control over the Commission and the EU institutions. In our view, the

[19] Rothenberger S and Vogt O: Fifty Years of Interparliamentary Cooperation, 13 June 2007, Berlin: *The "Orange Card": A fitting response to national parliaments' marginalisation in EU Decision-Making?*

required thresholds for preventing further consideration of a proposal must be much lower if the procedure is to have any real utility[20]." The ESC also reiterated its earlier finding on the Lisbon Treaty's provisions on national parliaments, contained in its first report on the Intergovernmental Conference that adopted the Treaty: "... we doubt the significance of the "greater opportunities" for national parliaments to be involved in any meaningful manner in the workings of the EU without ... a "red card" system that compels the Commission to withdraw any proposal which threatens to breach the subsidiarity principle." In other words, even if national parliaments trigger the yellow or orange card procedures, the decision on whether a proposal is compatible with subsidiarity will continue to rest with the EU institutions.

iii) The ESC's conclusions

5.1.22 The ESC set out its conclusions on the subsidiarity Protocol as follows:

- "The substance of the subsidiarity Article in the Lisbon Treaty is the same in its effect as the existing Article in the EC Treaty.

- "Examination of EU proposals for compliance with the principle of subsidiarity is a long-established and fundamental part of the scrutiny process of the European Scrutiny Committee of the House of Commons.

- "Whether a proposal does or does not comply is a matter of political judgement and is unlikely to be capable of an entirely objective assessment.

- "It is very rare for the whole of a proposal to be inconsistent with the principle. It is less rare for one of the provisions not to comply. We see no reason to expect that this will change, although the extension of the EU's competence under the Lisbon Treaty will offer additional areas for subsidiarity disputes if that Treaty is ratified.

- "Where we have concerns, we presently draw them to the attention of the Government and, where it shares our assessment, Ministers take up the concerns with the Commission and other Member States. Again, we see no reason to expect that this will change.

- "We expect the Commission to listen to the views of national parliaments even if the number of opinions does not reach the levels set for the yellow and orange cards. We warmly welcome Commissioner Wallström's statement that the Commission should listen to the views of national parliaments even if the number of votes does not reach the threshold.

- "For these reasons, we doubt whether the Lisbon Treaty's new subsidiarity provisions about the role of national parliaments would make much practical difference to the influence presently enjoyed by the UK Parliament."

[20] See HC 1014 (2006-07), para 68.

iv) The Government's response

5.1.23 The Government responded to the ESC's conclusions as follows:

- "It is clear that the Lisbon Treaty gives national parliaments, for the first time, direct powers in enforcing the principle of subsidiarity. The Lisbon Treaty sets out how national parliaments can decide whether EU legislation complies with the principle of subsidiarity. They will be informed directly by the Commission of all draft EU legislation and have 8 weeks to examine it in draft.

- "If one-third (or one quarter for some JHA proposals) of them consider a proposal goes against the principle of subsidiarity, it must be reviewed (the 'yellow' card). If a majority of national parliaments oppose a Commission proposal, and national governments or MEP's agree, then it can be struck down (the 'orange' card).

- "Subsidiarity already works. It is taken into account by both the Commission and Member States in bringing forward and considering proposals for EU action. The UK has successfully invoked subsidiarity on a number of occasions such as:

    - Tax: where the UK successfully argued that a 2003 Commission proposal to abolish the UK's VAT zero rates on food, children's clothing etc was inconsistent with subsidiarity

    - Labour Law: where, following a 2006 Commission report to determine what next was needed on labour law at a European level, the UK successfully argued that no new EU legislation was necessary

- "The Government is committed to ensuring that the new provisions in relation to national parliaments in the Lisbon Treaty operate effectively, and will work with both Houses of Parliament to make sure they will operate effectively."

5.2 Does the new role of national parliaments increase the standing of the parliamentary opposition as an element of the democratic participation in the legislative activity on national and European level? Are there any specific regulations in the parliament's by-laws concerning enhanced participation of the political opposition in European Committees and the like?

