



HANSARD  
SOCIETY

# HANSARD SOCIETY BRIEFING PAPER ISSUES IN LAW MAKING

## 8 : Scrutiny of European Union Business

FEBRUARY 2006

**1 Introduction:** The Hansard Society has been conducting a review of *Making the Law*, its 1992 report of the Commission on the Legislative Process, which advocated major reforms to the way that Parliament makes the law. As part of the review we have issued a series of Briefing Papers, the first six of which concentrated on the domestic legislative process. During the course of our work, we also assessed the many constitutional and political changes that had occurred since 1992, most notably the increasing impact of the European Union (EU), which is now said to account for 50 per cent of all 'significant' legislation enacted in the UK every year.<sup>1</sup> Paper 7 in this series, *European Union Legislation: The Regulatory Environment*, published in October 2005, looked specifically at this area, using the subject of regulation as its major theme.

This paper maintains the European focus but looks more closely at how the Westminster Parliament engages with, and scrutinises, legislation emanating from the EU. The paper also looks at how Westminster considers the activities of the EU and the way it holds UK ministers to account for their decisions in areas affecting the UK's relationship with the EU. It begins by looking at Parliament's system of scrutinising European law, highlighting some of the main strengths and weaknesses, before considering recent reform proposals and contrasting the UK scrutiny system with that used by other EU Member States. A concluding section puts forward suggestions for improvement.

**2 European Scrutiny at Westminster:** The principal means of scrutinising EU legislation in the UK Parliament is through dedicated committees in both Houses. The European Scrutiny Committee carries out this task in the Commons, and the European Union Committee acts in a similar role for the Lords. As Priscilla Baines has noted, 'The committees' work may be seen as a shared

endeavour by Parliament as a whole to scrutinise a particularly intractable area of legislative and, increasingly, other government activity.<sup>2</sup>

Both committees receive EU documents for consideration, (although as is explained in paragraph 2 (ii) the Lords Committee does not look at every document), along with Explanatory Memoranda from the relevant government department containing an assessment of the likely impact and implications of each document. The committees then analyse the documents in accordance with the terms of the Scrutiny Reserve Resolution (see paragraph 3). From this point onward the procedural similarity ends, and there are a number of significant differences to how these Explanatory Memoranda and documents are dealt with by the two Houses.

The following sections describe the different remits of the committees and recent developments to their work. Box A outlines the composition and working methods of the two committees.<sup>3</sup>

(i) **The House of Commons European Scrutiny Committee (ESC)** studies a large number of documents, usually in brief, reporting on or recommending for debate any which it believes are important. Its primary role is to sift EU documents on behalf of the House, assessing the political and legal importance of each one. Although it receives an Explanatory Memorandum (EM) on each document from the relevant minister, the Committee often requests further written information from the minister (sometimes more than once) before it is willing to

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clear a document, and regards this dialogue as one of the most important parts of the scrutiny process. When the House is sitting, the ESC meets every sitting Wednesday. It produces a weekly report that discusses the reasons for its decisions on each document, and also analyses the document and the EM. If deemed necessary, it will send a document to one of three Standing Committees for further consideration (See Box A). In 2004, the ESC considered 1,002 documents, deeming 559 to be of legal and/or political importance, and recommended 53 for further debate, three on the Floor of the House.<sup>4</sup>

The ESC also ‘monitors the activities of UK ministers in the Council, and keeps legal, procedural and institutional developments in the EU under review’. Its 16 members, supported by a similar number of staff, make it one of the largest and best supported parliamentary committees. Moreover, its work is also enhanced by support from the National Parliament Office, established in 1999, which has two staff members who act as the Committee’s ‘eyes and ears’ in Brussels. The Office provides a weekly (unpublished) bulletin and responds to specific questions and requests.

In addition to these scrutiny mechanisms, select committees now have guidelines for ‘core tasks’ that should underpin the work that they carry out. One of these tasks is to examine policy proposals emanating from the European Commission.<sup>5</sup> However, while some have suggested that select committees could play an even greater role in scrutinising European business, others contend that they are already struggling to carry out their present duties effectively. Gwyneth Dunwoody MP, Chair of the Transport Select Committee, warned the Modernisation Committee that placing further demands on committees to conduct prior scrutiny of European legislation would lead to over-stretch.<sup>6</sup> Of course, those who argue select committees could be more involved in the scrutiny of EU business do not suggest they should assume the functions of the ESC; but, rather, that committees could do more to

selectively focus on important proposals of relevance to their specific remit.

Any suggestion that select committees should do ‘more’ raises concerns among those who point out there are structural constraints that need to be considered. Select committee scrutiny is ‘resource hungry’. One solution, put to the Royal Commission on Lords Reform by the then Principal Clerk of Delegated Legislation in the House of Commons, Robert Rogers, is to have comprehensive joint scrutiny (e.g. on Statutory Instruments, European Union, Regulatory Reform, Delegated Powers) with a single central staff serving a joint committee on each. Sub-committees of each committee, composed of Members only of one House or the other, could then investigate in more detail. This approach, he argued, would allow for a much more economic use of the resources and ensure that the ‘single-House sub-committees’ reflect the political priorities and working methods of their own Houses.<sup>7</sup> However, although the Commission commended the idea, it has not been taken up.

(ii) **The House of Lords European Union Select Committee (EUC)** is charged with scrutinising EU legislation. It considers fewer items than its equivalent Commons committee but does so in greater depth, focusing on specific aspects of EU policy that have a particular relevance to the UK. The Chair of the Committee receives all the documents produced by the EU – approximately 1,000 each year – sifting through them on a weekly basis to decide which can be cleared immediately and which require further examination by one of the seven sub-committees.

