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# The UK Parliament and European Business

This paper looks at the way in which the UK Parliament currently scrutinises and monitors EU legislative proposals and other EU business. It also considers recent Government and Select Committee proposals for reforming the UK's European scrutiny system. Finally, the paper considers how elements of the proposed European Constitution relating to the role of national parliaments in the EU might be implemented, even if the Constitution itself is not.

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## Summary of main points

- The EC Treaty underlines the importance of Member State involvement in EU matters by means of a Declaration and a Protocol on the role of national parliaments. In addition, there is a limitation on EU action and a presumption of Member State competence under the 'subsidiarity' article (Article 5 TEC). However, it is up to Member States to establish their own mechanisms for scrutinising and monitoring EU business and to challenge the EU on subsidiarity grounds.
- The UK Parliament deals with EU business mainly by:
  - formal scrutiny by committees in both Houses
  - parliamentary debates
  - debates and exchanges following Government statements
  - parliamentary questions
- The European Scrutiny Committee (ESC) considers all EU documents and suggests whether further action is needed, based on their political or legal implications. It may recommend that a document be debated in Standing Committee or on the Floor of the House, or it may clear the document for scrutiny purposes. It may impose a "Scrutiny Reserve" on a document pending further information and/or consideration, which would normally constrain the Government from adopting the proposal in the Council.
- In 2004 the Foreign Secretary announced that the EU scrutiny procedure would be reformed. The then leader of the House, Peter Hain, and the ESC put forward proposals and the Modernisation Committee took evidence from the ESC, MPs, MEPs and others in five sessions in 2004.
- Reform proposals on the scrutiny of documents centred on what should happen after the ESC had identified the significant texts. The ESC recommended that:
  - the motion in the House should be the same as that passed in Standing Committee (for which there is no requirement at present)
  - there should be five European Standing Committees rather than three, with closer links to the ESC and a more corporate existence
  - longer debates are needed on the Floor of the House and in Westminster Hall
  - Departmental Select Committees (DSCs) should be more involved
  - the ESC would benefit from advice from outside organisations
  - the ESC should be allowed to deliberate in public.
- The Modernisation Committee reported on 22 March 2005. Its main recommendations were:
  - a new parliamentary forum for discussing EU business: a European Committee including MPs, Peers and MEPs four times a year to debate

major EU issues and to question EU Commissioners on significant policy issues.

- Scrutiny of EU legislation should begin earlier, with the Government giving advance notice to ESC of Commission consultation exercises.
  - A greater role for DSCs in scrutiny; and ESC should pass to them some matters for further inquiry.
  - Five standing committees instead of three, to allow greater specialisation, with a permanent Chairmen and greater powers to shape motions the Government subsequently puts to the House.
  - The Scrutiny Committee should be able to meet in public when it is considering which EU documents to refer for further debate.
- Some of the recommendations took account of new requirements contained in the proposed *Treaty Establishing a Constitution for Europe*. This would introduce, by means of new protocols on the role of national parliaments and subsidiarity and proportionality, additional requirements for the EU institutions to inform Member States and a new procedure by which national parliaments might intervene in the legislative process. The question now is what reforms will be implemented in the UK, in spite of the suspension of the Constitution ratification process.
  - The following acronyms are used in this paper:
    - EU                    European Union (also used to describe European law)
    - EC                    European Community
    - TEC                  Treaty Establishing the European Communities
    - TEU                  Treaty on European Union
    - ESC                  European Scrutiny Committee
    - FAC                  Foreign Affairs Committee
    - DSC                  Departmental Select Committee



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## I Introduction

The UK Parliament has a role in scrutinising EU draft legislation and other EU documents, in implementing EU legislation and treaties, and in holding the Government to account on its EU policies and negotiating positions in the EU institutions.

The processes for scrutinising EU legislation have changed since the UK joined the European Economic Community (EEC) in 1973. In 1972 a select committee, chaired by Sir John Foster, was appointed “to consider procedures for scrutiny of proposals for European Community Secondary Legislation” The Committee published two reports (HC 143 and HC 463, 1972-73), which made a number of recommendations as to how the House of Commons might be kept informed of developments in the EEC and how it might develop machinery for the scrutiny of legislative proposals. The scrutiny system was essentially based on the reports of this Committee until 1989.

In 1989 the Commons Select Committee on Procedure undertook an enquiry into the effectiveness of that system, particularly in the light of changes in the European legislative processes brought about by the Single European Act and the increasing volume of legislation emerging from the EEC. In its Response (Cm 1081), the Government accepted many of the Procedure Committee’s recommendations.<sup>1</sup> After agreement by the House, changes to the scrutiny system were put into effect from the beginning of the 1990-91 session.

The *Treaty on European Union* (Maastricht Treaty or TEU), which came into force in November 1993, brought about further institutional, political and economic changes, including an increase in the areas of Community activity and changes in the European legislative process. These gave rise to a review of the scrutiny system in 1997-98 by the Select Committee on Modernisation of the House. Recommendations in its Report (HC 791, 1997-98) were implemented in November 1998 and remain largely to this day.

The increasing influence of the EU on the Member State legislatures has given rise to more EU proposals and more documentation. Both the Government and parliamentary committees have expressed the view that the present methods for monitoring and scrutinising EU business have had difficulties keeping pace with EU developments. In 2004-5 the Modernisation Committee again looked into the impact of the EU on the UK Parliament, with a view to changing the way Parliament deals with European matters.<sup>2</sup>

The Committee considered a range of issues, including the delivery of EU documents, the European Standing Committee procedures, and the possibility of a new EU committee. It also identified reforms that would take account of the *Treaty Establishing a Constitution for Europe* (hereafter referred to as the “European Constitution”), as and

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<sup>1</sup> HC 622, 1988-89

<sup>2</sup> *Scrutiny of European Business*, HC 465-I and II, 2004-05, 22 March 2005 at <http://www.publications.parliament.uk/pa/cm200405/cmselect/cmmodern/465/46502.htm>

when it came into force. The recommendations would represent a major overhaul of the ways in which the House examines EU business.<sup>3</sup>

## II The EC Treaties and National Parliaments

### A. The present Treaty

#### 1. Role of National Parliaments

Declaration 13, annexed to the TEU, and Protocol 13, annexed to the *Treaty of Amsterdam*,<sup>4</sup> both attempted to involve national parliaments to a greater extent in EU matters. Declaration 13 states:

The Conference considers that it is important to encourage greater involvement of national parliaments in the activities of the European Union.

To this end, the exchange of information between national parliaments and the European Parliament should be stepped up. In this context, the governments of the Member States will ensure, inter alia, that national parliaments receive Commission proposals for legislation in good time for information or possible examination.

Similarly, the Conference considers that it is important for contacts between the national parliaments and the European Parliament to be stepped up, in particular through the granting of appropriate reciprocal facilities and regular meetings between members of parliament interested in the same issues.<sup>5</sup>

Protocol 13 sets out the procedures by which the EU must communicate with Member State governments, so that they can better inform their national parliaments.

1. All Commission consultation documents (green and white papers and communications) shall be promptly forwarded to national parliaments of the Member States.

2. Commission proposals for legislation as defined by the Council in accordance with Article 207(3) of the Treaty establishing the European Community, shall be made available in good time so that the government of each Member State may ensure that its own national parliament receives them as appropriate.

3. A six-week period shall elapse between a legislative proposal or a proposal for a measure to be adopted under Title VI of the Treaty on European Union being made available in all languages to the European Parliament and the Council by the Commission and the date when it is placed on a Council agenda for decision either for the adoption of an act or for adoption of a common position pursuant to

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<sup>3</sup> The Committee's recommendations are considered briefly in Research Paper 05/46, *Modernisation of the House of Commons 1997-2005*, 14 June 2005, at <http://hcl1.hclibrary.parliament.uk/rp2005/rp05-046.pdf>

<sup>4</sup> Came into force on 1 May 1999

<sup>5</sup> <http://europa.eu.int/eur-lex/en/treaties/selected/livre435.html>

Article 251 or 252 of the Treaty establishing the European Community, subject to exceptions on grounds of urgency, the reasons for which shall be stated in the act or common position.<sup>6</sup>

The Amsterdam Protocol also gave the Conference of European Affairs Committees (COSAC) a higher profile:

4. The Conference of European Affairs Committees, hereinafter referred to as COSAC, established in Paris on 16-17 November 1989, may make any contribution it deems appropriate for the attention of the institutions of the European Union, in particular on the basis of draft legal texts which representatives of governments of the Member States may decide by common accord to forward to it, in view of the nature of their subject matter.

5. COSAC may examine any legislative proposal or initiative in relation to the establishment of an area of freedom, security and justice which might have a direct bearing on the rights and freedoms of individuals. The European Parliament, the Council and the Commission shall be informed of any contribution made by COSAC under this point.

6. COSAC may address to the European Parliament, the Council and the Commission any contribution which it deems appropriate on the legislative activities of the Union, notably in relation to the application of the principle of subsidiarity, the area of freedom, security and justice as well as questions regarding fundamental rights.

7. Contributions made by COSAC shall in no way bind national parliaments or prejudice their position.<sup>7</sup>

Declaration 23, annexed to the *Treaty of Nice*,<sup>8</sup> which was signed in December 2000, invited national parliaments to participate in a debate on the future of the Union, and the *Laeken Declaration* of 15 December 2001 proposed that the debate should include specific questions about the role of national parliaments.<sup>9</sup> The following year the Convention on the Future of Europe was established to carry forward the Laeken Declaration.

## 2. Subsidiarity

Article 5 of the EC Treaty<sup>10</sup> concerns the principle of 'subsidiarity'.<sup>11</sup> This principle applies to the EU's law-making institutions, imposing a limit on EU action, an assessment of whether the EU should act in areas which do not fall within its exclusive competence, and an evaluation of the intensity or nature of any EU action. Article 5 states:

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<sup>6</sup> <http://europa.eu.int/eur-lex/en/treaties/selected/livre305.html>

<sup>7</sup> Ibid

<sup>8</sup> Came into force 1 February 2003

<sup>9</sup> <http://ue.eu.int/en/Info/eurocouncil/index.htm>

<sup>10</sup> Old Article 3b, introduced in the TEU in 1993

<sup>11</sup> Subsidiarity is discussed in more detail in Research Notes 92/70 and 92/90, Research Paper 93/26, *The Maastricht Debate: Further Developments on Subsidiarity* and Research Paper 95/36, *Progress in the Implementation of Subsidiarity Research Paper*.

In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.<sup>12</sup>

The Commission is obliged to include a subsidiarity assessment in its draft legislative proposals. However, the principle has remained elusive and there have been criticisms concerning its reliability, effectiveness and justiciability.

The British Government includes a subsidiarity assessment in its Explanatory Memorandums on EU documents submitted to the European Scrutiny Committee (ESC).

### **III How Parliament currently deals with EU business**

This section provides an overview of the ways in which the UK Parliament currently debates, monitors and scrutinises EU legislation, EU policies and other European business.<sup>13</sup>

#### **A. EU Scrutiny in parliamentary committees**

##### **1. The Commons European Scrutiny Committee**

In the House of Commons it is the European Scrutiny Committee (ESC) and the Foreign Affairs Committee (FAC), and in the House of Lords the European Union Committee, that are most concerned with European matters. Departmental Select Committees (DSCs) are also involved in discussing European policy and legislation in so far as they affect their subject areas.

The ESC's current terms of reference are set out in Standing Order No 143, which states:

- (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

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<sup>12</sup> OJC 325, 24 December 2002 p. 42

<sup>13</sup> A detailed account of scrutiny procedures can be found in the Commons and Lords Scrutiny Committee guides at <http://www.parliament.uk/documents/upload/ESC%20GreenGuide.pdf> and <http://www.parliament.uk/documents/upload/HofLBpEULeg.pdf> respectively.

- (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 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;
- any document which is published for submission to the European Council, the Council or the European Central Bank;
- (iii) any proposal to define a common position or for joint action under Title V of the Treaty on European Union which is prepared for submission to the Council;
- (iv) any proposal for a joint position, joint action or a convention under Title VI of the Treaty on European Union which is prepared for submission to the Council;
- 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.

The ESC receives copies of Commission proposals and all other EU documents, together with an Explanatory Memorandum (EM) prepared by the relevant Government Department. The EM provides information about the general effect of the document, its financial, legal and policy implications, and any further relevant information, such as whether the document is awaiting further consideration by other EU bodies. In the case of fast-moving proposals for which a formal Commission proposal to the Council is not yet available, Government departments often produce an un-numbered EM which looks at the likely contents. The ESC considers these at its weekly meetings when the House is sitting. It then publishes a report on the documents considered, highlighting any which it considers raise questions of legal and/or political importance, and any recommendations for further consideration by the House. It may also call witnesses, including ministers, to give oral or written evidence.

This is essentially a sifting process, rather than a deliberative one, and there is little time for a discussion of the merits of a proposal. The ESC Chairman, Jimmy Hood, summarised the scrutiny process as follows:

When we come to our weekly meeting on a Wednesday, [...], we can have a pile about this high, 30 or 40 documents to look at. What we have with each document is an A4 paper from our adviser telling us the treaty base, whether it is legally or politically important or not, what it seeks to do, maybe some brief history on it and then there is a recommendation on whether it has been looked at and can be cleared or whether it is politically or legally important and it has to be further scrutinised, whether to hold it back and get fuller information (that is

sending it to departments for further information, the Cabinet Office, etc). With the other information it will then come back to us and the recommendation will either be to go to debate because it is legally or politically important, or even then we get some recommendations that the information is not satisfactory and we should despatch a request for a bit more information and then we will make a decision to hold it back again to get the information, and then eventually we make the recommendation. It may go to debate and when it goes to debate then is it cleared from our scrutiny process. It is then in the hands of Parliament, for the Standing Committees or on the Floor of the House.<sup>14</sup>

## 2. Debates in European Standing Committees

The ESC may recommend a draft proposal of political or legal importance for debate in one of three European Standing Committees set up under Standing Order No. 119, or on the Floor of the House. When the Committee recommends a draft for debate in Standing Committee, there is an obligation for this to take place. The Government is not obliged to follow the recommendation for a debate in the Chamber, although there would be considerable pressure for such a debate if the subject matter were controversial.

In making its recommendations for further consideration, the ESC specifies the Committee to which that document should be referred.<sup>15</sup> The Chairman of a Committee may allow a Government Minister to make a statement and to answer questions from Members for up to one hour, or for a further half hour at the Chairman's discretion. The Committee may then debate the motion before it for up to 1½ hours. Any Member of Parliament, not just Standing Committee members, may take part in the Committee's proceedings and move amendments to motions, but only members may vote and be counted in the quorum (three, excluding the Chairman).

The Chairman reports to the House any resolution to which the Committee has come, or that it has come to no resolution. A motion drawn up in similar terms is then usually moved in the House a few days later by a Government whip in the name of the minister who took part in the debate, or the Secretary of State for that Department. This is a purely formal part of the proceedings and there is no further debate on the document.

The ESC may decide that an EU document would be relevant to a particular debate, even if that debate is not on European matters. In this case a 'tagged' document appears on the Order Paper in italics below the motion for debate, and the European dimension of a policy is thus debated in a range of areas.

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<sup>14</sup> Modernisation Committee Minutes of Evidence 5 May 2004 at <http://www.parliament.the-stationery-office.co.uk/pa/cm200304/cmselect/cmmodern/565/4050504.htm>

<sup>15</sup> European Standing Committees A, B and C have not so far been nominated in the 2005 Parliament. Instead, the House made an order on 7 July 2005 allowing the Committee of Selection to nominate *ad hoc* committees for each document (or group of documents) referred. The procedure is otherwise the same.

### 3. The Scrutiny Reserve Resolution

The Scrutiny Reserve Resolution of 17 November 1998<sup>16</sup> is an important element in the scrutiny process. The Modernisation Committee Report on the Scrutiny of European Business described the remit of the Resolution as follows:

21. The Commons European scrutiny system is primarily document-based. It is underpinned by the Scrutiny Reserve Resolution, which provides that no Minister may agree in the Council of Ministers or the European Council to a proposal which is still 'subject to scrutiny'. This means either that the European Scrutiny Committee has not completed its scrutiny of the relevant document or that the document is awaiting debate. There have been various versions of the Resolution since 1980, subsequent amendments having been introduced to extend the scope of scrutiny and to take account of Treaty changes.<sup>17</sup>

The Resolution does not mandate the Government to act in a particular way, but it constrains Ministers from giving agreement in the Council of Ministers to legislative proposals, decisions relating to the Common Foreign and Security Policy or cooperation in justice and home affairs, which the Committee has not cleared (i.e. the Committee has not finished its consideration, has requested further information from the Government, or has recommended further debate). If the Committee recommends a document for debate, it does not count as cleared until the debate has taken place and the House has come to a resolution about the document.