5.2.1 The answer to this question depends on the balance of political parties within the House of Commons. Whilst it is clear that the Lisbon Treaty provides new mechanisms for parliamentary intervention in the application by the EU of the principle of subsidiarity, that intervention will depend in each case on a Motion being agreed by a majority vote on the Floor of the House. Where there is a large Government majority, it is less likely that the opposition parties will be able to exercise more influence post-Lisbon than pre-Lisbon.

5.3 Is there any special regulation concerning access to government information in the field of the Common Foreign and Security Policy and in the field of Police and Judicial Co-operation in Criminal Matters?

5.3.1 There is no special regulation.

5.4 Are there any suggestions in your country concerning improvements to be made in the democratic scrutiny and control (*e.g.* publicity of the European Committee's proceedings; the possibility of the Committee to give instructions to the government to bring proceedings before the Court of Justice on subsidiarity or proportionality grounds; possibilities of direct discussion between the committee members and members of the European Commission *&c.*)?

5.4. 1 See 3.9 above. The discussions with the Government on the impact of the Lisbon Treaty and its Protocols on the ESC's scrutiny role includes the operation of Article 8 of the subsidiarity Protocol – decisions by a national parliament to challenge a legislative act before the ECJ.

6. The Lisbon Treaty and the Protocols

6.1 What is the meaning and function of the new Article 7(3) of the Protocol on the Application of the Principles of Subsidiarity and Proportionality? Are the obligations cumulative or alternative with those arising under Article 7(2) (the Protocol's "furthermore")?

6.1.1 The obligations on the Commission under Article 7(2) and (3) are identical in that the Commission has to review the draft legislative act with a view to either maintaining, or amending or withdrawing, it when the lowest threshold is met. To that extent, the first paragraph of Article 7(3) is largely repetitive.

6.1.2 But there is an additional (rather than alternative) obligation on the Commission where it decides to maintain a proposed legislative act to be adopted under the ordinary legislative procedure where a majority of national parliaments has sent reasoned opinions. The obligation is for the Commission to draft its own reasoned opinion, which together with those of the national parliaments is forwarded to the Council and European Parliament for consideration. These institutions can then either independently or jointly block the proposal before the conclusion of the first reading.

6.1.3 On a related note, the ESC has concerns over the definition of a "legislative act" under the Lisbon Treaty. If a "Union act" is not "legislative", as defined by Article 289 TFEU, neither the Protocol on the Role of National parliaments nor the subsidiarity Protocol will apply to it. Two concerns arise.

- The first concerns special legislative procedures. Where a Regulation, Directive or Decision is adopted with the "participation" of the European Parliament as defined in Article 289(2) TFEU, the ESC has presumed that the adoption is by "special legislative procedure" even where no reference is made to this procedure in the relevant Treaty provision (i.e. an oversight by the drafters, rather than express omission). This is because the ESC understands "participation" under Article 289 TFEU to include the Council consulting the European Parliament or obtaining its consent, as both these processes are described as "special procedures" in other provisions of the TFEU. By contrast, "participation" does not, the ESC presumes, include the European Parliament being informed by the Council.

  The ESC has asked the Government for confirmation that this interpretation is correct. There are several instances in the TFEU where an act is adopted by the Council with the participation of the European Parliament, but where "special legislative" procedure is not mentioned. Examples include Articles 74, 78(3), 81(3) (2nd para), 82(2)(d), 95(3), 103(1), 109, and 148(2).

- The second concerns non-legislative acts. The definition of legislative acts means that many Union acts, some of which will be politically and also legally binding, do not fall within the scope of the two Protocols intended to enhance the role of national parliaments in the EU. The ESC has asked the Government for clarification of the definition of non-legislative acts under the Lisbon Treaty.