These sub-committees then decide either to launch an inquiry, with a period of evidence-gathering, culminating in the publication of a report, or to draft letters to the relevant minister. In a typical year, the EUC will refer about 250 documents to sub-committees for examination, report on about 30 documents in depth, and also correspond with ministers on others. In total, some 70 peers are involved in the scrutiny process. The Commons and Lords committees

## BOX A THE OPERATION OF EUROPEAN STANDING COMMITTEES

**The House of Commons European Scrutiny Committee** is appointed under Standing Order No. 143 and has 16 members.

- It has the power to set up as many sub-committees as it wishes. The Committee is assisted by the National Parliament Office based in Brussels, which closely monitors the Commission.
- Initially, the Committee assesses the political and legal importance of each EU document and determines which will be subject to further investigation. All EU documents are sifted by the Committee itself, and documents deemed to be politically or legally important are discussed in the Committee's weekly report. (Sometimes the Committee may have to investigate at length before it can reach a view on whether something is of legal and political importance. On other occasions, it is plainly obvious.)
- Over 1000 documents are passed to the Committee for consideration each year and approximately 500 become the subject of a report; around 40 go on to be debated. Debates recommended by the Committee take place either in a European Standing Committee or more rarely on the Floor of the House.

There are three European Standing Committees with 13 permanent members and, although any MP may attend and speak, they do not have voting rights.

- Committee A deals with the environment, food and rural affairs, transport, local government and regions.
- Committee B deals with finance, work and pensions, foreign affairs, home and legal affairs and international development.
- Committee C deals with trade, industry, education, culture, media, sport and health.

The format of the Standing Committee is one of both question and debate. A minister answers questions for up to an hour (rigorously, without the assistance of colleagues or officials) and then the motion is debated for approximately an hour and a half.

Following Standing Committee proceedings, the Committee agrees a Motion, although the government may put down a slightly or wholly different one.

**The House of Lords European Union Committee** reports on approximately 30 documents each year and uses sub-committees to provide greater depth to its work than its Commons counterpart. The Committee focuses on proposals which raise issues of policy or principle, and considers which of these warrant debate. In essence, the EU Committee provides a form of departmental select committee system for the Lords, which it does not otherwise have. So, a peer interested in social policy might join Sub-Committee G out of an interest in that area, rather than European matters per se. The Committee has 19 members, seven sub-committees, and a total working membership of about 70 Lords including those co-opted to the Committee. The seven sub-committees are listed below:

- Sub-Committee A : Economic and Financial Affairs, Trade and International Relations
- Sub-Committee B: Internal Market
- Sub-Committee C: Foreign Affairs, Defence and Development Policy
- Sub-Committee D: Agriculture and Environment
- Sub-Committee E: Law and Institutions
- Sub-Committee F: Home Affairs
- Sub-Committee G: Social Policy and Consumer Affairs.

The sub-committees produce reports both for information and for debate. The government replies to each report within two months of its publication whether it is debated or not. A greater number of documents are considered in detail by correspondence with the relevant minister. Of the 1000 or so EU documents deposited each year, around 250 are sifted by the chairman for the sub-committees' consideration, and only a handful of those become subject to a full scale inquiry.

keep in close contact to ensure that work is not unnecessarily duplicated. Furthermore, as with the ESC, the EUC meets with MEPs and also collaborates with committees in other Parliaments and (including the European Parliament), a process coordinated by the Conference of European Affairs Committees.

Overall, when compared with many other EU countries, the UK Parliament's system of scrutinising EU business is one of the most effective. Indeed, according to Peter Riddell, only the Scandinavian countries with their mandatory systems (see paragraph 5) come close to the UK's degree of thoroughness.<sup>8</sup> The Hansard Society Commission on Parliamentary Scrutiny, which reported in 2001, took the view that, 'The scrutiny of European Union issues is an example of very highly effective scrutiny work undertaken by the Lords. It is also the best example of the two Houses working in a complementary and mutually beneficial manner.' The Commission's report argued that, 'This approach should be used as a model for future complementary, division of scrutiny functions between the two Houses.'<sup>9</sup>

Nonetheless, these endorsements have to be seen within a wider picture, and may simply indicate that the UK's system compares favourably with other scrutiny regimes, which are not rigorous at all. As this paper considers, the various shortcomings of the existing UK scrutiny process have been increasingly widely recognised and, as a result, a number of proposals for reform have been made.

**3 The Scrutiny Reserve:** At the heart of the system of parliamentary scrutiny is a power known as the scrutiny reserve. This is an undertaking by ministers that, bar in exceptional circumstances, they will not agree to anything in the European Council of Ministers – the EU's principal decision making body – until it has been cleared by the House of Commons ESC and the House of Lords EUC.

Whenever the scrutiny reserve is over-ridden the minister concerned must write immediately to the appropriate committee to explain why, and risks being

called for questioning if the written account is deemed inadequate. Although this happened on four occasions in 2002, no ministers were called in 2003 and only one in 2004. It has been suggested that this reflects the higher priority members of the government attach to this issue, as well as the successful efforts of the Cabinet Office – which provides bi-annual reports of scrutiny reserve breaches – in drawing attention to documents that may cause difficulties.<sup>10</sup>

**4 Weaknesses in the scrutiny system:** Despite the considerable work of the Committees (outlined above), and despite the safeguards provided by the scrutiny reserve, the parliamentary system of European scrutiny suffers from certain flaws which undermine its effectiveness. In this section, we outline some of these defects, before examining and identifying options for reform.