There are certain circumstances, such as urgency or because the House is not sitting, when the Government might agree to a proposal in the Council without the document having been cleared, and the Government publishes a six-monthly account of all scrutiny reserve overrides, giving the reasons for its action in each case.

### 4. Pre- and post-Council of Ministers scrutiny

When the ESC receives the annotated agenda for Council meetings from the relevant Government Department with a note on the UK's position, the Committee examines the agenda and decides whether to apply pre-Council scrutiny. It may then take oral evidence from the Minister who will represent the UK at that Council or from departmental officials, or it may ask the Government for a memorandum on particular points. When the outcome of a particular Council is known, the ESC may take oral evidence from the Minister on the position he/she took in the negotiations, or on the implications for the UK of the decisions reached by that Council.

These evidence sessions are held in public and a full transcript is published later. The Committee also receives a written report on each Council by means of a Parliamentary Question tabled by the Chairman.

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<sup>16</sup> See Modernisation Committee Second Report, Scrutiny of European Business, 16 March 2005 at <http://www.publications.parliament.uk/pa/cm200405/cmselect/cmmodern/465/46507.htm>

<sup>17</sup> Modernisation Committee Second Report at <http://www.publications.parliament.uk/pa/cm200405/cmselect/cmmodern/465/46504.htm#a8>

## **5. ESC relations with other committees and external bodies**

Over time, the ESC has developed closer links with other national parliaments and the European Parliament, partly through the meeting of European Affairs Committees in the EU Member States (COSAC). The ESC meets informally with the Lords EU Committee, UK MEPs and DSC chairmen roughly every six months.

## **6. The House of Lords European Legislation Select Committee**

The Lords the European Legislation Select Committee also examines proposals and decides whether they require further parliamentary attention. It produces brief reports on fewer EU documents than the Commons Committee. Its general practice is to conduct detailed enquiries based on particular proposals or subject areas (e.g. fraud, EMU, 'comitology', third pillar matters, the European Constitution), selected on the basis of their general importance, and to report either for information or with recommendations for debate in the Lords. Much of its work is conducted through sub-committees dealing with particular policy areas. The Commons and Lords Committees complement one another and there is close co-ordination between the two. They have powers to confer and to meet concurrently in certain circumstances, but these powers are rarely exercised formally.

## **B. Parliamentary debates on EU matters**

### **1. Legislative debates**

EC laws requiring primary legislation are the subject of bills and are debated and reported on accordingly. EC laws implemented by Statutory Instrument under Section 2(2) of the *European Communities Act (ECA)*<sup>18</sup> may be debated in Standing Committee.

Amendments to the EC Treaties, following the adoption by Member States of a new treaty (e.g. an accession treaty) or amendments to the *Treaty of Rome* (e.g. the Single European Act, the Maastricht, Amsterdam and Nice Treaties), must be authorised by amendments to the *European Communities Act 1972*. European Communities (Amendment) Bills go through all the usual parliamentary stages of a bill.

Primary legislation in the form of a "European Communities (Finance) Act" is needed to give effect to any new "Own Resources Decision", which amends arrangements for financing the Community budget, including the UK abatement mechanism.

### **2. Non-legislative debates**

Non-legislative debates on EU policies (e.g. the Common Agricultural Policy, fisheries, environment) are initiated by the Government or the Opposition, or take the form of adjournment debates. End-of-day adjournment debates may be devoted to the EU, as

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<sup>18</sup> This Section confers authority on ministers, Government Departments or Her Majesty in Council to make, with certain exceptions contained in Schedule 2 of the Act, subordinate legislation.

can adjournment debates in Westminster Hall. Any of these might end with a division on a motion for the adjournment.

In the Lords there are debates on a motion to take note of reports of the EU Committee, whereas in the Commons, the European Scrutiny and Foreign Affairs Committee reports are not routinely debated on the Floor of the House.

There is a European Affairs debate before each six-monthly end-of-Presidency European Council, although not generally before the spring and autumn summits. The Prime Minister makes a Statement to the House (which is repeated in the Lords, normally by the Lord Privy Seal) on every European Council, including the informal ones. The Prime Minister's statements are followed by an exchange of views and further questioning.

In addition, the *European Communities (Amendment) Act 1993* (to implement Maastricht) requires under Section 5 that:

Before submitting the information required in implementing Article 103(3) of the Treaty...[the] Government shall report to Parliament for its approval an assessment of the medium term economic and budgetary position in relation to public investment expenditure and to the social, economic and environment goals set out in Article 2, which report shall form the basis of any submission to the Council and Commission in pursuit of their responsibilities under Articles 103 and 104c.<sup>19</sup>

In accordance with this requirement, the Government presents to Parliament the fiscal plans outlined in the Budget Red Book and in the pre- Budget Report, normally on a 'take note' motion. In recent years this debate has usually taken place in a Standing Committee on Delegated Legislation on a motion that the Committee has considered the Government's assessment.

## C. EU questions

The Foreign and Commonwealth Office (FCO) is the lead Government Department for EU affairs. The Foreign Secretary or the Minister for Europe makes statements and answers parliamentary questions on the EU. There is no allotted time for EU questions, which are answered with other foreign affairs questions. FCO oral questions are answered by a Minister for about an hour roughly once a month, while written questions are answered much more frequently. EU matters are not usually subject to confidentiality rules.

Until 1985 there was a 20-minute slot for European questions in the Commons, but it was abolished, largely as a result of the great number of Points of Order complaining about the lack of time in the remaining 35 minutes for questions on non-EU subjects.

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<sup>19</sup> Maastricht imposed various requirements and tests upon States for achieving Economic and Monetary Union, the most well-known of which is the convergence test. During the passage of the Bill relating to the TEU, clauses designed to enhance the role of the UK Parliament in the decision-making process were added. Section 5 of the Act fulfils this purpose.

The Select Committee on Procedure looked at the possibility of reinstating the EU slot in its inquiry on *The Scrutiny of European Legislation* in 1989. Paragraphs 32-33 of the Memorandum submitted by the then Select Committee on European Legislation to the Procedure Committee stated that questions, particularly oral questions, provided a “valuable opportunity for any Member to hold Ministers to account for their Community responsibilities and activities” and that “there would be some advantage in providing a degree of certainty that Community matters will be raised in the course of oral questions to Ministers with significant European responsibilities, and thus stimulating questions on these important matters”.<sup>20</sup> The Memorandum continued:

32. The Committee would therefore like to see restoration of the Community ‘slot’ to FCO questions. Although individual proposals can be raised in questions to the relevant departmental Minister, the Committee takes the view that the present arrangements do not permit proper questioning on the over-sight and co-ordinating functions of the FCO on Community matters. It therefore suggests an experimental restoration of the ‘slot’, with a duration of at least 10 minutes initially.

33. The DTI has substantial Community responsibilities, not least as regards the Single Market. The Committee would therefore likewise welcome inclusion of a specific Community ‘slot’ in DTI oral questions. Like the restoration of the FCO slot, this could be experimental, and of similar duration.<sup>21</sup>

In the evidence session on 17 May 1989, the then Leader of the House, John Wakeham, was very doubtful whether the reinstatement of a European question time “would improve matters”. “We did do it, there was a demand to change, and there is not much of a demand that I can recognise to change back to the old system”.<sup>22</sup> He continued:

The particular difficulty, it seems to me, in changing back is that, again, so many of the issues are partly EC issues and partly national issues. For example, I have already mentioned the questions of Home Office and frontier controls. Is that an EC issue or is it a national issue” The Home Secretary would want to answer a question to do with frontier controls, even though there were EC implications. Take the movement of livestock across borders. The Minister of Agriculture would want to report to the House and to answer questions on those matters for which he has responsibilities, and it may well be that EC regulations are very much involved. So I see some practical difficulties in the separate slot in Foreign Office questions. If you look at the Order Paper now, it is very doubtful whether it would fill up a very large part of the time. But if you then look at the other questions which are not specifically asked about EC matters and say “Is there a European content to that subject?”, then in many cases you can identify some European content in a question which is not specifically a European question.

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<sup>20</sup> Memorandum submitted by the Select Committee on European Legislation to the Procedure Committee Fourth Report, *The Scrutiny of European Legislation*, Vol II, 1988-89, Minutes of Evidence, 24 May 1989

<sup>21</sup> Ibid

<sup>22</sup> Fourth Report Vol II, Q 86

The Procedure Committee's Report stated in paragraph 52 that:

On balance, we do not believe that the case is made out for the reintroduction of a reserved period for oral questions on Community affairs. We have received no evidence to suggest that questions on these matters are regularly crowded out of FCO questions. Nor are we persuaded that the relatively limited category of Community-related questions which can be asked of the Foreign Secretary within the rules of order<sup>23</sup> is of such pre-eminent importance as to justify special treatment, when set against the competing claims of other aspects of foreign policy. **We do not therefore recommend any change in the arrangements for questions on European Community affairs.**<sup>24</sup>

In its response to the Report, the Government accepted the Committee's recommendation that there should be no change in the arrangements on European Community affairs.<sup>25</sup> European legislation was debated on 28 June 1990 at c. 523 with reference to the Procedure Committee's Fourth Report and the Government's response.<sup>26</sup>

This issue was raised more recently in evidence to the Modernisation Committee in September 2004, in which the Clerk of the House, Roger Sands, suggested that the question of European questions might be revisited:

**Q218 Mr Pike:** You will recall that a few years ago as well as Scrutiny Committees we did have a session of questions specifically on European questions. At the moment European questions take pot luck in the general Foreign Office questions and it may be that not a single European question is lucky in the draw. Would you think that Europe is now so important that perhaps we should go back to having a session of questions specifically on European matters?

**Mr Sands:** I certainly think it is worth considering. I do not think it is for me to make a firm recommendation as to how question time is parcelled up, but I can certainly recognise that that is an option. The danger is the one that I mention at the bottom of the first page of the memorandum, the phenomenon that most large scale debates—and it is not just debates it is other proceedings—in relation to Europe tend to become generalised and end up sounding much the same. There is, I think, a danger that a European questions slot would just be monopolised by a handful of enthusiasts in this area, if I can put it that way.<sup>27</sup>

## D. Government White Papers

In a statement in February 2004, the Foreign Secretary outlined the ways in which the Government had kept Parliament informed about European developments, and how it would continue to do so:

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<sup>23</sup> Questions engaging the responsibility of other Departments, such as those dealing with individual items of Community legislation will either be disallowed by the Table Office or subsequently transferred.

<sup>24</sup> Procedure Committee Fourth Report 1988-89, Vol I para 52

<sup>25</sup> Cm 1081, May 1990, p4

<sup>26</sup> <http://www.parliament.the-stationery-office.co.uk/pa/cm198990/cmhansrd/1990-06-28/Debate-3.html>

<sup>27</sup> Modernisation Committee Minutes of evidence, 15 September 2004 at <http://www.parliament.the-stationery-office.co.uk/pa/cm200304/cmselect/cmmodern/565/4091503.htm>

Together with my right hon. Friend the Leader of the House and other colleagues, I was concerned to ensure that there was regular and rigorous parliamentary discussion of the intergovernmental conference following the publication of the draft constitutional treaty last summer. We therefore laid a White Paper on the draft treaty before the House last September. Ministers and officials attended a total of 13 sessions with Committees in this House and the Lords on the Convention on the Future of Europe and the IGC, and responded to 16 Select Committee reports. From last May onwards, when the successive parts of the Convention text of the draft treaty were published, we had more than a dozen debates on EU issues on the Floors of both Houses and three sittings of the Standing Committee on the Intergovernmental Conference.

That parliamentary engagement in the IGC process helped to develop a better understanding of the issues at stake, and strengthened our negotiating position at the EU table. On energy, to take just one example, the strength of opinion in Parliament helped us to secure an acceptable amendment from the Italian EU presidency. This level of scrutiny and debate on the IGC should, in my view, become the norm for providing Parliament with the opportunity to oversee the work of the European Union and the British Government's role in it. (HC Deb 11 feb 2004-straw statement).

The Government's six-monthly retrospective White Papers called *Developments in the European Union* have been replaced with six-monthly forward-looking White Papers called *Prospects for the EU in [year]*, which are followed by an up-date on prospects in the second half of the year. They look at proposals for EU action in internal and external policy areas, institutional issues and Presidency milestones, and they provide a timetable of Council meetings. The most recent report, *Prospects for the EU in 2005* devotes a section to the UK Presidency.<sup>28</sup>

## E. Specially Appointed Standing Committees

### 1. Standing Committee on the Convention on the Future of Europe

The Convention on the Future of Europe was established under the *Laeken Declaration* in 2002 to discuss ways in which the EU could be reformed.<sup>29</sup> A motion to set up a Commons "Standing Committee on the Convention" was tabled on 24 May 2002 and the Committee was set up by an Order on 12 June 2002. It consisted of members nominated to the European Scrutiny and the Foreign Affairs Committees and the UK

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<sup>28</sup> Cm 6611 at [http://www.fco.gov.uk/Files/kfile/Prospects%20in%20the%20EU%202005\\_CM%206611.pdf](http://www.fco.gov.uk/Files/kfile/Prospects%20in%20the%20EU%202005_CM%206611.pdf). These reports can be accessed on the FCO website at <http://www.fco.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1007029393402>.

<sup>29</sup> For information on the aims and work of the Convention, see Library Research Paper 02/14, *The Laeken Declaration and the Convention on the Future of Europe*, at <http://hcl1.hclibrary.parliament.uk/rp2002/rp02-014.pdf>, 03/16, *The Convention on the Future of Europe: the deliberating phase* 14 February 2003 at <http://hcl1.hclibrary.parliament.uk/rp2003/rp03-016.pdf>, 03/23 *The Convention on the Future of Europe: proposals for a European Constitution*, 18 March 2003 at <http://hcl1.hclibrary.parliament.uk/rp2003/rp03-023.pdf>, 03/56, *The Convention on the Future of Europe: institutional reform* at <http://hcl1.hclibrary.parliament.uk/rp2003/rp03-056.pdf> and papers 03/58 and 03/60 on the draft treaty drawn up by the Convention

parliamentary representatives on the Convention, with the participation of Convention alternates from the House of Lords and other Peers.<sup>30</sup> The latter were invited to contribute fully to the Committee but had no voting rights.<sup>31</sup> Several Peers objected to not being included on an equal basis with Commons Members and to the lack of consultation between the two Houses.<sup>32</sup> The Lords motion on the Committee was agreed with some resistance. The new Committee met on 16 July<sup>33</sup> and 23 October 2002,<sup>34</sup> 12 February 2003,<sup>35</sup> 19 March 2003,<sup>36</sup> 7 May 2003,<sup>37</sup> and 16 June 2003.<sup>38</sup>

## 2. Standing Committee on the Intergovernmental Conference

On 9 September 2003 the Government announced that there would be a similar procedure to enable Parliament to scrutinise the work of the Intergovernmental Conference (IGC) launched to consider the Convention's draft constitutional text.<sup>39</sup> Mr Straw told the Commons during the debate on the White Paper:

Scrutiny will need to take place at three sets of levels. One of those levels should be Select Committees, including the one that my hon. Friend chairs. In some specific areas, I do not doubt that subject departmental Select Committees will wish to be involved in examining carefully how various drafts of the text are likely to operate. I anticipate that that will be the case especially in relation to foreign policy and defence. Secondly, there should be scrutiny on the Floor of the House, and thirdly in Standing Committee.<sup>40</sup>

The Lords debated the draft constitution on 17 September 2003 and Peers were anxious to have more involvement than they had been granted at the Standing Committee on the Convention. Lord Stoddart of Swindon asked for Peers to be treated equally with MPs.<sup>41</sup> The Liberal Democrat, Lord Maclennan of Rogart (a member of the Convention on the

<sup>30</sup> HC Deb 12 June 2002 c972, at:

[http://pubs1.tso.parliament.uk/pa/cm200102/cmhansrd/cm020612/debtext/20612-33.htm#20612-33\\_snew1](http://pubs1.tso.parliament.uk/pa/cm200102/cmhansrd/cm020612/debtext/20612-33.htm#20612-33_snew1). The membership was as follows: Chairman: Mr. Frank Cook. Donald Anderson, Colin Breed, Roger Casale, William Cash, David Chidgey, Michael Connarty, Sir Patrick Cormack, Tony Cunningham, Wayne David, Terry Davis, Jim Dobbin, Fabian Hamilton, David Heathcoat-Amory, Mark Hendrick, Jimmy Hood, Eric Illsley, Anne McIntosh, Andrew Mackinlay, John Maples, Jim Marshall, Bill Oler, Greg Pope, Angus Robertson, Sir John Stanley, Anthony Steen, Gisela Stuart, Bill Tynan, Angela Watkinson.