6.2 What is your opinion on 'the power to block legislation' (Article 7(3) (b) of the Protocol? Will the role of the national parliament be enhanced or will it be of a rather symbolic character (*i.e.* the adoption of proposed legislation will not be effectively stopped)?

6.2.1 See 5.1.21 above.

6.3 Are there any new changes to the mechanism of activity of the national parliament proposed or under way as a response to the regulations of the Lisbon Treaty?

6.3.1 In 2005 the Select Committee on the Modernisation of the House of Commons, appointed to review procedures of the House, reported[21] on the scrutiny of EU business. In relation to the putative yellow and orange card procedure, the Modernisation Committee concluded that: the timetable is tight; the ESC is best placed to identify proposals which potentially breach the principle of subsidiarity; it is also best placed to draft the reasoned opinion (in the form of a Report to the House); it is desirable to give the reasoned opinion the authority of the House itself in the form of Motion to the House; the Motion should not be proposed by the Government but

[21] See footnote 10 above.

by the ESC; and partly because of the shortness of time and partly so as to make clear that the opinion is that of the House rather than the Government, the Motion should not be debated; if the Motion is agreed, the Speaker sends the text of the Resolution, together with a copy of the ESC's Report, to the relevant EU institution.

6.3.2 In its Report on *Subsidiarity, National Parliaments and the Lisbon Treaty* the ESC agreed with the procedure proposed by the Modernisation Committee, with one addition. The Committee recommended that, if a debate were not to take place, the Chairman or designated member of the European Scrutiny Committee should outline the reason for the reasoned opinion in a short speech to which a Minister may reply on behalf of the Government. (See also 3.9 and 5.4 above.)

6.3.3 At the time of writing, the above proposals are under discussion with the Government.

6.4 Is there any legislative initiative concerning the new role of the national parliament under the Lisbon Treaty? What is the substance of such proposals?

6.4.1 See 3.9 above.

6.5 Concerning subsidiarity control: a/are there specific rules of procedure? b/ are there portfolio arrangements? c/ are there agreements between the government and the parliament?

6.5.1 See 3.9 and 6.3 above – the impact of the Lisbon Treaty on the ESC's scrutiny role is currently under discussion with the Government.

6.6 What kind of area-specific criteria may be applied to control of subsidiarity?

6.6.1 As above.

7. The National Parliaments' Involvement and the Construction of a European Polity.

7.1 Did the Lisbon Treaty raise awareness of the magnitude of the fundamental issues of the European integration to be discussed and solved in the years to come?

7.1.1 It did, leading to a full inquiry and Report on subsidiarity (see 5.1 and 6.3 above).

7.2 What are the European policy issues under discussion within the

national parliament? Is the national parliament ready to become a substantial actor in the European policy making that also includes the strategy of integration?

7.2.1 No. The role of the ESC is to scrutinise the Government's activity on the basis of political or legal importance for the UK. It does not see itself as a substantial actor in EU policy making or further integration, and questions what opportunities for this are provided under the EU Treaties and Protocols. A detailed account of the ESC's response to the provisions of the Lisbon treaty affecting national parliaments is given above at 5.1 and 6.3.

7.3 Are there any special regulations or proposals of regulations concerning participation of representatives of NGOs, trade unions or organizations of employers in the activity of *e.g.* the European Committee of the parliament?

7.3.1 None at present.

7.4 Are there any proposals to include voices and opinions of interested groups of society before *e.g.* the European Committee of the parliament so as to enhance the level of democratic legitimacy by annexing concerns thus voiced to the parliament's final statement on the European matters?

7.4.1 The ESC staff communicates with civil society organisations and circulates briefings within the ESC. A civil society briefing can be annexed to a Report of the ESC. Matters of particular interest to the ESC include: how important is the proposal?; which aspects of the proposal give cause for concern?; would a debate serve a useful purpose?; and what matters might be covered by a debate?

7.5 To what extent may the new mechanism of involvement of the national parliaments into European affairs have impact on hitherto prevailing understanding of domestic and European politics?