**(i) EU legislation and parliamentary (dis)engagement:** According to Rogers and Walters, the parliamentary system of European scrutiny is a little like a burglar alarm:

'[It] can identify an EU proposal that might damage UK interests; and a burglar alarm can tell you that someone is attempting to get into your house through the kitchen window. But just as a bit more action is required to apprehend the burglar, so the scrutiny system depends on MPs (and anyone else affected by an EU proposal or policy) making effective use of the product.'<sup>11</sup>

At present, however, most MPs appear to be sleeping through the alarm, or at least putting their head under the covers and hoping that someone else will investigate. As evidence of this, committees and debates considering EU matters in the Commons tend to be unpopular and often poorly attended. Indeed, in 2004, Peter Hain, then Leader of the House of Commons, wrote in a memorandum:

'...the sad fact is that European Scrutiny is something of a minority interest: the great majority of Members take little interest in the reports of the European Scrutiny Committee or in the debates which it recommends. Meetings of the European Standing Committees to which it refers some

documents are badly attended and seen to be irrelevant. European issues are seen as something separate and avoidable, while they should be in the mainstream of our political life.’<sup>12</sup>

The House of Commons Modernisation Committee similarly asserted that ‘only a few Members, usually those with strong views on the fundamental question of Britain’s participation in the EU’, took an interest in European matters. It noted poor attendances at European standing committees and reported that this was in marked contrast to other countries such as Finland, ‘where MPs see European business as being at the centre of their work rather than the distant periphery’.<sup>13</sup>

Generally, discussion of European business is absent from the floor of the Commons. Although the ESC can, and does, recommend that specific EU documents be debated in the main chamber, it is ultimately at the discretion of the government whether discussion actually takes place. Generally, it rejects such requests. In the two sessions 2003-04 and 2004-05, only eight hours 30 minutes was spent on EU documents out of combined sitting time of 1746 hours (less than 0.5 per cent of the time available during that session).<sup>14</sup>

In contrast, reports recommended for debate by the Lords EU Committee are more regularly debated on the Floor of that House, though given the enormous differences between the activities and functions of the Houses, such a comparison may not be entirely fair. Furthermore, the sub-committees of the EU Committee are popular with peers (there is reportedly a queue to join them) and regularly produce high quality reports, in part because members are chosen on the basis of their relevant expertise.<sup>15</sup>

MPs can rightly protest that they face greater demands than their unelected counterparts, making it harder for them to spend the same amount of time on European affairs. Yet, it is possible that spare capacity exists in the Commons which could be utilised to increase

scrutiny of EU business. For example, Martin Linton MP told the Modernisation Committee last year that on the Labour benches alone there were 150 MPs who were not on any select committees and not in any government posts.<sup>16</sup>

To address this issue, the Hansard Society Commission on Parliamentary Scrutiny recommended that every backbench MP should be expected to serve on a select committee. However, this recommendation was not accepted and the continuing number of backbench MPs who do not sit on any select committee represents a major waste of resource that could be used to enhance the capacity and scope of the select committee system as a whole.

- (ii) **Lack of transparency:** Parliamentary scrutiny of EU legislation suffers from a lack of transparency. Even if a member of the public had the inclination, they would find it hard to track the process of inspecting individual proposals. The agendas for the meetings of the ESC are only published the day before the Committee sits and do not give a clear indication as to what day an item will be discussed (though a rolling agenda shows which documents are awaiting scrutiny). However, it should be said that the tight schedule is not necessarily the Committee’s fault, as it can only consider documents after an EM is received, which often takes time. Furthermore, the EU agenda is fast-moving and it can be very difficult to fix agendas weeks in advance.

A second complaint is that there is no mechanism for alerting outside interest groups to when a relevant issue is going to be debated, although it should be noted that the House of Lords’ EUC is currently installing an email-notification system. A further criticism is that the majority of ESC meetings are not held in public, in contrast to other select committees.

The main reason for this discrepancy is that most of its time is taken up considering documents rather than hearing evidence, in contrast to the working methods of most select

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committees. Some members of the Committee have, in the past, asked for permission to sit in public to facilitate greater understanding of its work, but the Government has been unwilling to consent to the request. By meeting in private, the clerk and the staff are able to discuss documents with the members in a frank and open manner (in much the same way as other select committees meet privately in deliberative mode). In public, it is argued, this frank advice would cease, undermining the Committee's effectiveness.

Legislative meetings of the European Council are also held in private, though as the Council is a legislative body rather than a deliberative committee, pressure to make its work open to the public is rather more acute. In September 2005, British MEPs from across the political spectrum called on the Council to open its workings to the public. Timothy Kirkhope MEP, leader of the UK Conservative MEPs, asserted that: 'Making laws behind closed doors is plainly wrong. Transparency and openness are essential if the EU is to gain the confidence of its citizens and make its politicians more accountable. The fact that the leaders of all the British delegations have come together demonstrates the strength of feeling on this issue.' Gary Tittley MEP, leader of the UK Labour Group, made the point that the only other legislative body that does not meet in public is in North Korea.<sup>17</sup>

Since then, an Early Day Motion has been tabled in the Commons – signed by MPs from all three main parties – which also condemned the Council of Ministers' practice of meeting in secret and calls upon the British Government to use its presidency of the EU to press for greater transparency.<sup>18</sup> The draft European Union Constitution considered the need for greater transparency in EU proceedings but following its rejection in referenda, it was not adopted or implemented.