<sup>31</sup> They could not move Motions, vote or be counted as part of a quorum.

<sup>32</sup> HL Deb 24 June 2002 c1063-4

<sup>33</sup> See: <http://pubs1.tso.parliament.uk/pa/cm200102/cmstand/conven/st020716/20716s01.htm>.

<sup>34</sup> See: <http://pubs1.tso.parliament.uk/pa/cm200102/cmstand/conven/st021023/21023s01.htm>

<sup>35</sup> See: <http://www.publications.parliament.uk/pa/cm200203/cmstand/conven/st030212/30212s01.htm>

<sup>36</sup> See: <http://www.publications.parliament.uk/pa/cm200203/cmstand/conven/st030319/30319s01.htm>

<sup>37</sup> See: <http://www.publications.parliament.uk/pa/cm200203/cmstand/conven/st030507/30507s01.htm>

<sup>38</sup> See: <http://www.publications.parliament.uk/pa/cm200203/cmstand/conven/st030616/30616s01.htm>

<sup>39</sup> Following a proposal from Graham Allen, the Government also opened an Internet discussion forum on the FCO website, via

<http://www.fco.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1007029391674>.

<sup>40</sup> HC Deb 9 September 2003 c 179 at

<http://www.publications.parliament.uk/pa/cm200203/cmhansrd/cm030909/debtext/30909-08.htm>

<sup>41</sup> HL Deb 17 September 2003 c 913 at [http://www.parliament.the-stationery-office.co.uk/cgi-bin/ukparl\\_hl?DB=ukparl&STEMMER=en&WORDS=igc+stand+committe+&COLOUR=Red&STYLE=s&URL=/pa/ld199697/ldhansrd/pdvn/lds03/text/30917-05.htm#muscat\\_highlighter\\_first\\_match](http://www.parliament.the-stationery-office.co.uk/cgi-bin/ukparl_hl?DB=ukparl&STEMMER=en&WORDS=igc+stand+committe+&COLOUR=Red&STYLE=s&URL=/pa/ld199697/ldhansrd/pdvn/lds03/text/30917-05.htm#muscat_highlighter_first_match)

Future of Europe), suggested that Peers might constitute a part of the quorum.<sup>42</sup> However, it was decided that, as for the earlier Committee, Peers could attend and speak, but they could not vote, move motions or count towards the quorum.

The IGC Committee differed from the Convention Committee in that it involved questioning Ministers, rather than parliamentary representatives. It received written reports from Ministers and oral statements on which Ministers were questioned. It held general debates on written reports by ministers and also on specific subjects on the adjournment. The Committee met for a maximum of two-and-a-half hours; the Minister had up to one-and-a-half hours for his statement and to answer questions, followed by an adjournment debate. The Committee, chaired by Frank Cook, met on 20 October, 10 November and 1 December 2003.<sup>43</sup>

## IV Reforming Scrutiny of the EU

Although the Government believes that the ESC “does an admirable job in sifting the large number of European documents which come before it, alerting the House, and outside stakeholders, to those of significance”,<sup>44</sup> it has also acknowledged that the present methods for monitoring and scrutinising EU business need to be ‘modernised’, in order for Parliament to be better informed about EU proposals and developments. The Select Committee on Modernisation launched an inquiry into the *Scrutiny of European Business* in May 2004 and held five evidence sessions. The Modernisation Committee’s terms of reference were “to consider how the practices and procedures of the House should be modernised”.

This section looks at views on the present European scrutiny system, reform proposals submitted to the Modernisation Committee and the Committee’s recommendations.

### A. Government proposals for reform

#### 1. Foreign Secretary

On 11 February 2004 the Foreign Secretary, Jack Straw, made a statement to the Commons on Parliament and the EU:

First, [...], starting in April this year, then each January thereafter, the Government will lay before Parliament a White Paper looking at the year ahead for the EU's legislative and other activities. The paper will set out the Government's priorities in the light of the European Commission's legislative and work programme for the year ahead, as well as the operational programme for the forthcoming EU presidencies agreed each December by the European

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<sup>42</sup> Ibid

<sup>43</sup> Committee debates can be accessed at <http://www.publications.parliament.uk/pa/cm200304/cmstand/interg/cminterg.htm>

<sup>44</sup> Government Memorandum from the Leader of the House to the Select Committee on Modernisation, HC 465-I, 22 March 2005 at <http://www.publications.parliament.uk/pa/cm200304/cmselect/cmmodern/508/508m06.htm>

Council. At the same time, subject to your agreement, Mr. Speaker, I plan to make an oral statement to the House summarising the White Paper's main themes. In addition, each July we will publish as a Command Paper an interim report to take stock of progress and to look ahead to the second six-month presidency of the year. Those papers will subsume our existing retrospective reviews of developments in the European Union.

Secondly, to build on the Standing Committee that was set up to look at the Convention, then at the IGC, the Government favour creating a successor Committee whose remit would be extended to cover the whole of the EU's work. To that end, my right hon. Friend the Leader of the House hopes shortly to present proposals to the Modernisation Committee for its consideration. Our aim is that the new Committee would be open to Members of both Houses, and that Ministers involved in EU work, from the Foreign and Commonwealth Office and from other Departments, would give statements, respond to questions and participate in debates. I hope that the House might also consider whether ways might be found to allow European Commissioners to make statements and answer questions before the new body, and perhaps for UK Members of the European Parliament to attend. I look forward to the Modernisation Committee's findings, and hope that it might include in its inquiry the operation of the European Standing Committees A, B and C, which, if I may express a purely personal view, seem never to have worked fully as intended.<sup>45</sup>

The reaction to this statement from the then shadow Foreign Secretary, Michael Ancram, was mixed. He welcomed the concept of enhancing the role of Parliament in EU matters, the provision of an annual White Paper and the new standing committee, but found that overall the statement was “gravely disappointing”.<sup>46</sup> Mr Ancram wanted the measures to actually affect the EU: specifically, to help “stem the tide of European regulations and directives” and to increase Parliament’s powers to stop or change them. He wanted the Government to tighten up the scrutiny reserve procedure, to strengthen Parliament’s right to seek a review of EU legislation that breached the principle of subsidiarity and to block such legislation, and to ensure that major European issues were dealt with on the Floor of the House.

The Liberal Democrat shadow foreign secretary, Sir Menzies Campbell, asked about the role of the Prime Minister in the procedures outlined by the Foreign Secretary and called for greater scrutiny of the EU budget

## **2. Proposals from the Leader of the House**

In May 2004 the Modernisation Committee Chairman and then Leader of the House, Peter Hain, proposed changes in a paper to the Committee, in which he regretted that EU matters were currently a “minority interest” in Parliament.<sup>47</sup> He proposed a European

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<sup>45</sup> HC Deb 11 February 2004 cc1415-17 at [http://pubs1.tso.parliament.uk/pa/cm200304/cmhansrd/vo040211/debtext/40211-05.htm#40211-05\\_head0](http://pubs1.tso.parliament.uk/pa/cm200304/cmhansrd/vo040211/debtext/40211-05.htm#40211-05_head0)

<sup>46</sup> Ibid c 1417

<sup>47</sup> Modernisation Committee, Memorandum by the Leader of the House, at <http://www.publications.parliament.uk/pa/cm200304/cmselect/cmmodern/508/508m03.htm>

Grand or Joint Committee for the scrutiny of “the whole of the EU’s work”.<sup>48</sup> This would involve MEPs as well as MPs and Peers, and would be able to question European Commissioners. He also proposed abolishing the European Standing Committees and referring documents identified by the ESC as significant to Departmental Select Committees.<sup>49</sup> Mr Hain suggested that the membership might constitute all members of both Houses, “along the lines of the Commons Grand Committees”, with a “modest quorum” of three from each House. The procedure might be similar to that of the Standing Committee on the IGC: i.e. statements from and questions to Ministers or Commissioners, followed by a debate on the adjournment. Mr Hain thought there should be no voting in the new Committee. It might meet quarterly, following Government motions in both Houses, to discuss the six-monthly Government White Papers on the EU and other matters “as need arose”. The ESC could also suggest topics for debate. He did not think the new Committee would reduce the need for debates on the Floor of the House. One of Mr Hain’s proposed options for enhanced parliamentary involvement with EU business was to “use the facility for Cross-cutting Questions sessions in Westminster Hall for Questions on European matters, perhaps on a regular and established basis”. This, he thought, would “have the benefit of allowing Ministers from different Departments to be questioned on a European matter which crosses departmental boundaries” (para. 17). He also thought it worth considering using Westminster Hall as a forum for questioning EU Commissioners, if Parliament decided against establishing a new joint European committee (para. 18).

Mr Hain praised the work of the ESC and its commitment to improving accessibility to its work, but thought the present Standing Committee system had not worked out as hoped: Members’ interest was low, attendance was poor and the proceedings were “ritualistic” and “largely devoid of much political interest”.<sup>50</sup> He did not think that the ESC’s suggestion to increase the number of Standing Committees from three to five would make them more successful (para. 21). Nor was he persuaded that amending the motion tabled to that agreed by the Committee (rather than moving the original Government motion), or making a motion tabled by the Government in different terms subject to a short debate “would make much difference” (para. 22). He proposed other options, as follows:

24. First, we could stick with roughly the present system and try and make it work better. There could be stronger linkage between the European Standing Committees and the European Scrutiny Committee, perhaps with the Scrutiny Committee sending a representative to the Standing Committee to explain why it thought a debate was necessary. Members of the Standing Committee might be provided with a briefing pack, including the Scrutiny Committee’s report. The core membership could be reduced, with perhaps some membership overlap with the relevant Departmental Select Committees.

25. Secondly, we could change the nature of the Standing Committees a little. We could do away with the core membership, reverting to ad hoc membership for each meeting (as for Standing Committees on Delegated Legislation). We could change the motion before them to a simple take note-type motion (“That the

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<sup>48</sup> Ibid

<sup>49</sup> <http://www.publications.parliament.uk/pa/cm200304/cmselect/cmmodern/508/508m03.htm>

<sup>50</sup> Ibid para. 20

Committee has considered [the document]), and we could perhaps limit them to 1½ hours. We could even go further and encourage the Whips on both sides to take the view that attendance was optional. The Government would in effect be saying: "here is an opportunity to debate the document; take it or leave it". The Government would need to be able then to put a substantive motion to the House, whether or not the Committee had reported. The House would then have an opportunity to divide on, or amend, the motion, if it wished, albeit without debate. The downside would be that Ministers and Opposition Spokesmen would still feel that they needed to attend; and stakeholders and the public might be less than impressed by inordinate meetings.

26. Thirdly, and more radically, we could decide that the Standing Committee format is not what we want. It might be that the select committee format of evidence-taking would be more appropriate, and would allow opportunity to engage the public, and outside stakeholders, more effectively in the European scrutiny process.

27. If so, the options would be either to retain the European Standing Committees with a core membership and give them the power to take evidence, and perhaps to travel (opening the possibility of evidence taking in Brussels, for example); or to abolish them and to refer the documents instead to a Select Committee, in the expectation that it would take evidence from the relevant Minister, and others as appropriate. This could be done either by an existing departmental select committee or one of a new set of subject sub-committees of the European Scrutiny Committee. Of these two options, the Government's preference would be for documents to be referred to the relevant departmental select committees, though it recognises the danger of overloading them. Creating sub-committees of the European Scrutiny Committee would risk duplicating what exists already in the House of Lords, and might well meet with the same lack of willing volunteers as for the European Standing Committees. Referring these matters to the Departmental Select Committees would be more consistent with the philosophy of "mainstreaming" European matters.

28. The Departmental Select Committees are already charged by the Liaison Committee with examining policy proposals from the European Commission. Some of them have done valuable work in this field. Scrutinising EU documents to the timetable required would impose a considerable workload on some Committees, and require a different way of working from Committees' traditional mode of inquiry. Those Committees with a heavy European workload could be given the power to set up an additional Sub-Committee for this purpose; and consideration could be given to increasing the size of those Committees, allowing Members to specialise in this work if they wished. The additional staff resources now being given to Committees should increase their capacity and speed of working.

29. Given that the timetable for negotiation of EU proposals is not within the UK's control, it will be important to ensure that any new system does not slow down the process of scrutiny clearance. Delays would adversely affect the UK's position in negotiations. It will also be important to ensure that scrutiny arrangements do not impinge upon the ability of the UK and the EU to take urgent operational decisions in response to emerging crises.

30. If a decision were made to do away with the European Standing Committees and to opt for referral to a select committee, there would still be opportunity for occasional debates on European documents of particular interest. On occasion,

time on the Floor might be required; but more regularly it might be possible to provide time in Westminster Hall. The Modernisation Committee might wish to consider this in the context of its review of sitting hours.<sup>51</sup>

Mr Hain concluded by hoping that, in order to increase the engagement of Westminster in Europe, the House authorities would extend the access that UK MEPs have to Palace of Westminster facilities (para. 32).

Some of these suggestions, together with those of the ESC (see below), were taken up by the Modernisation Committee and were included in its recommendations for reform. These are considered in Section V(C).

### **3. Reaction to the Hain proposals**

Sir Digby Jones, of the Confederation of British Industry, commented on the Hain proposals:

With over 50% of all government legislation originating in Brussels, it is now more important than ever to introduce a system of timely scrutiny of European legislation by UK MPs. The CBI supports a number of Peter Hain's proposals, but argues that more needs to be done. The idea of a Joint Grand Committee is good in principle, and would raise the profile of European issues in Parliament, but as it will only meet four times a year it will not significantly contribute to the scrutiny process. Equally, the CBI welcomes the idea of empowering standing committees to take evidence from outside organisations, but believes further reform is necessary, as these committees are traditionally poorly attended and relatively low-profile. Specifically the CBI would like to see a number of problems rectified. Firstly there needs to be earlier involvement by Parliament. Instead of waiting for documents to be sent out by the European institutions, scrutiny should be happening in advance of the drafting stage, when it is still possible to influence opinions in Brussels. Furthermore, in the House of Commons there needs to be more consultation of outside interest groups, and more transparency, so that the public can follow the progress of a piece of legislation. An agenda published should be published in advance of every meeting and meetings should be held in public. Finally MPs specialising in a policy area should scrutinise measures coming from both Brussels and Whitehall, rather than siphoning off all 'European' issues. This will probably involve a greater role for departmental select committees.<sup>52</sup>

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<sup>51</sup> <http://www.publications.parliament.uk/pa/cm200304/cmselect/cmmodern/508/508m03.htm>

<sup>52</sup> CBI website at [http://www.cbi.org.uk/ndbs/cbi\\_bss.nsf/0/80256fa500620dde80256f56003e153c?OpenDocument](http://www.cbi.org.uk/ndbs/cbi_bss.nsf/0/80256fa500620dde80256f56003e153c?OpenDocument). See also Foreign Policy Centre/CBI article *UK Parliamentary Scrutiny of EU Legislation* by Sir Digby Jones with Preface by Denis MacShane at <http://fpc.org.uk/fsblob/432.pdf>. The ESC took evidence from Sir Digby Jones on this issue in October 2004. See Minutes of Evidence at <http://www.publications.parliament.uk/pa/cm200304/cmselect/cmeuleg/1185/4102001.htm>

## B. European Scrutiny Committee proposals

### 1. Earlier reforms and recommendations

Over time the ESC has enhanced its scrutiny procedures in a number of ways. Examples include:

- encouraging adherence to the Scrutiny Reserve Resolution by taking oral evidence from ministers who failed to comply with it;
- publishing occasional separate reports on particularly important documents;
- beginning scrutiny earlier by examining the Commission's annual work programme, and earlier still if alerted by organisations such as the CBI;
- doing more pre- and post-Council scrutiny

In a report in June 2002 on *European Scrutiny*, the ESC identified a number of weaknesses in the UK scrutiny system, including:

- problems in the operation of the scrutiny process, especially breaches of the scrutiny reserve and the time taken to make available documents, Explanatory Memorandums and information requested;
- reluctance of successive EU Presidencies to allow adequate time for scrutiny by national parliaments;
- lack of impact of many of the debates we recommend on documents;
- lack of attention among other Members to the Committee's ongoing written interrogation of Ministers on EU proposals;
- the relationship with outside organisations and individuals; and
- restrictions imposed on us by the House's rules of privilege preventing information being made public soon enough following our deliberations.<sup>53</sup>

The Committee made the following recommendations for strengthening the UK's parliamentary scrutiny system:

- making more information public and meeting in public whenever possible (para. 41)
- remedying the delay in arrival of documents and other information from the Government (para. 44)
- Maintaining the scrutiny reserve on a non-statutory basis (Para. 44)
- Making scrutiny of Commission Annual Work Programme an important part of ESC programme
- Improving quality and usefulness of written answers on Council meetings (paras. 61, 63)
- Possible new procedures for debates on EU matters and importance of debates on Floor of House (para. 66)

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<sup>53</sup> ESC, *European Scrutiny in the Commons*, HC 152-xxx, 11 June 2002, 2001-02, at: <http://www.publications.parliament.uk/pa/cm200102/cmselect/cmeuleg/152-xxx/15202.htm>

- European Standing Committees not fulfilling potential (para. 67). Style of questioning could be changed (para. 68)
- Relevant material from outside bodies should be made generally available, possibly through the ESC website (para. 68)
- Increase number of European Standing Committees from three to five (para. 69)
- Departmental Select Committees could become more involved in the work of their corresponding European Standing Committee (para. 70)
- Motion moved by House should be that agreed by ESC, moved either by Government or by another Member with explanatory statement (para. 73)
- Deferred division rule might be applied to motions on EU documents (para. 75)
- Provision to refer EU documents for debate in Westminster Hall (para. 77)
- Provision for ESC and DSC(s) to call meetings of a European Grand Committee to consider “certain EU documents of wide interest, take pre-and post-Council statements by Ministers and hold general debates” (para. 79)
- Longer Floor debates on EU documents, with questions to Minister (para. 80)
- More DSC attention to EU developments (paras. 81, 84), e.g. examining Commission Green and White Papers (para. 86)
- Liaison common objectives for Select Committees should include consideration of Commission Green and White Papers (para. 87)
- DSCs involved in EU subject areas might appoint European rapporteur to monitor EU developments, whom ESC could consult and pass information to (para. 87)
- More Floor debates on specific EU matters but not linked to legislative texts, such as CAP, EU transport policy (para. 89).
- Perhaps an equivalent of ten-minute procedure for EU documents (para. 90)

The ESC proposals on improving public involvement in and knowledge of its work were prefaced by the preconditions that the House must have sufficient influence on Ministers' activities in the EU to make lobbying it worthwhile; and consideration of EU matters by the Commons must be easily accessible to the public (paras. 93-4). The ESC wanted its website to be improved, with interested parties receiving automatic notification when a document on a particular subject appeared as forthcoming business or in an ESC Report (paras 95-6)

In a section on “Other aspects of scrutiny” the ESC suggested

- The Government should relax the confidentiality provision in the concordats with the devolved legislatures sufficiently to be able to indicate in their Explanatory Memorandums whether and on what subjects there had been discussions with these bodies (para 106).
- The ESC was interested in more regular, six-monthly, meetings with MEPs on specific EU activity, e.g. Commission Annual Work Programme or Presidency priorities, possibly with DSC representatives (para. 107).
- The ESC confirmed that the National Parliament Office in Brussels established in 1999 contributed “significantly to the effectiveness of the scrutiny process” (para. 109).
- Certain documents deemed to be of little or no legal or political importance should be listed periodically, rather than deposited, unless ESC thought they should be. The ESC should receive lists of these documents and kept informed

by Government of broader issues and developments/trends regarding Association Councils and Committees and anti-dumping para. 111).

- The ESC supported a Government proposal for a Secondary Legislation Scrutiny Committee for debates on SIs recommended for debate (para 113).<sup>54</sup>

The ESC also supported a redefinition of COSAC's main role "as assisting national parliaments to improve their scrutiny of government activities in the EU, by sharing best practice and information and acting as a strategic body on behalf of national parliaments".<sup>55</sup>

COSAC's agenda should then concentrate on the roles of national parliaments rather than general issues. In addition, COSAC needs to have a small secretariat to facilitate the exchange of information (e.g. on scrutiny problems, in respect of particular documents or more generally), to monitor activities relevant to national scrutiny (e.g. compliance by the Council with the protocol on the role of national parliaments), and to take up procedural matters of concern with the Council Secretariat or the Commission. The Secretariat could also, in co-operation with the EP, organise the joint meetings of national parliamentarians and MEPs discussed above. A precondition for any such reforms is that changes in COSAC's rules must cease to require unanimity.<sup>56</sup>

The ESC focused its Fourth Report, published in June 2003, on the role of national parliaments in the EU, taking into account the conclusions of the Convention on the Future of Europe and the Convention Praesidium's draft articles for a constitutional text.<sup>57</sup> It concluded:

- The requirements of national parliaments are in principle simple: information and the time to express views before decisions are made. They require these, above all, in order to fulfil their acknowledged vital role of making their own governments accountable (para. 7)
- One of the most important requirements is that the Council of Ministers should meet in public when legislating (para. 11)
- We strongly support the provision in the draft constitutional treaty that the Council shall meet in public when legislating (para. 13)
- We believe such a record of proceedings should include a full transcript, as in national parliaments, and preferably also audio and video recordings (para. 14)
- The needs of national parliaments must be built into the EU's legislative system, rather than recognised only when wholly convenient (para. 22)

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<sup>54</sup> ESC, *European Scrutiny in the Commons*, HC 152-xxx, 11 June 2002, 2001-02, at:

<http://www.publications.parliament.uk/pa/cm200102/cmselect/cmeuleg/152-xxx/15202.htm>

<sup>55</sup> COSAC is the body formed by the European Affairs committees in the Member States. ESC, *European Scrutiny in the Commons*, HC 152-xxx, 11 June 2002, 2001-02, Para 150

<sup>56</sup> Ibid

<sup>57</sup> The Convention opened in February 2002 with the aim of reforming the institutional structure of Europe with a view to future enlargement and possibly drawing up a constitutional text for the EU. One of the Working Groups established by the Convention, WG IV, looked specifically at the role of national parliaments. This WG was chaired by the UK parliamentary representative on the Convention, Gisela Stuart.

- Although the question of proportionality is capable of analysis by a court, it also has a substantial element of political judgment, and should therefore be covered by the early-warning mechanism (para. 31)<sup>58</sup>

## 2. ESC Submission to Modernisation Committee

In April 2004 the ESC submitted a Memorandum to the Modernisation Committee.<sup>59</sup> The Committee welcomed the Government's proposal for a new European grand committee:

9. We strongly support the proposals by the Foreign Secretary and the Leader of the House for a Joint European Grand Committee. It would build on the precedents set by the successful Standing Committees on the Convention and on the Inter-Governmental Conference (IGC), as well as on proposals we made in 2002. We are satisfied that it would add value to the House's European scrutiny by providing a relatively high-profile forum for debate, and that, in the form proposed in the Leader's paper, it would not undermine existing scrutiny procedures. The latter point is particularly important given that meetings of the Grand Committee would, under the Leader's proposal, be called by the Government whereas the current scrutiny debates on documents are initiated by backbench Members in the ESC.<sup>60</sup>

The ESC commented on proposals for the further consideration of EU documents, debates in Standing Committee, attendance by Members at these debates and the parliamentary procedures linked to their outcome:

(i) While there is scope for improving the effectiveness of the scrutiny aspect of the Standing Committees, we would be surprised if the House were willing to abandon entirely the possibility of a debate, which provides the opportunity for individuals and parties to set out alternative views; indeed the Leader indicates that some debates would continue even if further consideration of EU documents normally took place in departmental select committees (paragraph 30). For some documents further scrutiny is more necessary than debate; for others there is little need for further scrutiny but scope for a worthwhile debate. The options are therefore to try to categorise documents in advance in this respect or to retain a combination of scrutiny and debate for each document. On balance we favour the latter.

(ii) We believe that further consideration of documents is likely to work best if conducted primarily by a group of Members who feel they are carrying out a task which has been committed to them by the House and is of benefit to the House. However, we also recognise that, particularly in view of the wide-ranging nature of EU legislation, there will often be other Members with expertise or constituency or other interests in particular documents, and that the proceedings benefit from their presence. The provision for any Member to attend also permits Opposition spokesmen to participate. We would therefore favour keeping something similar to the present arrangement in this respect.

(iii) The option of a purely formal motion instead of a substantive one is an interesting idea for reducing the involvement of the whips (though, contrary to

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<sup>58</sup> <http://www.publications.parliament.uk/pa/cm200203/cmselect/cmeuleg/63-xxiv/6308.htm>

<sup>59</sup> The ESC's comments on the subsidiarity early warning mechanism are considered in Section VI.

<sup>60</sup> <http://www.publications.parliament.uk/pa/cm200405/cmselect/cmmodern/465/465ii.pdf>, para. 3

paragraph 25 of the Leader's paper we would regard it as essential for Ministers to attend in any event). However, it would not necessarily achieve this purpose, and, as far as debates are concerned, we would regard the downgrading of the motion from a substantive one to a purely formal one as too high a price for that uncertain benefit. We consider below the possibility of select committee-type inquiries instead of debates.<sup>61</sup>

The Committee had doubts about the Government's proposal for referring EU documents to DSCs:

A more workable version of this option would involve overlapping committees, with only some Members sitting both on the departmental select committee and the related European committee (similar to the relationship between the Lords European Union Committee and its sub-committees), and an enlarged ESC staff serving the European committees. However, the link between any Report or transcript and a subsequent decision in the House would be less direct even than the link between Standing Committee and House in the present system. We do not support the option of referring documents to departmental select committees.<sup>62</sup>

The ESC proposed the following changes to the way Standing Committees operate:

26. First, we and our predecessors have long argued that there should be five European Standing Committees instead of three, so that each would be more focused on a specific policy area or areas.<sup>63</sup> In the present session, for example, European Standing Committee C has so far had referred to it documents on space policy, the Working Time Directive, genetically modified maize, the Doha Development Agenda, disposal of batteries and nutrition and health claims made on food. There would be no more debates than now, but each committee would meet less often. Each could be smaller than now (we suggest nine Members), so few additional Members would be required (45 compared with 39). They would have subject names rather than being "A", "B" and "C".

27. The Leader's paper rejects this option, saying "if the Committees have not worked, it does not seem to make sense to make more of them" (paragraph 21), but this is a counsel of despair; the point of our proposals is to ensure that European Standing Committees do work. We hope the Modernisation Committee will find out from the Government what the basis is of its belief that a larger number of committees would not be successful. We note that the Leader's paper also mentions (paragraph 25) the possibility of *ad hoc* membership for each meeting, which would be equivalent to creating as many European Standing Committees as there are debates, and therefore considerably more than five. No option provides a guarantee of willing Members, but we are particularly doubtful that many willing Members will be found for any committees which do not permit a reasonable amount of specialisation.

28. Secondly, we propose closer links between the European Standing Committees and ourselves. This could come about in one of two ways. Either we

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<sup>61</sup> Para. 19

<sup>62</sup> Para. 22

<sup>63</sup> FN 10: Twenty-seventh Report from the Select Committee on European Legislation, 1995–96, The scrutiny of European business, HC 51–xxvii, paras 205–6; Seventh Report from the Select Committee on Modernisation of the House of Commons, 1997–98, The scrutiny of European business, HC 791, p xxviii; HC 152–xxx, 2001–02, para 69

could make it our practice to delegate one of our Members to attend each debate, to explain why we decided a document needed further consideration. Alternatively there could be a representative of each European Standing Committee on the ESC. We favour the latter, since it would give the Standing Committee representative the opportunity to influence decisions on the referral of documents, and provide a better channel for feedback on referrals and the helpfulness or otherwise of our Report paragraphs (on which we currently receive no feedback at all). In either case it would be necessary to ensure that the ESC and the Standing Committees did not meet at the same time.

29. The Modernisation Committee might also consider whether some overlap of membership between the Standing Committees and the relevant departmental select committee or committees would be worthwhile. Also, if service on a Standing Committee came to be regarded as preparation for becoming a member of a related departmental select committee, this would provide an incentive to serve on the Standing Committees.

30. Thirdly, we propose that the Standing Committees have more of a corporate existence, with their own elected Chairmen or Convenors and staff with particular responsibility for them. The Chairman could be the representative on the ESC, and could make representations more generally on its behalf. This would imply the Standing Committees sometimes meeting independently to take decisions. There could also be provision for the Standing Committees occasionally to take evidence on a document (within an overall timetable laid down by the Government), and perhaps even to visit Brussels, in advance of a debate. The debates could continue to be chaired by a member of the Chairman's Panel, as now, while any evidence taking would be chaired by the Standing Committee's own Chairman (making the situation comparable to that of a Special Standing Committee); or the Modernisation Committee might wish to consider whether the Standing Committee's own Chairman should chair all meetings.

31. The staff would be responsible for ensuring that meetings were adequately publicised, particularly to the relevant specialist press, and that the Committee had all the briefing it needed; they would also be the first point of contact for Members. We regard better publicity for European Standing Committee debates as especially important. As regards briefing, document packs relating to Standing Committee debates are already available from the Vote Office, and always include the document, the Government's Explanatory Memorandum and our Report paragraphs on the document. Our Report paragraphs are intended as a guide to the document and the main issues that arise from it, but it is clear that members of Standing Committees do not always see it in that light. Standing Committees might benefit from additional evidence from bodies outside Government, or from some kind of summary analysis where a debate covers several substantial documents.

32. Fourthly, members of the Standing Committees need to know that any decision they take has some significance. In practice the Government's motion is rarely amended, and it has never been defeated. However we consider it an important principle that the Government should not be able to proceed exactly as it originally intended regardless of the Committee's decision. This principle is recognised in the case of the Regulatory Reform Committee by varying the proceedings in the House according to whether a draft regulatory reform order was agreed to without a division, agreed to with a division or disagreed to.<sup>64</sup> The Government's ability to ignore decisions of European Standing Committees has

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<sup>64</sup> Standing Order No. 18

been hotly debated since 1991, with various remedies proposed.<sup>65</sup> We proposed in 2002 that the motion moved in the House should always be the one agreed by the Standing Committee, that if the Government did not wish to move it another Member should do so, and that in such circumstances a brief explanatory statement by the mover and a Minister should be permitted. However, we said we would also be happy with a provision that, if the Government moved a motion different from that agreed by the Standing Committee, there should be a brief statement from the Minister and from someone opposing the motion, and this would presumably meet the Government's objection at least in part. In that case the difference from the present situation would be only the two brief statements. Such occasions would probably be rare, but we disagree with the Government's view that the change would not make much difference.<sup>66</sup>

The Committee also hoped that the Modernisation Committee would support its earlier proposal that it should be able, on an experimental basis, to refer documents for debate in Westminster Hall. The ESC was concerned about debates on the Floor of the House and regarded it "as extremely important that the more significant EU documents can be debated there, with sufficient time".<sup>67</sup> It supported Mr Hain's proposal for cross-cutting questions in Westminster Hall and agreed that sessions should relate to a specific cross-cutting issue or issues. It also agreed that the possibility of questioning Commissioners in Westminster Hall should be considered. It hoped the Modernisation Committee would encourage DSCs to consider undertaking pre- and post-Council scrutiny, for which it, the ESC, could play a coordinating role. While acknowledging that it had no role in post-implementation scrutiny, the ESC hoped for an examination of how implementation of EU legislation should be scrutinised. On publicity and information, the ESC proposals included:

a press strategy for the House's European business, easier access to relevant information through an improved web-site, a system of automatic electronic notification of Committee Reports, forthcoming debates and documents awaiting consideration on specific subjects to outside persons and organisations who have notified their interests to us, press notices each week highlighting notable ESC activity and perhaps other EU-related House activity, and carrying out more of the ESC's work in public.<sup>68</sup>

The ESC asked the Modernisation Committee to consider the proposal that it be permitted to meet in public when deliberating. It hoped for endorsement of its plans to improve information dissemination and media awareness of its work, that the scope of the Members' European travel scheme could be broadened, and that the work of the National Parliament Office in Brussels would continue, possibly becoming more involved with Standing Committee work.