7.5.1 A likely consequence of the subsidiarity Protocol and the paserelle clauses in the Lisbon Treaty is that understanding of the EU within the House of Commons will improve. This is because a vote on the Floor of the House will be required to trigger the yellow and orange card procedures, and the appeal to the European Court of Justice.

8. The National Parliament under the Lisbon Treaty and Beyond

8.1 Considering that legislation in the field of Justice and Home Affairs comes to be an ever more vital aspect of the development of European

integration, are there any concepts or proposals for a more intense influence of the national parliament on these matters?

8.1.1 The provisions applying to the UK and Ireland on opting into legislation under Title V of the Lisbon Treaty – "Freedom, Security and Justice" – will require an additional scrutiny Resolution in both Houses of Parliament. This is because the procedure for opting into legislation under Title V is distinct: under a Protocol to the Lisbon Treaty the UK and Ireland cannot be bound by legislation under this Title unless they have notified the Commission of their willingness to opt into it (a previous Protocol had applied on similar terms to legislation under Title IV of the EC Treaty). The decision subject to scrutiny is not therefore a Minister's decision in the Council in Brussels, but one taken in Whitehall and then communicated to Brussels.

8.1.2 In 2008, the then Leader of the House of Lords, Baroness Ashton, gave the following undertakings to both Houses of Parliament in relation to this area of EU legislation. Most important of these was the undertaking not to decide whether to opt into legislation until an eight week period for Parliamentary scrutiny had elapsed.

- "To table a report in Parliament each year and make it available for debate, both looking ahead to the Government's approach to EU Justice and Home Affairs policy and forthcoming dossiers, including in relation to the opt-in and providing a retrospective annual report on the UK's application of the opt-in Protocol;

- "To place an Explanatory Memorandum (EM) before Parliament as swiftly as possible following publication of the proposal and no later than ten working days after publication of the proposal. That EM would set out the main features of the proposal, as now, and, in particular, to the extent possible, an indication of the Government's views as to whether or not it would opt-in. Where the Government is in a position to provide them at that stage, the EM will also cover the factors affecting the decision. The European Scrutiny Committees of the two Houses will then be able to fully review the proposal and, where it has been possible to give a view, the Government's approach to the opt-in;

- "Provided that any such views are forthcoming within 8 weeks of publication, to take into account any opinions of the Committees with regard to whether or not the UK should opt-in;

- "The Committees, as with all proposals, can call a Minister to give evidence and can make a report to the House if they wish with a recommendation for debate, on a motion that would be amendable (other debates in the Lords to take note of Committee reports are not usually amended).

- "For the Commons, such a debate would usually be in Committee. In the Lords, where a Committee determines that a decision on whether or not to opt-in to a measure should be debated, the Government will undertake to seek to arrange a debate through the usual channels.

- "As a general rule, except where an earlier opt-in decision is necessary, not to override the scrutiny process, by making any formal notification to the Council of a decision to opt-in within the first 8 weeks following publication of a proposal.

- "Where the Government considers an early opt-in to be essential, it will explain its reasons to the Committee as soon as is possible. The Government will continue to keep the Committees fully informed as negotiations develop;

- "To ensure that a Minister is regularly available to appear before the Scrutiny Committees in advance of every Justice and Home Affairs Council.

8.1.3 "This package of measures will be reflected in a Code of Practice, to be agreed with the Scrutiny Committees, setting out the Government's commitment to effective scrutiny. The Government believes that the Scrutiny Reserve Resolution should also be amended, or a new resolution brought forward, to incorporate these commitments. This will be reviewed three years after the entry into force of the Treaty to ensure that the enhanced scrutiny measures are working effectively. We believe that this package, in addition to the strengthened role for national parliaments in the Treaty, strikes the right balance between ensuring that the Government can exercise the opt-in effectively within the Treaty deadline, whilst ensuring that Parliament's views are fully considered."