**(iii) Disconnection between Westminster and the European Parliament:** The UK Parliament is often accused of insufficient collaboration with

the institutions of the EU. In particular, there have long been suggestions that Westminster ought to have more formal relations with the European Parliament, as is the case with some other national parliaments. The Committee on European Union in Germany, for example, consists of 33 members of the Bundestag and 11 MEPs acting in an advisory capacity. As Peter Riddell notes, such structures help to keep national parliamentarians up to date with developments in Europe.<sup>19</sup>

However, proposals to set up forums along these lines have often received a cautious response from MPs who fear that formal contact with their counterparts in Brussels (and Strasbourg) would endanger the clear separation of their respective institutions. This opposition appears to be softening and the Modernisation Committee's March 2005 report on the scrutiny of EU business (see paragraph 7) recommended the creation of a Joint Grand Committee that would enable MPs and Peers to hear directly from MEPs and Commissioners, pointing out that a range of witnesses from inside and outside Parliament were in favour of the creation of such a body in order to raise awareness of EU policy and legislation and stimulate public debate.

**(iv) Inadequate scrutiny of delegated legislation:** EU legislation is presented to Parliament in the form of delegated (as opposed to primary) legislation. There are a number of different procedures through which delegated legislation must pass before becoming law. However, as was noted in *Issues in Law Making 3*, the current parliamentary procedures for scrutinising delegated legislation are not effective, and many proposals have been put forward to reform them. In short, the current procedures allow significant areas of delegated legislation to be passed without any detailed scrutiny or indeed any scrutiny at all.

The absence of effective scrutiny is particularly important in the field of EU legislation for two main reasons: first, is the enormous scope of EU legislation and its significant impact, particularly in areas such as commerce, regulation and the

## **BOX B EU LEGISLATION ON MINERALS, VITAMINS AND FOOD SUPPLEMENTS**

One of the most high profile pieces of EU legislation to be implemented in recent years has related to regulations on minerals, vitamins and food supplements. This case study outlines some of the main dates in the implementation of the legislation and also highlights different parliamentary procedures used in the scrutiny and debate of the measures.

Directive 2002/46/EC was formulated with the aim of harmonising EU legislation on food supplements. It was published in the Official Journal of the European Communities (L183/51) on 12 July 2002 and regulations came into effect in England on 1 August 2005. Separate parallel legislation was prepared for Scotland, Wales and N. Ireland. The Directive aimed to meet the following objectives:

- To define the term ‘food supplement’;
- To introduce a list of substances that may be used as sources of vitamins and minerals in the manufacture of food supplements;
- To set out requirements for labelling in addition to those already included in the Food Labelling Regulations 1996 (as amended);
- To provide a framework for maximum and minimum levels for vitamins and minerals in food supplements to be set in the future.

The Food Standards Agency drew up draft regulations and a partial Regulatory Impact Assessment for the purposes of consulting on the issue. The feedback received included support for new labelling and packaging requirements, but also significant criticism of the implementation of the Directive, and its perceived detrimental impact on the alternative health industry.

The legislation involves the use of a positive listing system, whereby ingredients not listed are outlawed for use in consumables. A company using any ingredient not listed in the document’s Annexes, but which was included in products that were on sale on 12 July 2002, was required to produce and submit a dossier to the European Commission which then passed it to the European Food Safety Authority for

consideration. This process was considered by some to be prohibitively expensive for smaller businesses, possibly forcing them to discontinue certain products containing ingredients not included in the Annexes.

Prior to the full implementation of the regulations, there were a number of different elements of parliamentary and EU scrutiny, including:

- The Commons European Scrutiny Committee produced two reports prior to the introduction of this legislation.<sup>20</sup>
- In January 2003, a major debate took place in the House of Commons.
- In July 2003, a standing committee met to discuss and vote on the approval of Statutory Instrument 1387.
- In June 2003, the legislation was debated in the House of Lords. The motion was passed opposing the Food Supplements Directive by 132 votes to 79.<sup>21</sup>
- A series of Early Day Motions were tabled between 2003-05 which were critical of the measures and attracted support from across the House of Commons.
- 12 June 2005: the deadline by which dossiers had to be submitted. Otherwise the product had to be removed from the market by 31 July 2005.
- A group of UK vitamin makers and health food stores banded together in order to challenge the legality of the Directive. This matter was referred to the European Court of Justice. On 12 July 2005 the Court ruled that the Directive was legal.
- 1 August 2005: new regulations came into full effect in the UK.
- 23 August 2005: a list of supplements with dossiers sent to the European Food Safety Authority for assessment.
- 1 Jan 2010: the date which a product will be able to remain on the market if EFSA does not give an unfavourable opinion on the dossier submitted.

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environment; second, scrutiny of legislation would provide an opportunity to assess whether the UK Government had added in extra complexity through 'gold plating'.

As noted in Paper 7, 'gold plating' is one of the most contentious aspects of the European legislation process. It occurs when EU directives are transposed into British law. The British Chamber of Commerce (BCC) claims there is a 'relative elaboration ratio' for the UK of 334 per cent; in other words, rather than simply copying out EU directives, the British Government on average multiplies their size enormously.<sup>22</sup> It should be noted that some of the increase in length is due to the precise and specific style of legislation commonly used in the UK, so that when something is drafted into an SI it will be longer than the Directive without any gold plating. Nonetheless, it is generally accepted that some additional elaboration takes place and the whole issue of transposition is one that the UK Government now takes a close interest in.