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<sup>65</sup> See HC 51–xxvii, 1995–96, paras 198–200

<sup>66</sup> Paras 26–32

<sup>67</sup> Para. 36

<sup>68</sup> Para. 50

## V Modernisation Committee Inquiry

### A. Evidence sessions

5 May 2004

The Modernisation Committee took evidence from the ESC Chairman, Jimmy Hood, and the then Clerk of the Scrutiny Committee, Dorian Gerhold, on 5 May 2004, on points raised in its Memorandum.<sup>69</sup> Mr Hood wanted to encourage colleagues in departmental committees to be more involved in scrutinising EU legislation, but pointed to the practical difficulties: departmental committees did not have the resources or the time to do the sifting and scrutinising; also, Europe was not a “sexy subject”.<sup>70</sup> Mr Hood thought the UK Parliament “should be treating all European issues as domestic because most of it is in the domestic law”:<sup>71</sup>

If we treat Europe as a foreign land and foreign policy issues then I think we are looking at it from the wrong end and maybe we should be looking more ourselves inside the House at how we approach European issues because everything we do involves Europe.<sup>72</sup>

He also proposed a Question Time, akin to Prime Minister’s Question Time, for the Minister for Europe. Mr Hood described the experience of joint meetings of Westminster MPs and Peers with MEPs:

There has been a complete change now, not just in my own party terms but in the House. Over the last perhaps 18 months or so we have set up meetings, all-party meetings, including the House of Lords, with MEPs. We have had two meetings here and one in Brussels and the whole atmosphere has completely changed and we are speaking as parliamentarians who are complementary and see our jobs as complementary to what each other is seeking to do. We concentrate on the role of national parliaments. They do their bit in the European Parliament and scrutinise the Commission and we do our bit in looking at what our Ministers are doing in the Council and there has been a complete sea change. On top of all that has come along devolved government and here comes enlargement, and enlargement will bring in some more devolved government, and we see a need to broaden the welcome into this political forum. That is why we even suggest that maybe some of our colleagues from the Welsh Assembly, the Scottish Parliament and the Northern Ireland Assembly be involved in the Grand Committee as well to give us all a forum to talk about how our respective democracies and responsibilities are working. We welcome it and I would hopefully look forward to us going down that road.<sup>73</sup>

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<sup>69</sup> Modernisation Committee Minutes of Evidence at <http://www.parliament.the-stationery-office.co.uk/pa/cm200304/cmselect/cmmodern/565/4050502.htm>

<sup>70</sup> Minutes of Evidence at <http://www.parliament.the-stationery-office.co.uk/pa/cm200304/cmselect/cmmodern/565/4050503.htm>

<sup>71</sup> Ibid

<sup>72</sup> Ibid

<sup>73</sup> Ibid at <http://www.parliament.the-stationery-office.co.uk/pa/cm200304/cmselect/cmmodern/565/4050504.htm>

Mr Hood also made the point that the majority Parliament in the UK presented a different situation as regards scrutiny from the coalition government of Denmark, for example.

They [the Danish *Folketing* Committee] meet and their committee meets to mandate their Minister and when they meet it is under the Prime Minister. It reflects the coalition of the government in the parliament. Therefore, it is very rarely, if at all, the committee will be at difference with the Minister of the government or the line the government is taking. We are completely different. We are a majority parliament and we need to scrutinise our Executive a lot more vigorously than the Folketing Committee does, and we do that.<sup>74</sup>

### 23 June 2004

In June 2004 the Committee took evidence from David Heathcoat-Amory and Gisela Stuart, who had been Commons parliamentary representatives on the Convention on the Future of Europe in 2002-3. Mr Heathcoat-Amory initiated a discussion of the legislative process at EU level:

References to the importance of national parliaments has been in the Treaty for years now and subsidiarity has been a Treaty requirement since 1992, but it has not been effective in stopping this torrent of legislation which dipped slightly after the completion of the single market, although it is now accelerating again because the Union is getting into new areas like home affairs and justice and immigration. The European Scrutiny Select Committee is really completely inadequate for the task of even looking critically at this volume let alone doing anything about it, and then when we do disagree on an all-party basis on something there is precious little can be done about it. So we are confronted with this huge dynamic, this over-government above us which we feel completely powerless to arrest.<sup>75</sup>

The UK Parliament does not have the power to change the process at EU level, but Gisela Stuart pointed to procedural difficulties in implementing subsidiarity and suggested that pressure might be applied on the European Commission:

... the difficulty we have as the House of Commons is that we have a delete process for proposals, and that is the Queen's Speech or a General Election, so either something goes through and is agreed within a year, or, if it is modernisation, we might extend it for two years, but certainly every five years we say, "Stop, you have to put it back on the table." There is no similar delete button on Commission proposals and that is the problem for us in terms of the collective memory of this House. At what point do we key in? I would suggest we make some fairly strong proposals to the Commission to actually ask them, and in any negotiations with the European Parliament, that they put on a time frame by which agreement has to be reached, and it comes to an end. That will then allow us with whatever committee structure we end up with to have a time frame where

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<sup>74</sup> Ibid at

<http://www.parliament.the-stationery-office.co.uk/pa/cm200304/cmselect/cmmodern/565/4050505.htm>

<sup>75</sup> Modernisation Committee Minutes of Evidence 23 June 2004 at <http://www.parliament.the-stationery-office.co.uk/pa/cm200304/cmselect/cmmodern/565/4062305.htm>

our views have an effect. Without that we will always be operating in a kind of fog.<sup>76</sup>

The discussion considered in particular how parliamentary scrutiny of the application of subsidiarity might be improved. Mr Heathcoat-Amory described the kind of committee that might be established to consider subsidiarity issues:

You need to combine an expertise about the subsidiarity principle, in other words some committee needs to examine the Commission's proposals and— [with] [...] official advice from the clerks and compare it with other proposals. A committee, in other words, which has some knowledge of the subject and can take an informed view. But also it is important that the House as a whole or at least some particular committee is able to engage on it and given in public an opportunity to express an opinion. So you need a double system. But it has to be done very quickly because we need to assemble other national parliaments in parallel because the timescale is very compressed—I think quite needlessly compressed. I do not see the need for hurry, we are not talking about fast-moving international negotiations, we are talking usually about a process of domestic legislation where deliberation on a very long timescale is often much more desirable to give outside interests, lobby groups and our constituents, an ability to respond. So I do not think we ought to dance to an artificially imposed timetable from the Union, but I also feel it must be a collective decision of the House of Commons as a whole to formally complain when the subsidiarity principle is breached.<sup>77</sup>

#### 14 July 2004

On this occasion the Committee took evidence from four UK MEPs.<sup>78</sup> Timothy Kirkhope regretted that there was little liaison between Westminster and European MPs and consequently “not a basic intervention by our national Parliament at an early enough stage in the formulation of policies”.<sup>79</sup> The UK Parliament, he thought, did not have enough advance warning of what was going on in Brussels.

Richard Corbett outlined five “ideas”:

- pre-Council scrutiny before relevant Committee (possibly mandating the Minister) following the Nordic method, which would highlight the key issues on the Council's agenda before they came up;
- enhance scrutiny of national implementing measures after the EU legislation is adopted, where this is done by statutory instrument, in order to avoid “gold-plating”;
- the possibility of the Scrutiny Committee meeting in public in the interests of openness and transparency;

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<sup>76</sup> Ibid at

<http://www.parliament.the-stationery-office.co.uk/pa/cm200304/cmselect/cmmodern/565/4062307.htm>

<sup>77</sup> Modernisation Committee Minutes of Evidence 23 June 2004 at <http://www.parliament.the-stationery-office.co.uk/pa/cm200304/cmselect/cmmodern/565/4062307.htm>

<sup>78</sup> Richard Corbett (Labour), Timothy Kirkhope (Conservative), Chris Huhne (Lib.Dem.) and John Whittaker (UKIP)

<sup>79</sup> Modernisation Committee Minutes of Evidence 14 July 2004 at <http://www.parliament.the-stationery-office.co.uk/pa/cm200304/cmselect/cmmodern/565/4071403.htm>

- improving the relationship of UK MPs with MEPs, through a special grand committee or another knowledge sharing mechanism;
- treating EU legislation, not as foreign policy, but as domestic policy.<sup>80</sup>

Chris Huhne suggested that DSCs should have a more major input in the EU legislative process, taking evidence from Ministers on an on-going basis, as in the Finnish *Eduskunta*.<sup>81</sup> John Whittaker believed that “if there were to be meaningful scrutiny of European legislation either *ex ante* or *ex post* by this Parliament, by the parliaments of the 24 other members of the European Union, the whole jolly thing would grind to a halt” (which he thought would be a good thing).

## 8 September 2004

At this session Gwyneth Dunwoody<sup>82</sup> and Michael Jack gave evidence to the Committee. Mrs Dunwoody expressed doubts about having Commissioners giving evidence to the ESC, which, she thought, might be no more than “rather elaborate staged appearances” by people who are not answerable to national governments.<sup>83</sup>

Mr Jack was concerned about intelligence gathering in the EU and thought that from the UK Parliament’s point of view, its involvement in the EU decision-making process was “far too far downstream”. He continued: “If we are going to have an influence on policy we have to be involved upstream and therefore the decisions to be made are what are the mechanisms and what are the resources required to improve our engagement?”<sup>84</sup> He described a possible role of “European rapporteur”, who, because of time constraints on the ESC and other Committees, would make enquiries at UKREP (the UK officials who liaise between the Government and the EU institutions), the Commission and the EP, in order to “find out what is happening in the ideas formulation stage” and report back to the UK Parliament.

When asked about the extent of the ESC’s influence on the work and investigations of the Committee which he chaired (Environment, Food and Rural Affairs Committee), Mr Jack said:

In simple terms, the European Scrutiny Committee does not have any influence at all in determining what our select committee does in looking at Europe. I think visiting the Commission and basically keeping an eye on what is happening determines our priorities in those particular areas far more than either the European Committee of the House of Standing Committees A, B and C.<sup>85</sup>

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<sup>80</sup> Modernisation Committee Minutes of Evidence 14 July 2004 at <http://www.parliament.the-stationery-office.co.uk/pa/cm200304/cmselect/cmmodern/565/4071404.htm>

<sup>81</sup> Ibid

<sup>82</sup> An MEP from 1975 to 1979

<sup>83</sup> <http://www.publications.parliament.uk/pa/cm200405/cmselect/cmmodern/465/4090804.htm>

<sup>84</sup> <http://www.publications.parliament.uk/pa/cm200405/cmselect/cmmodern/465/4090805.htm>

<sup>85</sup> <http://www.publications.parliament.uk/pa/cm200405/cmselect/cmmodern/465/4090805.htm>

He emphasised the importance of “upstream” involvement:

I am interested in us having some influence—as we might do, for example, through the House's pre-legislative scrutiny process which select committees are involved in—in helping to shape what the final form of the legislation is, then I agree very much with Ms Ruddock's contention that we need to be in earlier and we need to engage with European officials, with commissioners, with ministers as they discuss the ideas whilst they are still malleable enough to be changed. There may well be a role to comment on the final version and there may well be a third role which is Parliament putting a tick in the box to deal with the mechanics of the scrutiny process.<sup>86</sup>

Mr Jack did not think the questioning of Government ministers in the present Standing Committee system was effective in influencing the Government's stand in the Council of Ministers:

... the idea that somehow you are influencing the British Government position, the stance the minister takes, the words that will be uttered in the Council of Ministers, forget it; the die is cast. My vote goes for hammering out what we can do upstream.<sup>87</sup>

Sir Nicholas Winterton suggested that UKREP should be appointed by and accountable to Parliament, if representatives were to be “meaningful and to enable Parliament to achieve the earlier involvement in discussion”.<sup>88</sup> Mrs Dunwoody did not want the responsibility of appointing officials, and thought that no amount of speaking to officials in Brussels would help if other Member States had decided on a particular political line and were determined to push it through. She added:

The habit of not producing agendas until the last moment, the habit of adding particular important items on at the last moment, the way things can be deferred; they are all well-known and very effective means of influencing the outcome.<sup>89</sup>

Joan Ruddock raised the issue of amending the motion in Standing Committee, commenting:

The power to amend is there, the power to force a vote is there but it matters not at the end of the day whether it is in the committee or on the floor of the House, if the Government has a majority and it uses its whips effectively it always wins the day. The mechanisms we have at the moment do not provide any way of influencing what that minister does in council [...] there is not a way of amending or making more effective the present system because it ends up with a party vote. Clearly that is a form of scrutiny which we all understand.<sup>90</sup>

Sir Nicholas Winterton considered the issue of amendments in Standing Committee: if the European Standing Committees do amend, the Government is not obliged to table

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<sup>86</sup> Ibid

<sup>87</sup> <http://www.publications.parliament.uk/pa/cm200405/cmselect/cmmodern/465/4090805.htm>

<sup>88</sup> Ibid

<sup>89</sup> Ibid

<sup>90</sup> <http://www.publications.parliament.uk/pa/cm200405/cmselect/cmmodern/465/4090806.htm>

that amended motion on the Floor of the House; they table the original motion. He thought that if an amendment was passed in a European Standing Committee, that motion should be tabled on the Floor of the House and also debated on the Floor of the House.

### 15 September 2004

Here the Committee took evidence from the Clerk of the House, Roger Sands, and the Clerk of Delegated Legislation, Liam Laurence Smyth.

Roger Sands was sceptical about parliamentary procedural changes being able to bring the EU “closer to its citizens”, which has been the aim of successive IGCs. Liam Laurence Smyth added that the UK Parliament already provided many and good opportunities for MPs to acquaint themselves with the EU, “and they could do a lot more themselves”.<sup>91</sup> He also commended UKREP for their help in explaining to select committees what they have been doing “and giving us an insight into issues we should be raising with the Commission”. He described the FCO as “enormously positive in their dealings with the European Scrutiny Committee”. It was up to select committees to ask the right questions, and the earlier the better, as “the moment when you are most likely to be able to influence the outcome comes before ministers have made up their mind what they want to do”. The Clerk thought the House was now adequately informed in advance of developments in Brussels by the re-cast six-monthly Government White Papers, *Prospects for the EU*, in which, he thought, “everything is open to them, nothing is really hidden”.<sup>92</sup>

There were further questions about the degree of influence Parliament could exert over the legislative process, with assertions that the way Parliament dealt with EU business was essentially “backwards-looking” and that it did not intervene at an early enough stage to have any effect. There was also a suggestion that the Lords scrutiny procedures were more proactive, and therefore more effective, than those in the Commons. Mr Sands thought it would be a mistake to move away from a document-based system, which was the basis for both the Commons and the Lords EU Committees. The difference between the two systems, he thought, lay in the fact that the Lords Committee was more selective, and that the proposals selected were examined in more detail by means of the system of sub-committees.

Mr Laurence Smyth did not think the Common system was “backwards looking” and praised the ESC for its support for the use of impact assessments.

There was some scepticism about the present situation whereby European Standing Committees can disagree with a Government motion and even pass an amendment about which the Government does not have to do anything, simply tabling the original motion on the Floor of the House. Mr Sands thought this was an unsatisfactory way to proceed and that it perhaps accounted for the lack of interest in European Standing

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<sup>91</sup> <http://www.publications.parliament.uk/pa/cm200304/cmselect/cmmodern/565/4091503.htm>

<sup>92</sup> *ibid*

Committee proceedings.<sup>93</sup> He reminded the Committee that the Procedure Committee had repeatedly recommended that an amendment to a Government motion in European Standing Committee “should have some procedural consequences, whether it be a short debate on the floor of the House or, more likely, putting the committee’s motion to the House and forcing the Government to reject it if they really feel strongly about it”.<sup>94</sup>

Mr Laurence Smyth made some points about the Commons’ handling of EU business:

- There should be more Commons involvement by the DSCs on the merits of statutory instruments, in order to scrutinise claims by Government departments that new regulations were necessary to implement a European objective.
- A joint committee on the merits of statutory instruments was difficult to tackle because of timing issues etc, and the Government was wise to see how the Lords got on before turning it into a joint committee.
- DSCs were missing an opportunity to call in a minister just before the European Council met in each Presidency and ask what the Government hoped to achieve.<sup>95</sup>

Mr Sands pointed out that, if DSCs chose to report routinely on significant European issues, Westminster Hall now gave select committees the opportunity to debate reports.

## **B. ESC response to evidence**

In a supplementary submission in January 2005 the ESC responded to points raised in evidence to the Modernisation Committee and reported on recent developments. The ESC was critical of, and in some cases rejected, certain criticisms of the present system.