8.1.4 In addition, in January 2009 the Government responded to the ESC's conclusions on opt-in decisions in its Report on subsidiairity[22] as follows:

- "We will continue to do our utmost to ensure that Explanatory Memoranda are submitted within 10 days of deposit of documents.

- "We will endeavour to include in the EM a list of factors that we expect to take into account when coming to an opt-in decision, and where possible an indication as to whether we expect to opt in.

- "We are content to take the views of the Committee into account in the case of Title IV TEC opt-in decisions if they are forthcoming within 8 weeks of the publication of proposals, and therefore not to opt-in within that 8 week period unless it is essential. The final decision as to whether to opt in will of course rest with Ministers.

- "We are content to be flexible regarding making time available for debates on policy on which opt in decisions will need to be made, if the Committees recommend such questions for debate. However, this will only be possible if there is early, informal communication with the Clerks to the Committees to forewarn us when a debate might be desirable, and on the condition that the 8 week period for giving a view on the opt-in decision cannot be extended even if it proves impossible to hold a debate before that deadline.

[22] HC 197, First Special Report of Session 2008-09: *Government's Response to the Committee's Thirty-third Report of Session 2007-08*

8.1.5 Discussions are taking place with the Government on how these undertakings will be implemented. The ESC has also recommended that the eight-week scrutiny period apply to Government decisions to opt into not only draft legislation but also legislation that has been adopted in the Council[23].

8.1.6 The Standing Order and Scrutiny Reserve Resolution, revised to take account of the changes to EU legislative procedure introduced by the Lisbon Treaty, will apply uniformly to all other EU documents.

8.2 What kind of conditions should be met to make national parliaments more influential in setting the agenda of the European Union?

8.2.1 The essential ingredients for effective Parliamentary scrutiny are set out at 3.8 above.

8.2.2 The ESC sees its objectives as improving democratic oversight of draft legislation under negotiation in the EU, and increasing transparency and Parliamentary awareness of the conduct of European business. It does not see, however, how the legislatures of the EU can in reality "set the agenda" of the EU: the EU institutions are not constitutionally accountable to national parliaments. It trusts, however, that by giving its views to the Government on EU documents that are deposited it will influence the approach of the UK to the EU, and that is its third objective.

8.2.3 There is no doubt, though, that the sending of reasoned opinions to the concerned EU institutions will focus minds on the meaning of subsidiarity and the sensitivities of national or regional electorates. It is therefore vital that, firstly, each national parliament has in place an effective mechanism for sending reason opinions in the eight-week time frame; and secondly, that national parliaments cooperate more closely by taking greater advantage of the COSAC network.

8.3 Is there any discussion concerning the possibility of the model of parliament evolving from one of a rather reactive towards a more policy-formulating body?

8.3.1 None at the moment.

[23]The "Freedom Security and Justice" Protocol to the Lisbon Treaty allows the UK and Ireland to decide to opt into legislation within three months after it has been published and before it is adopted, or any time after it has been adopted.

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UK National Rapporteur: Topic 1

December 2009

ANNEX

Orders of reference of the European Scrutiny Committee (S.O. No. 143)

143.—

(1) There shall be a select committee, to be called the European Scrutiny Committee, to examine European Union documents and—
(a) to report its opinion on the legal and political importance of each such document and, where it considers appropriate, to report also on the reasons for its opinion and on any matters of principle, policy or law which may be affected;
(b) to make recommendations for the further consideration of any such document pursuant to Standing Order No.119 (European Standing Committees); and
(c) to consider any issue arising upon any such document or group of documents, or related matters.