Since November 2001, following a request from Parliament, UK legislation enacting European law has had to be accompanied by a Transposition Note (TN) explaining how the main elements will be interchanged. Earlier this year, the Prime Minister told the House of Commons Liaison Committee that 'with all regulation that now comes from Europe we have made it clear there should be an end to gold plating'.<sup>23</sup>

In March 2005, the Government published revised guidelines for implementing EU law 'in the clearest and least burdensome way possible' and which, according to the Prime Minister, 'establishes the principle that transposed UK laws should mirror, as closely as possible, the wording of the original EU directive...[and] puts in place more checks and balances against over-implementation'.<sup>24</sup> However, these revisions do not elevate or increase Parliament's ability to monitor this practice.

Furthermore, the Lords Constitution Committee noted in its 2003-04 report that, 'when bills implementing EU law are brought before

Parliament, the Explanatory Notes [Memorandum] do not provide information on the scrutiny undertaken at an earlier stage by the Scrutiny Committee of the two Houses'.<sup>25</sup> In other words, when an Act of Parliament is required to give effect to a directive, there is no reference to the scrutiny process that the directive underwent prior to being agreed in the Council. As the Committee noted, there is no reason why this information should not be included: 'The better the House is informed about the purpose and provisions of a bill, the greater the potential for effective scrutiny and ensuring that the measure is fit for purpose.'

- (v) **Insufficient time for scrutiny:** Effective document-based scrutiny depends upon the comprehensive and timely transmission of EU documents and information to parliaments.<sup>26</sup> However, the agendas for Council of Ministers' meetings are typically unpredictable and documents are often available only immediately before a decision has to be taken (especially when they result from last-minute negotiations).<sup>27</sup>

The Amsterdam Treaty stipulated that national Parliaments should be given a six-week period between the publication of formal proposals by the Commission and their consideration by the Council of Ministers to allow for scrutiny of the proposed legislation. Despite this, there are complaints that the time allowed is still too short. In the UK, some participants have criticised Parliament for commencing scrutiny of EU business too late in the process, reducing its ability to influence the final shape of European legislation. Michael Jack MP was among several parliamentarians to tell the Modernisation Committee inquiry into European scrutiny that Parliament gets involved in EU matters 'far too far downstream. If we are going to have an influence on policy we have to be involved upstream'.<sup>28</sup>

Although there have been rare cases when the late arrival of explanatory memoranda has caused difficulties for completing inspection before Council decisions are made, in general the scrutiny of EU business begins as early in the UK as in any other country. Indeed, in

responding to Michael Jack's point, the Modernisation Committee noted that, since national Parliaments can only consider proposals once they have been published by the European Commission, there is little room for starting the process any sooner (though it floated the possibility of establishing a system that would allow examination of legislation before the Commission has produced formal documents). Nonetheless, it acknowledged that the fact many people inside and outside Parliament perceive the process to begin too late, suggests awareness of how the system works needs to be increased.

Yet, even if that problem were successfully addressed, it is likely that time constraints would remain. Despite the Amsterdam Treaty's guarantee that national legislatures should have six weeks to consider Commission proposals, the timeframe is often compressed by Member States hurrying to push through legislation during their six-month presidency of the EU. Additionally, more fundamental problems arise from complications inherent in the EU's 'co-decision procedure'. As Whitaker explains, this involves both the Council and the European Parliament and can entail two readings, a conciliation committee and a final reading in each institution. As legislative proposals can change significantly during this co-decision process, scrutiny carried out by national parliaments at the initiation stage may end up outdated and worthless.<sup>29</sup>

**(vi) Legislative overload:** It is clear that the sheer volume of new proposals emanating from Brussels has put a tremendous burden on both Houses' European committees, despite the resources afforded to them. With just three European standing committees and no ESC sub-committees, the Commons system is particularly overstretched. The problem of overload is, of course, not restricted to European legislation but is a wider feature of the legislative process. Parliamentarians of all parties increasingly complain that too much law is put before Parliament and that they cannot adequately examine it. Consequently, many feel that the quality of overall scrutiny is being compromised.

## **BOX C** EUROPEAN SCRUTINY IN THE SCOTTISH PARLIAMENT

The primary function of the European and External Relations Committee of the Scottish Parliament is to scrutinise the work of the Scottish Executive in relation to European and external relations issues, as well as conducting its own inquiries into how these issues affect Scotland. The European and External Relations Committee succeeded the former European Committee, as agreed by the Parliament on 5 March 2003. Its main aims are to:

- Monitor the activities of the Scottish Executive and to make sure it accounts for itself in the most transparent way possible in terms of the work of ministers and officials when considering EU issues;
- Create a more transparent decision-making process in the EU in order to ensure that people in Scotland can see more clearly the impact the EU has on their lives and what the Scottish Executive is doing to protect their interests.

Its remit is to consider and report on:

- Proposals for European Communities legislation;
- The implementation of European Communities legislation;
- Any European Communities or European Union issue;
- The development and implementation of the Scottish Executive's links with countries and territories outside Scotland, the European Communities (and their institutions) and other international organisations;
- Co-ordination of the international activities of the Scottish Executive.