4. We do not accept the distinction drawn by several witnesses between “scrutiny” and “influence”. [FN 27] It appears to be based on the mistaken view that scrutiny in the Commons is backward-looking, “downstream” [FN 28] and generally late, a matter we consider below. It is largely through the scrutiny process, including the information it requires the Government to provide, that the House can determine what is planned, what the Government’s thinking is and how it wishes to influence Ministers, and the House’s main way of seeking to influence Ministers is through the debates which form part of the scrutiny system. For the House to seek to influence EU policy formation across the board [FN 29] would be extremely ambitious and almost certainly unrealistic, but we consider below how it might increase its involvement in the earlier stages of EU proposals and thereby its opportunity to influence.<sup>96</sup>

The Committee rejected the criticism that its work was often ‘downstream’ because scrutiny came too late in the EU legislative process for it to be effective:

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<sup>93</sup> <http://www.publications.parliament.uk/pa/cm200304/cmselect/cmmodern/565/4091504.htm>

<sup>94</sup> *ibid*

<sup>95</sup> *ibid*

<sup>96</sup> Supplementary submission para. 4

[...] to describe the scrutiny process as “downstream” is far from the truth. Even less accurate, given the existence of the scrutiny reserve resolution, is the suggestion that the system “largely looks backwards rather than forwards”.<sup>97</sup>

It was suggested that scrutiny might begin earlier than at present, at the stage of the Commission’s consultations:

Beginning scrutiny even earlier would mean doing something at the stage when the Commission is consulting prior to producing the first formal paper setting out its thinking. There is no systematic way in which we could be involved at that stage. The Commission sometimes consults widely and sometimes does not, and rarely circulates informal drafts. We propose that the Government should take the initiative in informing us of EU proposals at that stage, which we would then follow up on a selective basis. We have also been discussing with business organisations how they could keep us informed about their views on EU proposals at that stage. We could then request information, possibly including an “unnumbered Explanatory Memorandum” from the Government, and in some cases might recommend a debate. We could provide information to the relevant departmental select committee. It would remain primarily the Government’s job to influence the Commission in the interests of the UK; we would regard the main purpose of parliamentary scrutiny at this stage, as at other stages, as being to influence the Government and to hold it to account.<sup>98</sup>

The ESC also made the point (para. 9) that an early debate on an EU matter was not always advantageous and that later debates also had their merits. It drew attention to the pitfalls in some of the Danish and Finnish scrutiny systems which had been admired by some witnesses (paras. 11-13); pointed out that it had already increased the number of occasions on which ministers were questioned, and noted:

What is really needed is to increase the number of Members able to devote time to questioning Ministers on EU matters, as with our suggestion of a new form of European Standing Committee taking evidence from Ministers (para 10 above and Annex 1). The most important thing in this context is to get the structure of the European Standing Committees right.<sup>99</sup>

On the provision of information on EU proposals and their scrutiny to interested parties, the ESC asked the Modernisation Committee:

to recommend that funding (through the PIMS project or otherwise) be provided for (i) on-line indexing of the ESC’s weekly Reports, (ii) a system of e-alerting relating to EU documents and ESC reports, and (iii) making the European Scrutiny Database available to the public through the website.<sup>100</sup>

The ESC gave details of recent developments to improve the involvement of DSCs (para. 21) and thought that they could “contribute views as part of the Commission’s consultation exercises” (para. 22). It thought an hour and a half on the Floor of the

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<sup>97</sup> Supplementary submission para. 6

<sup>98</sup> Supplementary para 8

<sup>99</sup> Para. 16

<sup>100</sup> Para. 18

House was inadequate for debates on important subjects, such as the Financial Perspective and the Justice and Home Affairs Programme, noting that “As a direct result we decided in October to recommend the decision on Turkish accession to the EU for debate in a Standing Committee instead of on the Floor because of the greater time available”.<sup>101</sup> Its conclusion was that “Almost by definition, if a document is important enough to require debate on the Floor, it needs more than an hour and a half”.<sup>102</sup> The ESC thought media advisers were a useful innovation and could usefully publicise debates on EU documents. The Committee also queried a Cabinet Office suggestion that that around 50% of significant legislation enacted in the UK originated from the EU (para. 26).<sup>103</sup>

The ESC proposed a new model for European Standing Committees, which would operate as follows:

- The Government would put forward its draft motion, and a date by which the EDC should report.
- The EDC would take evidence from the Minister for up to an hour (the same time as is currently allowed for questions).
- The EDC would then produce a short Report to the House, the main purpose of which would be to comment on the Government’s motion, which the EDC could, if it chose, amend. (Since the Committee would have a Government majority, we would expect amendment of the Government’s motion to be rare.)
- The House would decide on the motion—without debate, if the Government’s motion was not amended, or with some time for debate, if the Committee amended the Government’s motion. As now, there would be an opportunity for a vote.

The Committee thought the advantages of this system were:

- evidence would be taken on the merits of every EU document referred for further consideration, and the proceedings would have more of a consensual character;
- a greater likelihood that members of the EDCs would feel they were performing a service on behalf of the House;
- retention of the right of all Members (including Opposition spokesmen) to participate in the questioning of Ministers;
- removal of the risk in the Leader’s proposal of overloading the departmental select committees with EU-related work, at the expense both of their other activities and of effective European scrutiny; instead the members of what are at present standing committees would be drawn into select committee-type work; and

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<sup>101</sup> Para. 23

<sup>102</sup> Ibid

<sup>103</sup> See Standard Note SN/IA/2888 for figures on the amount of EC-based UK legislation. It 2002-03 it was on average between 7 and 10%, reaching 53.5% only in the area of agriculture and the environment.

- the Government would retain control of the overall timetable and would have the same degree of certainty of getting its business through as at present.<sup>104</sup>

## **C. Modernisation Committee Conclusions and Recommendations**

The Modernisation Committee's conclusions and recommendations for reforming scrutiny of European business took account of many of the ESC's suggestions and were as follows:

### **Timing of Scrutiny**

**1. We recommend that the Government give an undertaking to alert the European Scrutiny Committee by letter at an early stage of consultation exercises on important proposals in which it is involved. The Scrutiny Committee can then decide whether to ask for an unnumbered explanatory memorandum on the proposal from the Government, or to supplement the information supplied by the Government with information from pressure groups and others. The Scrutiny Committee might then decide to take evidence and produce a report on the proposal itself; to recommend a standing committee debate; or to draw the attention of the relevant departmental select committee to the proposal. (Paragraph 49)**

### **Departmental Select Committees**

**2. We recommend that, where the Government gives the European Scrutiny Committee early notice of a proposal being considered by the Commission, the ESC forward a copy to the relevant departmental select committee for information as a matter of routine. (Paragraph 51)**

### **Meetings of the European Scrutiny Committee**

**3. We recommend that Standing Orders be amended for an experimental period of one Session to allow the Committee, if it so wishes, to conduct the sifting part of its deliberations in public. (Paragraph 54)**

### **A new Joint Grand Committee**

**4. We recommend that a Joint Committee of the two Houses be established to consider matters related to the European Union, along the lines proposed by the Government in its memorandum. (Paragraph 61)**

**5. In the interests of simplicity and clarity, we recommend that the committee be called the Parliamentary European Committee (PEC). (Paragraph 62)**

**6. We recommend that there should be no core membership of the Committee; the quorum should be seven, including at least two Members from each House, and counting the occupant of the Chair. (Paragraph 64)**

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<sup>104</sup> ESC Supplementary submission, Annex 1

**7. We recommend that the importance of the new Committee be reflected in its chairmanship and propose that a senior figure from each House should chair it. In the Commons, this might be the Chairman of Ways and Means or another Deputy Speaker, with a senior member of the Chairman's Panel as an alternate. We would hope that a similar arrangement would seem appropriate in the House of Lords. The Chairmen from the two Houses would have a role in convening meetings and we would expect that each meeting would be chaired, wherever possible by one Chairman from each House. It would of course be for the individuals concerned to decide how to divide up the time in the Chair between themselves. (Paragraph 66)**

#### **Participation of non-Members**

**8. We recommend that a Commissioner be invited to some meetings of the PEC. (Paragraph 68)**

**9. We recommend that, where a representative of the Commission is present, he or she should be invited to make a brief statement before responding to questions from the Committee. In order to clarify the status of Commissioners at these meetings, we recommend that arrangements similar to those set out in Standing Order No. 96 in relation to a Minister who is not a Member of the House be adopted in relation to Commissioners attending the Committee. As well as making a statement and answering questions, we recommend that a Commissioner attending a meeting of the Committee should be permitted by the Chair to make a brief reply to any subsequent debate. (Paragraph 70)**

**10. We recommend that UK Members of the European Parliament should be permitted to attend and speak at meetings of the PEC. We have already referred to the 'reciprocal enlargement' procedure whereby members of a specified committee of the National Assembly for Wales may attend and participate in the proceedings of the Welsh Affairs Committee. We envisage a similar status for MEPs attending the PEC: they would attend and participate as guests of the UK Parliament, rather than as full members of the Committee. (Paragraph 72)<sup>105</sup>**

#### **Procedure**

**11. We recommend as follows:**

a) Meetings of the Parliamentary European Committee should follow the pattern of the Standing Committees on the Convention and the IGC. They should begin with

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<sup>105</sup> While the Committee did recommend participation by Commissioners and MEPs in the PEC (paras 67-73), this was not extended to the devolved Parliament and Assembly Members (para 73): "While we are sympathetic to the suggestion, we are wary of over-complicating from the outset what is already a novel set of proposals. The three bodies have very different responsibilities and powers in relation to EU matters; the devolution settlements are different, so that there are aspects of the UK's Community responsibilities where one body may have a clear involvement and the others may not; and the potential attendance at meetings of the PEC will be such that there is already likely to be severe pressure on speaking time. For these reasons, and with some reluctance, we do not recommend that the devolved bodies should be formally involved at this stage. We do not wish to rule out the possibility entirely, however, and this is something which we believe should be kept under review once there is sufficient experience of the working of the PEC to reach an informed conclusion". <http://www.parliament.the-stationery-office.co.uk/pa/cm200405/cmselect/cmmodern/465/465i.pdf>

a statement from a Commissioner or a Minister, followed by questions, lasting for up to one and a half hours. This should be followed by a debate on a specified subject on a motion for the adjournment of the Committee, which may continue until the Committee has sat for a total of two and a half hours.

**b) The occupant of the Chair should enjoy similar powers of order as the occupant of the Chair in a Commons standing committee.**

c) There should be a provisional speakers' list for the debate, but no list of the participants who are to be called to ask questions, who should rise to catch the Chairman's eye in the usual way.

d) The Chairmen of the PEC should meet well in advance of the Committee's first meeting to discuss any matters arising from these recommendations.

e) The Committee should not normally meet when either House is sitting.

f) In the meantime, we recommend that the Chairmen of the Modernisation Committee, the Procedure Committee, the House of Lords EU Committee and the House of Lords Procedure Committee, among others, meet informally at an early stage to discuss procedural issues relating to the PEC. (Paragraph 76)

### Triggering meetings

**12. We do not expect that the Committee will usually meet more than four times per year, two of which will be to consider the Foreign Secretary's White Papers.** (Paragraph 77)

**13. We believe decisions as to the dates, times and subjects of meeting of the PEC should be considered by the Chairmen drawn from the two Houses. In the Commons, as with the arrangements for Westminster Hall, the business should be 'such as the Chairman of Ways and Means shall appoint'.** Acting in concert with the Chairman of the PEC drawn from the Lords, he should consider proposals from the Government, the European Scrutiny Committee and the House of Lords EU Committee. A Motion setting the time for each meeting would then be moved in the House, as with the Scottish and other Grand Committees. (Paragraph 78)

### Debates before European Council meetings

**14. We recommend that the biannual debates before the European Council meetings be retained but that the scope of the debate be confined more narrowly to the main subjects which the Council will consider.** (Paragraph 81)

### Reports from Council meetings

**15. On the few occasions when the business of the European Council has been uncontroversial and of less significance, we believe that a written statement by the Prime Minister should suffice.** (Paragraph 82)

### Westminster Hall

**16. We recommend that cross-cutting questions on an EU-related matter be held in Westminster Hall as and when a suitable opportunity arises.** (Paragraph 83)

### European Standing Committees

**17. We recommend that the number of European Standing Committees be increased from three to five, that the Committees be designated by names, which indicate clearly their functional ambit, rather than letters and that the core membership of each Committee be reduced from 13 to nine. (Paragraph 92)**

#### **Chairmanship**

**18. We recommend that each European Standing Committee be given a permanent chairman, drawn from the Chairman's Panel. (Paragraph 96)**

#### **Strengthening links with the European Scrutiny Committee**

**19. We recommend that the Chairman of a European Standing Committee should have the power to permit at the very beginning of the meeting a brief opening statement, of no more than five minutes, from a member of the European Scrutiny Committee who is present. This should be followed immediately by the Minister's statement. For this proposal to work effectively it will be important to avoid scheduling meetings of European Standing Committees at the same time as the European Scrutiny Committee meets. (Paragraph 98)**

#### **Motions in the Standing Committee**

**20. We recommend that a Motion in the *same* terms as the Resolution of the Standing Committee should be taken forthwith (currently Standing Order No. 119(9) provides for such motions to be taken forthwith) and it should be open to the Government to table an amendment to reverse or modify the Resolution agreed to by the Standing Committee. The question on the amendment should be put in a similar way to the Question on Opposition days, thus giving primacy to the Resolution from the Standing Committee. The Question would be "That the original words stand part of the Question". If that were defeated the proposed words to be inserted by the Government amendment could be declared by the Chair to have been agreed to. (Paragraph 101)**

#### **Transposing directives into UK law<sup>106</sup>**

**21. We welcome the Government's new Transposition Guide but our initial examination suggests how limited the Parliamentary role is in this process compared, for example, with Nordic Member States. (Paragraph 108)**

**22. We recommend that the relevant EU directive and any related publications—such as the ESC's Report, if there is one—should be 'tagged' on the Order Paper whenever the House is considering legislation which implements a directive. Copies of the relevant EU legal instrument should also be made available to Members of standing committees on bills and delegated legislation committees, where appropriate. (Paragraph 109)**

#### **Co-operation between national parliaments**

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<sup>106</sup> Gold plating is considered in Standard Note SN/IA/3328, 16 December 2004, at <http://hcl1.hclibrary.parliament.uk/notes/iads/sn/ia-03328.pdf>

**23. We welcome the development of the IPEX project,<sup>107</sup> and the House's involvement in it. We hope that it will prove to be a useful resource in the future for co-ordinating the scrutiny activities of national parliaments. (Paragraph 111).<sup>108</sup>**

The Leader of the House, Geoffrey Hoon, has told the House he has been looking carefully at the Modernisation Committee recommendations on scrutiny, adding:

It is a matter that we need to resolve. I agree that it is important that we should improve the quality and quantity of European scrutiny. It is clear from elections here and votes in countries such as France and Holland that the European population is anxious to see an improvement in the way in which we deal with European issues. I am sure that this House, which has always set the standard for scrutiny, will look carefully at the proposals when they are brought forward, and when I have thought about them.<sup>109</sup>

## **D. House of Lords Procedure Committee proposals**

The House of Lords Procedure Committee has also considered reform of Parliament's involvement in European affairs and responded favourably to the proposal for a joint European committee.<sup>110</sup>

The Committee considered a proposal from the Government for a new committee involving both Houses in debate of European matters. This would be a successor to the Commons Standing Committees on the Convention on the Future of Europe, and on the EU Intergovernmental Conference, which a number of Lords attended. However, unlike its predecessors it is intended that this new committee should be a genuine joint committee in which Lords could play a full role. The proposal is for a committee with a remit to cover all aspects of the EU's work, by means of general debates, and statements from and questions to ministers and others. It would not conduct investigative or scrutiny enquiries, nor adopt substantive motions or make reports.

Although some doubt was expressed about whether a new joint committee would add significantly to the work already done by the European Union Committee of this House, we recommend that this House should co-operate with the House of Commons in establishing such a committee. The details of its operation will need to be settled in agreement with that House, but we recommend that:

The committee should be open to all members of both Houses  
 The quorum should be low (perhaps two from each House)  
 The committee should be given the power to permit the participation of United Kingdom MEPs

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<sup>107</sup> The objective of IPEX (Interparliamentary EU Information Exchange) is to support interparliamentary cooperation in the EU. Its purpose is to provide a platform for the electronic exchange of EU-related information between parliaments in the EU.

<sup>108</sup> <http://www.publications.parliament.uk/pa/cm200405/cmselect/cmmodern/465/46503.htm>

<sup>109</sup> HC Deb 16 June 2005 c 398 at <http://www.publications.parliament.uk/pa/cm200506/cmhansrd/cm050616/debtext/50616-06.htm>

<sup>110</sup> 2<sup>nd</sup> Report 2003-4, 20 May 2004, at <http://www.publications.parliament.uk/pa/ld200304/ldselect/ldprohse/99/9903.htm>

The committee should be given the power to allow statements from and questions to European commissioners and other EU officials  
The committee should meet no more than four times a year  
The committee should adjourn for divisions in either House  
The title of the committee should be simple and avoid confusion with other types of committee in either House, perhaps Joint European Committee  
The chairmanship should reflect the joint nature of the committee  
The committee should not automatically follow Commons procedures; for example a speakers' list for debate would be desirable  
The effectiveness of the new committee should be reviewed after two sessions

## **VI The *Treaty Establishing a Constitution for Europe***

In 2002 there were calls by members of the Convention on the Future of Europe for an enhanced role for national parliaments in the legislative process, in order to reduce the 'disconnection' between the EU and its citizens. This implied that governments and parliaments would also have to 'connect' better with citizens by changing the ways in which they dealt with EU business. The role of national parliaments and their input in a proposed subsidiarity "early warning mechanism" were the subject of Convention working groups, which published reports in 2002. Their recommendations fed into the process by which the *Draft Treaty Establishing a Constitution for Europe* was drawn up in June 2003. An IGC on the European Constitution opened in October 2003 and the final text was signed by Member State governments in October 2004.<sup>111</sup> Articles in Parts I and III contained assurances that the EU would apply the subsidiarity principle in drawing up legislation, while the Protocol on Subsidiarity and Proportionality set out the mechanism for applying it at EU level. As before, it would be left to Member States to decide on the national machinery for implementation and the application of subsidiarity at sub-state levels.<sup>112</sup> The Protocol on the Role of National Parliaments set out mechanisms for improving the provision of EU documentation to national parliaments, in order for them to enhance their own scrutiny procedures. The following sections look in detail at the provisions in the European Constitution.