The expression 'European Union document' in this order and in Standing Orders No. 16 (Proceedings under an Act or on European Union documents), No. 89 (Procedure in standing committees) and No. 119 (European Standing Committees) means—
(i) any proposal under the Community Treaties for legislation by the Council or the Council acting jointly with the European Parliament;
(ii) any document which is published for submission to the European Council, the Council or the European Central Bank;
(iii) any proposal for a common strategy, a joint action or a common position under Title V of the Treaty on European Union which is prepared for submission to the Council or to the European Council;
(iv) any proposal for a common position, framework decision, decision or a convention under Title VI of the Treaty on European Union which is prepared for submission to the Council;
(v) any document (not falling within (ii), (iii) or (iv) above) which is published by one Union institution for or with a view to submission to another Union institution and which does not relate exclusively to consideration of any proposal for legislation;
(vi) any other document relating to European Union matters deposited in the House by a Minister of the Crown.

(2) The committee shall consist of sixteen members.

(3) The committee and any sub-committee appointed by it shall have the assistance of the Counsel to the Speaker.

(4) The committee shall have power to appoint specialist advisers either to supply information which is not readily available or to elucidate matters of complexity within the committee's order of reference.

(5) The committee shall have power to send for persons, papers and records, to sit notwithstanding any adjournment of the House, to adjourn from place to place, and to report from time to time.

(6) The quorum of the committee shall be five.

(7) The committee shall have power to appoint sub-committees and to refer to such subcommittees any of the matters referred to the committee.

(8) Every such sub-committee shall have power to send for persons, papers and records, to sit notwithstanding any adjournment of the House, to adjourn from place to place, and to report to the committee from time to time.

(9) The committee shall have power to report from time to time the minutes of evidence taken before such sub-committees.

(10) The quorum of every such sub-committee shall be two.

(11) The committee shall have power to seek from any committee specified in paragraph (12) of this order its opinion on any European Union document, and to require a reply to such a request within such time as it may specify.

(12) The committees specified for the purposes of this order are those appointed under Standing Order No. 152 (Select committees related to government departments) including any subcommittees of such committees, the Select Committee on Public Administration, the Committee of Public Accounts, and the Environmental Audit Committee.

(13) Unless the House otherwise orders, each Member nominated to the committee shall continue to be a member of it for the remainder of the Parliament.

Resolution of the House of 17 November 1998 (The scrutiny reserve resolution)

Resolved, That

(1) No Minister of the Crown should give agreement in the Council or in the European Council to any proposal for European Community legislation or for a common strategy, joint action or common position under Title V or a common position, framework decision, decision or convention under Title VI of the Treaty on European Union:—
(a) which is still subject to scrutiny (that is, on which the European Scrutiny Committee has not completed its scrutiny) or
(b) which is awaiting consideration by the House (that is, which has been recommended by the European Scrutiny Committee for consideration pursuant to Standing Order No.119 (European Standing Committees) but in respect of which the House has not come to a Resolution).

(2) In this Resolution, any reference to agreement to a proposal includes—
(a) agreement to a programme, plan or recommendation for European Community legislation;
(b) political agreement;
(c) in the case of a proposal on which the Council acts in accordance with the procedure referred to in Article 251 of the Treaty of Rome (co-decision), agreement to a common position, to an act in the form of a common position incorporating amendments proposed by the European Parliament, and to a joint text; and
(d) in the case of a proposal on which the Council acts in accordance with the procedure referred to in Article 252 of the Treaty of Rome (co-operation), agreement to a common position.

(3) The Minister concerned may, however, give agreement—
(a) to a proposal which is still subject to scrutiny if he considers that it is confidential, routine or trivial or is substantially the same as a proposal on which scrutiny has been completed;
(b) to a proposal which is awaiting consideration by the House if the European Scrutiny Committee has indicated that agreement need not be withheld pending consideration.

(4) The Minister concerned may also give agreement to a proposal which is still subject to scrutiny or awaiting consideration by the House if he decides that for special reasons agreement should be given; but he should explain his reasons—
(a) in every such case, to the European Scrutiny Committee at the first opportunity after reaching his decision; and
(b) in the case of a proposal awaiting consideration by the House, to the House at the first opportunity after giving agreement.

(5) In relation to any proposal which requires adoption by unanimity, abstention shall, for the purposes of paragraph (4), be treated as giving agreement