**(vii) Post-legislative scrutiny:** The Hansard Society has long advocated that Parliament should systematically review the laws that it passes. Such post-legislative scrutiny should apply to key pieces of EU legislation as much as UK domestic legislation. The Government has recently made encouraging moves in this area by asking the Law Commission to undertake a study on the issues involved in introducing a system of post-legislative review. The Law Commission's report is expected in 2006 and represents an opportunity for Parliament to ensure that it is actively involved in looking at the effects of the laws it passes and also gives an opportunity to those affected by legislation to feed into the process.

## **BOX D REFORMS PROPOSED BY THE CONFEDERATION OF BRITISH INDUSTRY (CBI)**

In its evidence to the Modernisation Committee, the CBI put forward a series of reform proposals that built on previous recommendations outlined by the Director-General, Sir Digby Jones. These included:

- That British politicians ought to have a greater presence in Brussels so that committees can be better informed of the EU agenda at an earlier stage – indeed before proposals are even drafted.
- In order to achieve a complete understanding of the impact of a piece of European legislation, the Scrutiny Committee and the European standing committees ought to engage in a regular and extensive dialogue with relevant outside interest groups.
- In line with standard practice for departmental select committees and to restore public confidence, the scrutiny system must be accessible and transparent.
- Specifically, that the Scrutiny Committee's agenda should be easily available and the majority of its meetings opened to the public.
- The whole scrutiny system ought to be more 'joined-up' and that MPs, MEPs, officials and civil servants in both London and Brussels should communicate and pool information more effectively.<sup>32</sup>

**5 Lessons from Nordic countries:** In 1998, following a Modernisation Committee report on the subject, reforms were made to Parliament's system of European scrutiny, most notably the extension of scrutiny reserve provisions to include other areas of EU competence, such as foreign and security policy, and greater monitoring by the ESC of the Council of Ministers. Nonetheless, despite these changes, criticism of the scrutiny system continued, with Peter Hain, then Leader of the House of Commons, saying MPs needed to 'up their game'<sup>30</sup> and the Confederation of British Industry (CBI), rather more pointedly, asserting that they were 'asleep on the job'.<sup>31</sup> In response, in 2004 the Modernisation Committee announced a new inquiry into European scrutiny. The Committee received a wide range of submissions and suggestions about how to reform the current document-based system, many of which extolled the virtues of mandating scrutiny systems employed by national parliaments of the Nordic countries.

The pioneer in this was the Danish Folketing, though Sweden and Finland have similar systems that concentrate on questioning ministers before Council meetings and establishing a negotiating mandate, rather than on examining documents. In Finland, for example, it is established practice that, ahead of attending a European Council meeting, ministers must appear before the national parliament's Grand Committee to explain the government's proposed line. These hearings usually take place on the Friday before the Council meeting, and in advance of the hearing the relevant ministry must provide the Committee with a copy of the Council's agenda and a memorandum containing background information and the government's proposed position on each item to be discussed.

After the Council meeting, and usually within a few days, the ministry sends the Committee a written report. The minister gives an oral explanation at the next scheduled hearing, though they can be obliged to report earlier. Membership of the Grand Committee is highly prestigious and includes many former ministers and sitting chairs of specialist committees. In parallel to these regular hearings, the Committee also seeks views from specialist committees on the content of particular proposals as they affect Finnish

interests. The mandatory system undoubtedly strengthens the hand of national Parliaments in scrutinising the executive, and certainly makes individual ministers more accountable for EU matters. During the Nice Inter-Governmental Conference, for example, a Swedish Minister reportedly spent eight hours discussing the proceedings with the Swedish Committee by telephone.<sup>33</sup> However, a common criticism of this system is that it has the undesirable consequence of weakening the negotiating power of the national government in question.

According to Chris Huhne MP, 'Danish ministers can be so tied down that other ministers do not find it worthwhile negotiating with them, as they know they have no flexibility beyond their public position.' However, earlier this year a Finnish parliamentary committee undertook a major review of its system of EU scrutiny which concluded that the mandatory set-up 'works well. Thanks to this system, Finnish negotiators in Union preparatory bodies always represent a national position that has parliamentary backing.' Indeed, it claimed that the system has actually 'strengthened the negotiating capabilities of Finnish representatives in the Union's institutions'.<sup>34</sup>

## **6 Reforming the system: Government initiatives:**

Some leading figures in the UK Government have expressed interest in similar processes to those used in the Nordic countries. Jack Straw, the Foreign Secretary, told the House of Commons last year that he had 'no fear whatever about Parliament being involved much earlier, not just in the scrutiny of documents but in establishing policy in advance. It strengthens our hand when we go to Brussels or Luxembourg if we know what Parliament wants and what it does not want.'<sup>35</sup> However, it seems extremely unlikely that the Government would approve a wholesale adoption of the Nordic model and agree to its ministers being mandated in the Council. Obviously, such a move would have fundamental implications for the relationship between Parliament and government in the UK.

Indeed, the Government's proposals to the Modernisation Committee focused on reforming the existing system rather than replacing it. While applauding the 'diligent and valuable' work of the scrutiny committees in both Houses, Mr Straw argued that:

'We need a broader and earlier focus, across Parliament as a whole, on the forthcoming plans of the Commission and the European Council, sufficiently in advance that all Members of the House and of the other place have an opportunity to raise concerns and to influence policy before it is set in stone.'<sup>36</sup>

Accordingly, the Foreign Secretary announced that every January the Government would present to Parliament an annual White Paper looking ahead to the EU's legislative programme for the forthcoming year, and the Government's priorities. In addition, Mr Straw announced that he would make an oral statement to the House summarising the White Paper's main themes and, furthermore, that each July the Government would publish an interim report to take stock of progress and look ahead to the second six-month presidency of the year. Jack Straw also announced the Government's plans to create a new Joint Grand Committee of both Houses – which European Commissioners could attend – that would meet on a quarterly basis. This proposal was welcomed by various stakeholders that had submitted written and oral evidence to the Modernisation Committee's inquiry.