### **A. Subsidiarity Articles**

Articles I-9(3), III-259 and IV-444 of the European Constitution deal with subsidiarity.

Articles I-9(3) and III-259 ensure that the EU will comply with the principle of subsidiarity. National parliaments will also be given a veto on the use of the "simplified revision procedure", which provides for the extension by the Council of Qualified Majority Voting (QMV) to any area which previously required unanimity (also known as the *passerelle*) in Article IV-444. This Article envisages a formal role for national parliaments in approving the transition from unanimity or from a special legislative procedure to QMV by the adoption of a 'European decision' authorising this change. The Council is required to

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<sup>111</sup> Agreed 29 October 2004, Cm 6429

<sup>112</sup> The Scottish First Minister, then Jack McConnell, set out the Scottish Executive's views on subsidiarity in a speech in June 2002 on "The Future of Europe Debate: a Scottish perspective" at <http://www.scotland.gov.uk/about/FCSD/ExtRel1/00014768/page1239857280.aspx>

notify any such decision to national parliaments and if any parliament objects within six months the decision will not be adopted.

In the UK, the *European Union Bill*,<sup>113</sup> which had its Second Reading on 9 February 2005, but then fell because of the General Election, set out the following procedure for obtaining parliamentary approval for such decisions:

- a. The House of Commons sends a message to the House of Lords asking for its opinion on whether the Commons should resolve to approve the initiative under Article IV-444;
- b. Not less than 20 sitting days after the Lords receives the message, the Commons may approve the initiative by resolution.

The decision on whether to approve the initiative would lie with the Commons.<sup>114</sup>

In May 2005 the Lords EU Select Committee published a Report on the *passerelle* clause. The Committee reiterated earlier concerns about the provisions in Article IV-444:

7. The Committee commented on the *passerelle* provisions in our earlier report on the draft Constitutional Treaty as it was under discussion in the Convention on the Future of Europe.<sup>115</sup> We expressed serious reservations about what was proposed. We particularly called for a role to be provided for national parliaments; and for the Treaty itself to set out those areas to which the *passerelle* might apply. The first of these concerns has in our view been addressed by the final text of the Treaty as presented for ratification. This is welcome.

8. What is both surprising and in our view unacceptable is the way in which the Government has chosen to propose that this provision be implemented in the United Kingdom.

9. The Treaty clearly provides that a decision under the *passerelle* can be blocked by "a national parliament". The Treaty also, correctly in our view, does not seek to prescribe for Member States what this means. We note, however, that elsewhere in the Treaty (for example in the Protocol on Subsidiarity) the Treaty clearly notes the independent role played by the two chambers in a bicameral parliament.

10. In the European Union Bill, however, the Government has proposed that the role of the national parliament for the purpose of an objection to a *passerelle* provision be taken by the House of Commons alone, albeit that this House is allowed 20 days to decide whether to express a view.

11. It is not normally this Committee's function to comment on bills. In the case of the European Union Bill, however, its provisions clearly fall within our terms of reference. We are reporting separately on the Constitutional Treaty's subsidiarity

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<sup>113</sup> Bill 45 of 2004-05. The Bill is discussed in Library Research Paper 05/12, 3 February 2005, at <http://hcl1.hclibrary.parliament.uk/rp2005/rp05-012.pdf>

<sup>114</sup> The Modernisation Committee endorsed the proposals for Parliament to exercise its veto over the *passerelle* clause as set out in the Bill and invited the Procedure Committee "to keep the operation of the mechanism under review" if the Bill was passed. See <http://www.publications.parliament.uk/pa/cm200405/cmselect/cmmodern/465/46506.htm#a36>

<sup>115</sup> FN 4: 41st Report, session 2002-03, "The Future of Europe-The Convention's draft Constitutional Treaty" (HL Paper 69, paras 177-8). <http://www.publications.parliament.uk/pa/ld200203/ldselect/ldcom/169/16901.htm>

provisions (also covered in the Bill)<sup>116</sup> and are in correspondence with the Government about both CFSP matters and the question of primacy of EU law.

12. We note that the Constitution Committee has a role to play in examining constitutional issues arising in bills and has reported on the European Union Bill.<sup>117</sup>

**13. We have, however, decided to make this report to the House on Clause 2 of the Bill because we consider that the Clause raises important issues which the House should debate during the passage of the Bill.**<sup>118</sup>

14. It is in our view Clause 2 as it stands is unacceptable in a bicameral system such as ours, where there is no overriding constitutional or other provision to determine the respective roles of the two Houses. The passerelle provision should be implemented in such a way that the view of the national parliament represents that of both Houses.

**15. We accordingly recommend that Clause 2 of the European Union Bill be amended to provide that "an initiative for a decision" under Article IV-444 of the Constitutional Treaty must be approved by both Houses of Parliament.**<sup>119</sup>

## B. Protocol on subsidiarity and proportionality

Article 1 of the Protocol asserts that the EU institutions would "ensure constant respect for the principles of subsidiarity and proportionality". Article 2 would require the Commission, except in cases of "exceptional urgency", to "consult widely", taking account, where appropriate, of regional and local dimension of the proposed action. Article 4 sets out the procedure, which would be as follows:

The Commission shall forward its draft European legislative acts and its amended drafts to national Parliaments at the same time as to the Union legislator.

The European Parliament shall forward its draft European legislative acts and its amended drafts to national Parliaments.

The Council shall forward draft European legislative acts originating from a group of Member States, the Court of Justice, the European Central Bank or the European Investment Bank and amended drafts to national Parliaments.

Upon adoption, legislative resolutions of the European Parliament and positions of the Council shall be forwarded by them to national Parliaments.

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<sup>116</sup> FN 5: 14th Report, session 2004-05, "Strengthening National Parliamentary Scrutiny of the EU—the Constitution's Subsidiarity Early Warning Mechanism" (HL Paper 101).

<sup>117</sup> FN 6: 4th Report, session 2004-05 (HL Paper 78, paras 7 and 8 and Appendix 5). The Committee concludes that the Clause "appears to propose a constitutionally unprecedented procedure". The Committee will make a further report in due course.

<sup>118</sup> FN 7: Concern about the Clause was expressed in the House during a Starred Question put by Lord Marlesford (HL Deb 6 April 2005, cols 727 - 731: [http://www.publications.parliament.uk/pa/ld199900/ldhansrd/pdvn/lds05/text/50406-03.htm#50406-03\\_star0](http://www.publications.parliament.uk/pa/ld199900/ldhansrd/pdvn/lds05/text/50406-03.htm#50406-03_star0))

<sup>119</sup> Lords Select Committee on the European Union, 15<sup>th</sup> Report, 2004-05, *Clause 2 of the European Union Bill—the Constitution's Passerelle provisions*, 5 April 2005, at <http://pubs1.tso.parliament.uk/pa/ld200405/ldselect/ldecom/102/10203.htm>

Article 5 would require that draft legislative acts be “justified with regard to the principles of subsidiarity and proportionality” and contain “a detailed statement making it possible to appraise compliance with” these principles. The statement should include an assessment of the proposal’s financial impact and, for a draft European framework law, of “its implications for the rules to be put in place by Member States, including, where necessary, the regional legislation”. Reasons for concluding that a Union objective can be better achieved at Union, rather than national, level, would have to be substantiated by qualitative and, if possible, quantitative indicators. Draft legislative acts would have to take account of the need for any financial or administrative burden on the Union, national, regional or local government, economic operators and citizens, to be minimised, and “commensurate with the objective to be achieved” (proportionality).

Article 6, on parliamentary intervention, states that:

Any national Parliament or any chamber of a national Parliament may, within six weeks from the date of transmission of a draft European legislative act, send to the Presidents of the European Parliament, the Council and the Commission a reasoned opinion stating why it considers that the draft in question does not comply with the principle of subsidiarity.

National parliaments would be responsible for consulting regional parliaments.

Article 7 would require the EP, Council and Commission (and, where appropriate, the Member States, ECJ, European Central Bank or European Investment Bank), to take account of the reasoned opinions of national parliaments on their drafts. This Article allocates two votes to each parliament, with bicameral parliaments having one vote for each chamber. If the reasoned opinion on non-compliance with subsidiarity represented at least one third of all votes, the draft would have to be reviewed. The threshold would be a quarter in the case of draft legislative acts submitted under Article III-264 (the area of freedom, security and justice). After this review the Commission, or one of the other initiators, might decide to maintain, amend or withdraw the draft, stating their reasons.

Under Article 8 the ECJ would have jurisdiction in actions on grounds of infringement of subsidiarity, brought under Article III-365 (role and procedures of the ECJ), or notified by Member State governments “on behalf of their national Parliament or a chamber of it”. The Committee of the Regions (CoR) would also have the power to bring an action before the ECJ in an area in which it was consulted. Under Article 9 the Commission would have to submit to the European Council, EP, Council and national parliaments, an annual report on the application of subsidiarity. This report would be forwarded to the CoR and the Economic and Social Committee.

### **C. Protocol on the role of national parliaments**

The Preamble to the Constitution Protocol states that its aim is 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

European legislative acts as well as on other matters which may be of particular interest to them ...<sup>120</sup>

Under Article 1 all Commission consultation documents (green and white papers and communications) would be forwarded directly by the Commission to national Parliaments upon publication. The Commission would also forward to national parliaments the annual legislative programme and “any other instrument of legislative planning or policy”, at the same time as to the European Parliament and the Council. The Protocol also clarifies the matter of who sends the documents to national parliaments. The Amsterdam Protocol provided that Commission consultation documents should be “promptly forwarded” to national parliaments, but did not stipulate that the Commission should do this. It is left up to Member State governments. The Constitution Protocol would clearly attribute this responsibility, with certain exceptions, to the Commission.

Under Article 3 national parliaments might send to the Presidents of the EP, the Council and the Commission a “reasoned opinion” on whether a draft legislative act complied with the principle of subsidiarity, in accordance with the procedure laid down in the Protocol on the application of the principles of subsidiarity and proportionality.

Article 4 would provide for a six-week period between a draft legislative act being made available to national parliaments in the official languages of the Union and the date when it was placed on a provisional Council agenda for adoption, or for the adoption of a position under a legislative procedure, such as a common position. There would be exceptions to this in cases of urgency, but the reasons for exceptions would have to be stated in the act or position of the Council. In all other cases no agreement may be reached on a draft proposal during the six-week period. For urgent cases for which “due reasons” have been given, there would be a ten-day period before adoption.

Article 5 would provide for the agendas and outcomes of Council meetings, including the minutes of meetings where the Council is deliberating on draft legislative acts, to be sent directly to national parliaments at the same time as to Member State governments. Under Article 6, when the European Council intended to make use of Article IV-444(1) or (2) of the Constitution (allowing the move from unanimous voting to QMV, without amending the Treaty under Article IV-443), national parliaments would be informed of the initiative of the European Council at least six months before any European decision was adopted.

Article 7 would require the Court of Auditors to forward its annual report to national parliaments at the same time as to the EP and Council. Article 8 stipulates that, for bilateral parliaments, the preceding Articles would apply to both component chambers. Articles 9 and 10 concern inter-parliamentary cooperation. Article 9 provides that the EP and national parliaments will “together determine the organisation and promotion of effective and regular inter-parliamentary cooperation within the Union”. Article 10 provides that a conference of parliamentary committees dealing with EU affairs “may submit any contribution it deems appropriate for the attention of the European Parliament, the Council and the Commission”. Furthermore, this conference would

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<sup>120</sup> CIG 87/04 Add 1

promote the exchange of information and best practice between national parliaments and the EP, including their special committees, and might also organise inter-parliamentary conferences on specific topics, in particular the common foreign and security policy (CFSP, including defence policy). The conference contributions would not be binding on national parliaments, nor “prejudge their positions”.

## **D. Implementing the subsidiarity early warning mechanism**

### **1. European Scrutiny Committee proposals**

In anticipation of the subsidiarity early warning mechanism contained in the European Constitution Protocol, the ESC submitted to the Modernisation Committee a paper setting out the issues for the UK Parliament. The main points were:

- How would the Commons decide whether to submit an objection on subsidiarity grounds?
- Problem of identifying non-compliant proposals and deciding whether this was sufficiently serious to present a reasoned opinion under the Protocol. Only the ESC could identify possible non-compliance and should therefore initiate the procedure for objecting and draw up the reasoned opinion.
- ESC might decide whether to object, and this decision might be endorsed or overridden by the House. This should not require time on the Floor or assistance from the Government.
- The House’s endorsement could be achieved or withheld by means of debate, or by a motion providing for objection to be made, to be agreed without debate, and if objected to, to be subject to a deferred division. The Government could decide on the timing within a specific range.
- The Government found this suggestion reasonable, but the Procedure Committee wanted opportunity for debate before a vote. A debate should not depend on the Government providing time or the whips ensuring a quorum. The case for a complaint could be considered in European Standing Committee to which the ESC had referred the matter. If agreed in SC, the debate would be followed by a motion in the House. If the SC rejected the ESC’s proposal, the Procedure Committee still wanted a vote on the Floor of the House. Alternatively, the motion before the Committee could be purely formal: that it had considered the proposal; or the proposal could be considered by a standing committee type of committee with ESC members as core members and any other Member able to attend to ensure a quorum. The ESC would then decide whether to put a subsidiarity objection to the House for a decision. If a debate was a requirement, the ESC favoured this option.
- When the ESC found grounds for a subsidiarity objection in a document, they would alert the devolved assemblies in order for them to voice their views; the ESC would rescind scrutiny clearance if the devolved assemblies identified subsidiarity problems they (the ESC) had missed.
- The ESC might require an opinion from a DSC and would coordinate closely with the Lords EU Committee. No need for extensive inter-parliamentary coordination,

but the ESC would inform their counterpart committees of proposals for a subsidiarity objection and cooperate on an inter-parliamentary basis.<sup>121</sup>

In a supplementary submission to the Modernisation Committee Inquiry, the ESC suggested the Committee might wish to consider how “the subsidiarity early-warning mechanism should be operated during parliamentary recesses, and whether at such times (especially in the summer) the right to make a reasoned objection to an EU proposal on subsidiarity grounds should be delegated to the ESC”.<sup>122</sup>

The Modernisation Committee recommendations on the procedure for applying Article 6 of the Subsidiarity Protocol were as follows:

119. We recommend that the European Scrutiny Committee should have responsibility for identifying those proposals which potentially breach the principle of subsidiarity. The system should work as follows:

- a) The Committee decides that a proposal does not comply with the principle of subsidiarity and sets out the reasons for this decision in a Report.
- b) The Chairman, or another member of the Committee acting on behalf of the Committee, puts a Motion on the Future Business Section C to the effect 'That, in the opinion of this House, [the proposal] does not comply with the principle of subsidiarity for the reasons set out in the [First] Report of the European Scrutiny Committee'.
- c) Not less than five and not more than eight sitting days after notice of the Motion has been given, the Government puts the Motion on the Order Paper.
- d) The Questions on the Motion and any Amendment to it which is selected are put forthwith in the House.
- e) If the Motion is agreed to, the Speaker forwards the text of the Resolution, together with a copy of the European Scrutiny Committee's Report, to the relevant EU institution.<sup>123</sup>

## 2. Lords EU Committee proposals

The House of Lords EU Committee also examined how national parliamentary scrutiny could be strengthened in the context of the subsidiarity early warning mechanism.<sup>124</sup> The Committee was positive about the new mechanism, believing that, even if the Constitution does not come into force, “the provisions relating to national parliaments and to subsidiarity can and should provide a stimulus to greater and more effective scrutiny by all national parliaments in the EU”.<sup>125</sup>

The Committee thought that “even if the Constitutional Treaty does not enter into force, the provisions relating to national parliaments and to subsidiarity can and should provide a stimulus to greater and more effective scrutiny by all national parliaments in the EU” (281). The Committee supported the strengthening of the subsidiarity principle in the

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<sup>121</sup> ESC Submission to Modernisation Committee, 5 May 2004

<sup>122</sup> Para. 20 at <http://www.publications.parliament.uk/pa/cm200405/cmselect/cmmodern/465/465ii.pdf>

<sup>123</sup> <http://www.publications.parliament.uk/pa/cm200405/cmselect/cmmodern/465/46506.htm#a36>

<sup>124</sup> *Strengthening national parliamentary scrutiny of the EU – the Constitution's subsidiarity early warning mechanism*, HL 101, 2004-05, 14 April 2005, at <http://pubs1.tso.parliament.uk/pa/ld200405/ldselect/ldcom/101/101.pdf>

<sup>125</sup> HL 101, p.55

proposed Protocol and its emphasis on the role of national parliaments, but also noted that national parliaments and the EU institutions would “have to be stringent in ensuring that the principle is adhered to and that the objective of subsidiarity ... is met” (284). The Committee considered the procedure in the House for applying the proposed early warning mechanism and monitoring it:

292. In view of the political significance of the exercise of a vote under the early warning mechanism, we recommend that the House itself should cast the vote (subject to our conclusion in paragraph 99) (para 95).