## **7 The Modernisation Committee's Report:**

In March 2005, the Modernisation Committee published its report, *Scrutiny of European Business*, and largely endorsed the Government's proposals concerning the creation of the Joint Committee, which it suggested naming the 'Parliamentary European Committee' (PEC).<sup>37</sup> It recommended that Commissioners be invited to meetings of the PEC, which it believed would convene on average four times a year, and suggested that British MEPs be permitted to attend and to speak.

It noted the effectiveness of the Nordic scrutiny systems, particularly Finland, but argued that the strong emphasis on consensus politics there, as a consequence of the country's proportionate electoral system and history of coalition governments, means that 'notwithstanding the great strengths of the Finnish system, it is difficult to identify aspects which might usefully be transferred to the UK setting'. The Committee concluded by commending the complementary aspects of the Commons and Lords processes which, facilitating rapid analysis on one

hand and more detailed consideration on the other, together 'provide for a scrutiny of EU legislation which is both broad and deep'. The Committee did, however, propose some specific reforms to the existing system. It endorsed the ESC proposal that the number of European Standing Committees be increased from three to five, and recommended that their core membership shrink (from 13 currently) to nine and that they be designated by transparent names rather than perfunctory letters. In addition, it proposed that each committee should meet less frequently – on average six or seven times a session compared to 11 or 12 at present – making attendance less of a 'burden' for members. It also recommended that the European Scrutiny Committee should be able to meet in public when it is considering which documents to refer for further debate.

Finally, the Modernisation Committee recommended that the Government undertake to alert the ESC by letter 'at an early stage of consultation exercises on important proposals', and that in turn the ESC forward the letter to the relevant departmental select committee for information as a matter of routine.

The incoming Commons Leader, Geoff Hoon, indicated that parliamentary scrutiny of EU business would be a priority for the coming session: 'I believe – not least as a former Member of the European Parliament – that it is important to look carefully at the way in which the House scrutinises European legislation. I am of the opinion that we could do better and that we could engage in the debate about such legislation rather earlier in the process. Certainly, I know that it is something that particularly interests the Modernisation Committee'.<sup>38</sup>

Meanwhile, the Minister for Europe, Douglas Alexander, announced 'a new approach to provide better and more timely information to both Parliament and the European Scrutiny Committees about the agendas and outcomes of EU Council of Ministers meetings'. He stated that the Government would provide Parliament with a ministerial statement no later than the day before a formal Council meeting 'to provide as much information about the items on the agenda, why they are on the agenda, and what the UK as holders of the EU presidency hopes the Council will achieve'. After the Council meeting,

written ministerial statements will be produced within five working days. Although this move does involve Parliament more closely in the scrutiny of EU business, one day's notice of the agenda ahead of a Council means its involvement in shaping EU policy and draft legislation remains largely symbolic.

**8 The Government Reply to the Modernisation Committee's Report:** At the time of writing, the Government has still not replied to the Modernisation Committee's report, *Scrutiny of European Business*, published in March 2005. The period following the report's publication was somewhat abnormal. The General Election in May and the subsequent Cabinet re-shuffle caused inevitable delays. However, the UK's Presidency of the European Union, which started in July, brought European Union issues up the political and media agenda and it might have been expected that any announcements on the subject would have been made in that period. In any event it would have been expected that a committee would have received a government response by this point.

But then, the Modernisation Committee is not a standard select committee, given that it is chaired by a Cabinet Minister, namely the Leader of the House of Commons. The Committee's recommendations are seen as carrying much greater weight and, therefore, a greater chance of being accepted and implemented. In this case, the Committee's recommendations closely reflect the proposals which the Government itself put to the Committee in a memorandum published in April 2004. However, the delay of almost a year (to date) perhaps suggests that the Government is reconsidering these proposals. Part of the debate within Government is thought to centre on a different set of proposals, which might include more radical changes to the current system of European Standing Committees than the Modernisation Committee recommended, perhaps moving to a select committee based system.

Some of the debate within Government may be about practical and structural concerns (for example, how the scrutiny reserve might operate under a different system). Given the enormous scope of the EU and its legislation and business, effective scrutiny is vital to

the political and parliamentary system as a whole. It is to be hoped that proposals for improvement are brought forward without any further delay, especially since improved scrutiny in this area has long been advocated across the political spectrum.

**9 EU Constitutional Reform:** The rejection of the draft Constitutional Treaty by the French and Dutch electorates in referenda in 2005 set back plans to reform the EU's decision making structures, although, in the view of some commentators, the rejections may eventually open up the possibilities for more fundamental changes. With 10 new members already admitted in 2004, and with further enlargement underway, constitutional change is probably unavoidable.

One measure that may yet be resurrected with important consequences for the role of national parliaments, relates to the principle of subsidiarity (referring to decisions taken at the lowest appropriate level). The draft constitution proposed to introduce a so-called 'yellow card' procedure, whereby, if a national parliament believes an EU legislative proposal breaches the principle of subsidiarity, it could present a reasoned objection; and if a third of chambers submitted similar objections within six weeks, the Commission would have to review the proposal.