293. We recommend that in this House the trigger for a debate and decision on whether to cast a vote under the early warning mechanism should be a report from our Committee (para 96).

294. The House could agree that the exercise of its vote on any legislative proposal would be delegated to the EU Select Committee in the event of a six week period expiring during a recess, unless the House had already come to a decision on the proposal in question (para 99).

295. We recommend to the House that the operation of the early warning mechanism should be kept separate from the House’s current Scrutiny Reserve under which we currently operate (para 100).

296. We recommend that the Government should not support a proposal in Council which has been the subject of a subsidiarity yellow card in either House of Parliament without first further explaining to Parliament its reasons for doing so (para 101).

297. We disagree with the suggestion that the two Houses must co-ordinate their response in individual cases. However, we recognise that although each chamber has its own vote it will be desirable for the House to work with the Commons on subsidiarity issues and, where possible, for the two Houses to support each other when submitting reasoned opinions. In spite of this, it is important to note that if the two Houses do reach a different view on whether a yellow card should be raised in a particular case their votes would not cancel each other out—it will just be that the threshold is not one step closer to being reached (paras 107-108).

#### **Working within the six-week period provided by the Treaty**

298. As the six-week timeframe is short we fully expect the EU institutions to ensure that proposals reach national parliaments at the same time as they reach national governments to give parliaments the opportunity to scrutinise them fully and do so in the light of each other’s deliberations. We warmly welcome this new system as it will strengthen the process of parliamentary scrutiny and prompt national parliaments to investigate and act on breaches of the principle of subsidiarity in good time (paras 113-114).

299. We recommend that the Commission should inform national parliaments when consultation on a legislative act is launched (para 115).

300. We welcome the commitment by the Government to assist parliament during the six week period. We expect the Government to assist parliament as early as possible in the six week period and to provide a detailed analysis in each case of the application of the subsidiarity principle. Such an analysis should take the form of the quantitative and qualitative analysis the Commission would be required to produce by Article 5 of the Protocol (para 134).

301. Whilst we recognise that an analysis of subsidiarity issues upstream would be beneficial, the full subsidiarity implications of EU action in a particular field would not be clear until a draft legislative proposal has been tabled (para 145).

#### **Monitoring the mechanism**

309. It is unclear whether the Constitutional Treaty intends subsidiarity monitoring to be a legal or simply a political obligation for each Member State and national parliament. In practice it would be up to each parliament to decide the extent to which they would become involved in scrutinising subsidiarity compliance. While there may be no

enforceable legal obligation upon them to do so, in our view the political pressure would be such that they ought to feel obliged to carry out this scrutiny fully (para 170).

310. It is clear that the Commission and other EU institutions would intensify their subsidiarity checks in order to pre-empt the raising of yellow cards by national parliaments. We welcome this (para 176).

311. The Commission's annual report on subsidiarity is to be welcomed and will be received with interest (para 178).

312. Subsidiarity checks by the Government, and the assessments promised under Clause 3 of the European Union Bill, should be rigorous and detailed whether or not the Protocol comes into force. The Government's subsidiarity assessment should, as now, be part of the explanatory memoranda furnished by the government on each legislative proposal (para 180).

313. We expect, given the short time frame allowed, that the Government's subsidiarity assessment will be received by Parliament no later than two weeks after submission of the draft legislative proposal. This is the timetable to which the Government currently works. In the event of a delay in preparation of an Explanatory Memorandum, the subsidiarity analysis should if necessary be presented separately to avoid delay (para 181).

314. The new procedures will enhance openness and accountability, by subjecting the Government's assessments to public scrutiny by Parliament, which is all for the good. In addition, we will begin our analysis of draft legislative proposals as soon as they are received (para 182).<sup>126</sup>

The Lords Committee also looked at the *passerelle* clause in a Report entitled *Clause 2 of the European Union Bill—the Constitution's Passerelle provisions*. The Committee was critical of the procedure proposed in the EU Bill for scrutinising this mechanism, which did not envisage a role for the House of Lords in stating an objection to a *passerelle* proposal.<sup>127</sup>

### 3. Government's Reply to Lords Committee proposals

In July 2005 the Government replied to the Lords Committee proposals. Its response to the recommendation in Paragraph 101, that the Government should not support a Council proposal that has been the subject of a subsidiarity yellow card without first justifying this to Parliament, was as follows:

10. The Government values the contribution of Parliament on EU questions and takes seriously its responsibility to keep Parliament informed. Therefore, the Government agrees in principle with the Committee's recommendation, that the Government should not agree to proposals which have been the subject of a yellow card in either House without first explaining to Parliament its reasons for doing so. The Government would aim to do this at the earliest possible point at which such a decision was taken. This approach would be consistent with the Government's undertakings embodied in the House's Scrutiny Reserve Resolution of 6 December 1999. However, given the often fast moving pace of negotiations, and periods of parliamentary recess, it may not be possible for the Committee to consider the Government's position further before decisions are reached in the Council of Ministers. The Government is of course ready to work

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<sup>126</sup> <http://pubs1.tso.parliament.uk/pa/ld200405/ldselect/lducom/101/101.pdf>

<sup>127</sup> 15<sup>th</sup> Report 2004-05, HL 102 13 May 2005 at <http://pubs1.tso.parliament.uk/pa/ld200405/ldselect/lducom/102/102.pdf>

with the Committee to ensure that appropriate procedures are put in place to respond to such instances if they arise.<sup>128</sup>

## VII Improving scrutiny without the European Constitution

After both France and the Netherlands rejected the proposed European Constitution in referendums in May and June 2005,<sup>129</sup> the British Government announced that it would suspend parliamentary proceedings linked to its ratification pending a resolution of the impasse. However, the general need for scrutiny reform has been clearly identified. The non-implementation of the Constitution will not necessarily preclude reforms to improve the way the Government informs Parliament about EU matters and the way Parliament keeps itself informed about EU matters and seeks to influence the Government in EU decision-making procedures.

One observer thought subsidiarity would be a legitimate and popular area for reform:

Crucially, the fact that the system is merely advisory presents an opportunity for European leaders in their present predicament. Because it does not upset the existing power balance in the EU, it could easily be put in place without amending the treaty. Inevitably, there will be opposition.

[...]

Euro-sceptics will complain that this amounts to smuggling elements of the treaty in through the back door. Europhiles will worry that "cherry-picking" the least objectionable elements of the treaty is a prelude to its abandonment. They should press ahead despite such objections.<sup>130</sup>

A COSAC contribution addressed to the EU institutions adopted at the XXXIV COSAC meeting on 9-11 October 2005 stated:

4. Those national parliaments which wish to participate shall conduct a subsidiarity and proportionality check on a forthcoming EU legislative proposal or proposals, developing their existing scrutiny role as recognised in the Protocol on the Role of National Parliaments attached to the Treaty of Amsterdam, allowing them to test their systems for reaching decisions on subsidiarity and proportionality, enabling an assessment of the justifications presented by the Commission and stressing to the Commission national parliaments' role in relation to subsidiarity.<sup>131</sup>

Paragraph 2 of the COSAC Conclusions on Subsidiarity and Proportionality also called on national parliaments to fulfil the requirements of the Amsterdam Treaty Protocol and carry out a subsidiarity and proportionality check on EU legislative drafts, "with due

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<sup>128</sup> Government Reply to Lord Grenfell, Chairman of Lords European Union Committee

<sup>129</sup> For information on the referendums see Research Paper 05/45, *The Future of the European Constitution*, 13 June 2005, at <http://hcl1.hcllibrary.parliament.uk/rp2005/rp05-045.pdf>

<sup>130</sup> Ian Cooper, Munk Centre for International Studies, University of Toronto, *EUObserver* 13 June 2005 at <http://euobserver.com/?aid=19302&rk=1>

<sup>131</sup> <http://www.cosac.org/en/meetings/previous/London2005/ordinary/meetingdocuments/contributiondoc/>

respect for national parliaments' internal work programmes, legal frameworks and traditions".<sup>132</sup> COSAC suggested a procedure for the operation of the check, as follows

- i. Within two weeks after the examination by national parliaments of the European Commission's annual work programme, as envisaged in the initiative "Raising European Awareness", participating national parliaments should inform the COSAC Presidency of the proposals they wish to be subject to the subsidiarity and proportionality check; they may also make additional proposals at any time; the Presidential Troika should designate the most frequently mentioned proposals to be subject to the check; the list will be distributed to the national parliaments and the European Parliament;
- ii. the IPEX database should, if possible, be used in connection with the subsidiarity and proportionality check;
- iii. participating national parliaments should seek to complete their scrutiny within a six-week period;
- iv. the six-week period should begin when the proposal has been published in all languages;
- v. participating national parliaments or chambers should send any comments on subsidiarity or proportionality directly to the Commission, the European Parliament and the Council within the six-week period, copying those comments to the COSAC Presidency; and
- vi. it would be helpful if national parliaments could indicate clearly whether their comments relate to subsidiarity or proportionality.<sup>133</sup>

Richard Laming, director of *The Federal Union*, thought that democratic reforms to increase the transparency and efficiency of the EU decision-making process could be implemented by an agreement of the European Council:

**Meeting in public**

First, the Council of Ministers could meet in public when dealing with legislation. (This doesn't even need a summit – a single national government could simply leak all the papers and broadcast the proceedings from the Council chamber on a mobile phone.) Who could object to this? Every government has already signed up. Even the French and Dutch electorate, I suspect, would accept this one.

Next, the European Council could choose itself a chair. The heads of government meet in secret and publish no minutes, so they might even have chosen somebody already and not told anyone. If they had, we couldn't find out. Choosing a chair doesn't require a treaty change, only a decision by the people at the meeting itself.

Thirdly, national parliaments should be consulted on legislation. Open Council meetings will make this possible, in any case, for those national parliaments that choose to stir themselves, but the Commission could invite comments from them on the immediate publication of the first legislative proposal.

And lastly, the heads of government should make it clear that the next president of the Commission will be appointed on the strength of the results of the next

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<sup>132</sup> Ibid

<sup>133</sup> <http://www.cosac.org/en/meetings/previous/London2005/ordinary/meetingdocuments/contributiondoc/>

European elections in 2009. That will concentrate minds. Want to get ahead in European politics? Then earn the right at the ballot box.<sup>134</sup>

Elsewhere in Europe there are new proposals to improve cooperation between national parliaments in the EU, and between national parliaments and the European Parliament. On 23 August 2005 the EU publication, *Agence Europe* cited in its daily bulletin a study on interparliamentary cooperation in the EU by Morgan Larhant, published by the Paris Europhile think-tank *Notre Europe* (founded by Jacques Delors). The study, published on 11 August 2005, drew on questionnaires completed by national parliamentary representatives and the secretariats of the *organes spécialisées* (specialist bodies, such as the ESC). The author had also interviewed a number of EP officials. A number of suggestions for further inter-parliamentary cooperation which have been floated by the EP are taken up in the study and they all envisage the EP in a co-ordinating/organising role. The *Agence Europe* report was as follows:

*"Today, thanks to the Conventions (on the fundamental rights in the EU and the European Constitution) and the development of COSAC (the Conference of bodies specialised in Community affairs), awareness of the contribution of inter-Parliamentary cooperation on several levels is making progress ; the time for a new start is approaching", and even if it "is unable to plug the gaps various national parliaments are suffering from on their handle on community affairs, cooperation between European parliaments (...) may become an effective way of making the parliamentary voice heard on European integration and thus of developing a more democratic European Union, which is closer to its citizens".*

This is the conclusion reached by Morgan Larhant in his "policy paper" (our translation throughout as the paper is only available in French), entitled *Inter-parliamentary cooperation in the European Union- Time for a new start?*, which was published on 11 August by *Notre Europe*, an association founded by Jacques Delors and currently chaired by Pascal Lamy (<http://www.notre-europe.asso.fr>). The author, who considers that there is no point in setting up a "new institution, which (...) would inevitably create mistrust, or even rejections" (and therefore say "no" to the "Congress" put forward by Valéry Giscard d'Estaing during the Convention which drew up the European Constitution), has taken position instead in favour of a rationalisation of mechanisms which already exist and which should, in his view, bring about the "creation of a genuinely transnational co-operative system". (After years of often tense relations, the European and national members of Parliament have come much closer together recently: this is partly due to their joint work within the European Convention, and also a result of the increasingly frequent invitations to national MPs to take part in particularly important meetings of committees of the EP, for example on the European Constitution or on the revision of the Lisbon strategy: Ed).

Having taken a close look at the current situation and studied the responses of the parliaments of the Member States of the EU to a detailed questionnaire, Morgan Larhant has made the following suggestions, amongst others:

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<sup>134</sup> *EUObserver* 9 June 2005 at <http://euobserver.com/?aid=19282&rk=1>. Richard Kurpas, of the Centre for European Policy Studies (CEPS) has written about possible reforms that could be introduced without ratifying the Constitution in "What Could be Saved from the European Constitution if Ratification Fails? The Problems with a 'Plan B'", CEPS Policy Brief No. 70/May 2005 at [http://shop.ceps.be/BookDetail.php?item\\_id=1222](http://shop.ceps.be/BookDetail.php?item_id=1222)

(1) The essential dimension of cooperation between the national parliaments and between these and the European Parliament must remain the exchange of information: therefore, the practice of round tables must be continued and COSAC's number one mission must become the exchange of experience between members of Parliament. According to the author: - we must avoid any "*attempts at increased institutionalisation*" of COSAC; - the European Commission, the Presidency of the Council and the High Representative for CFSP should take part in COSAC's work more regularly; - the contributions voted on by COSAC should be limited to issues which are essential for the future of Europe and those concerning parliamentary control on European affairs; - a member of its secretariat could be given the job of increasing the media coverage of COSAC's work.

(2) Parliamentary cooperation as a palliative to the "*double democratic deficit*" (the fact that in certain important fields, "*parliamentary control is not fully carried out either by the national members of Parliament or by the EP*") could be reinforced if: - a network of Parliamentary committees were set up for each Community policy for which the EP has only non-binding competencies; - these networks were followed up; - the other Community institutions occasionally took part in these networks (including the director of the ECB); - each national parliament would co-operate with these networks and both political and administrative level.

(3) Interparliamentary cooperation as a "*timely source of democratic legitimacy*" will, in particular, require that: - the European Council ("*whether the Constitutional Treaty enters into force or not*") convenes a Convention for all "*major revisions of the constitutive treaties*"; - when a Convention is not convened, the EP holds a round table "*with representatives of the national parliaments upstream of its vote*".

(4) Better coordination between the various forms of cooperation will be made possible by: - a permanent representative being sent to the EP by all the national parliaments; - measures allowing the Conference of the Presidents of the Parliaments of the EU to become "*the steering and coordination body of parliamentary cooperation*" in the future. In order to do this, the Conference will have to have its own permanent secretariat made up of civil servants seconded by the European Parliaments. Furthermore, the Conference should think of ways to allow cooperation between the parliaments of the EU to enjoy the expertise acquired by the secretariat of the Parliamentary Assembly of the Council of Europe.<sup>135</sup>

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<sup>135</sup> *Agence Europe* daily bulletin, 23 August 2005. The full text of the paper, "La coopération interparlementaire dans l'UE l'heure d'un nouveau départ?" can be accessed at <http://www.notre-europe.asso.fr/IMG/pdf/Policypaper16-fr.pdf>.