The ESC has argued that this does not go far enough, and instead urged for a 'red card' procedure that would have forced the Commission to withdraw a proposal that had been objected to by two-thirds of national parliaments. However, this suggestion was not included in the draft constitution. Hence, as Philip Norton has pointed out, the yellow card proposal does not alter the fact that national parliaments are restricted to the use of persuasive, rather than coercive, powers.<sup>39</sup>

**10 Parliament as a forum for debate:** One of Parliament's most important functions is to articulate and debate major issues concerning the nation. Few issues are as important, or as controversial, as those relating to the EU. Yet, despite its importance, there is considerable ignorance and indeed misunderstanding about European matters, a situation which is not always helped by the way that the media approaches this subject. Although Parliament obviously addresses the

subject of the European Union in its debates, it is vital that it makes its procedures relevant and transparent, and engages with the issue of the EU in a way that the public as a whole can follow and understand.

**11 Proposals for reform:** In relation to EU legislation, the structures created in both the Commons and the Lords have equipped Westminster with a more effective system of scrutiny than exists in the national parliaments of many other member states, and certainly outside those national parliaments employing a mandatory system, which as we have seen, has its own drawbacks. All EU documents are deposited with Parliament and assessed to see what, if any, action should be taken. Moreover, as Norton has argued, the scrutiny reserve forces ministers to think carefully about the government's position in relation to any given proposal and to justify its stance. For their part, committees in the Commons and Lords do not use the reserve unreasonably, 'so, in effect, a balance exists; the government complies with the scrutiny reserve knowing it is not overly used...The process is important and limiting, especially in a deterrent sense.'<sup>40</sup>

One major weakness of the system is the failure of many parliamentarians, and particularly MPs, to engage with the process. This is a serious problem, since the effectiveness of the system depends on the principal actors to play an active part. As Peter Riddell notes, 'it is not really a matter of procedure but of political will. Are enough MPs willing to take European scrutiny seriously? And is the media willing to devote resources to covering in detail European activities which they are eager to denounce in general?'<sup>41</sup> If the answer to those questions is found to be 'no', then any reforms will be of little effect.

With that important point in mind, this paper concludes by looking at a number of areas where the procedures for scrutinising EU legislation might be changed to increase the effectiveness of the overall system and perhaps encourage parliamentarians, the media and the wider public to take greater interest in European business. A range of proposals have been brought forward, including those made by the Modernisation Committee, to improve Westminster's performance in this area. Further changes to the system might include:

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- Parliament and government should press for greater openness and transparency in the institutions of the European Union as this would aid the UK's scrutiny of their activities.
- Explanatory Memoranda should outline the scrutiny that each piece of proposed EU legislation has undergone and be posted on departmental websites.
- The European Scrutiny Committee should be able to require a debate in the Chamber on the most important proposals.
- Parliamentary committees should engage more closely with outside interest groups and widen their evidence-base.
- The European scrutiny system should be brought more obviously into the mainstream of parliamentary life. One way to achieve this would be to tackle the present disconnection between parliamentary committees – where the bulk of scrutiny work is undertaken – and the Commons Chamber.
- While the Lords is more ready to debate matters referred to it by the EU Committee proposals for commons debates on documents recommended by the ESC are generally rejected by the government. The government's control of the timetable, of course, touches on much broader questions about Parliament's ability to set its own timetable.
- EU legislative business remains ghettoised on the margins of the parliamentary process – certainly as far as the Commons is concerned. To fill the vacuum, Rogers and Walters propose that the ESC could be given 'the power to specify a time within which debates on EU documents should be held and the power to require a debate in the Chamber on the most important proposals...A similar approach could be used for European standing committees, removing the government's right to substitute a motion of its own when a document was reported from standing committee.'<sup>42</sup>

**12 Conclusion:** Parliament is often accused of being an institution in decline, weakening in the face of major political and constitutional changes which are steadily eroding its influence. These include an increasingly powerful and amorphous executive; devolved government in Scotland, Wales and Northern Ireland; and the growing influence of human rights issues. Perhaps most significantly of all, however, has been the impact of membership of the European Community, now Union. According to some, the UK's membership of the EU has had a profound and historic impact and has severely compromised the traditional sovereignty of Parliament by making it submit to the supremacy of Community law. Debates about sovereignty inevitably become polarised according to the broader views about the EU held by the protagonists involved, but it is beyond doubt that EU membership has transferred some of Parliament's legislative powers elsewhere. However, to assert that the institution is in decline is to underestimate Parliament's capacity to adapt to changing circumstances.

As noted at the outset, the EU now accounts for 50 per cent of all significant legislation enacted in Britain every year. It is, therefore, vital that Parliament engages properly with European affairs. Encouragingly, there is evidence that this is happening. The proposals for structures to enable members of both Houses to make formal contact with MEPs and Commissioners is an important proposal that shows how far things have moved in a relatively short space of time; as recently as 1997, the Procedure Committee had argued strenuously against the creation of such formal structures. But just as building stronger links between Westminster and European institutions is important, so is the need to establish closer relations between national parliaments throughout the EU which, in the final analysis, remain the essential democratic elements within the Union. On that note, the ESC's recommendation to strengthen the power of national parliaments in applying subsidiarity – by forcing the Commission to withdraw legislative proposals opposed by two-thirds of national parliaments – should be reconsidered. Only if national parliaments are seen to have genuine influence over the decision making process in Europe, will their members, and the wider electorate, take a greater interest in such matters.

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