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Factsheet L11 Legislation Series

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House of Commons Information Office

EU Legislation and Scrutiny Procedures

This Factsheet describes how the United Kingdom Parliament seeks to influence, examine and scrutinise the workings of the European Union. In particular, the Factsheet looks at the scrutiny of European legislation in the House of Commons.

Although the devolved assemblies in Scotland, Wales and Northern Ireland have some powers of implementation with regard to EU legislation, their scrutiny procedures are not discussed in this Factsheet.

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Introduction

The accession of the United Kingdom to the three European Communities (the European Economic Community (EEC), the European Coal and Steel Community (ECSC) and the European Atomic Energy Community (EURATOM)) on 1 January 1973 had great implications for the traditional concept of parliamentary sovereignty. The *European Communities Act 1972* gave the force of law in the United Kingdom to existing Community legislation and obliged the UK Government to incorporate into domestic law future legislative acts of the Communities. The Single European Act (came into force in 1987), Maastricht Treaty (came into force in 1993), Amsterdam Treaty (came into force in 1999) and Nice Treaty (came into force in 2003) extended these obligations. The *Treaty Establishing a Constitution for Europe* was signed in 2004 but was not ratified by all Member States and therefore did not come into force. This treaty was followed by the *Treaty of Lisbon*, comprising the *Treaty on European Union* and the *Treaty on the Functioning of the European Union*, which was ratified by the UK on 16th July 2008. The last country to ratify the treaty was the Czech Republic, which completed the process on 3 November 2009. The treaty became law on 1 December 2009.

The Factsheet first describes the institutions of the European Union and the way in which EU legislation is made, before looking at how it is incorporated into UK law and how Parliament scrutinises draft EU legislation.¹

Further information on the workings of the European institutions may be obtained from the United Kingdom offices of the European Commission and European Parliament. This Factsheet concentrates on House of Commons procedures; further information on the House of Lords' role is available from its Journal and Information Office. Contact details are given at the end of the Factsheet.

Institutions of the European Union

Council of Ministers

The Council of Ministers is composed of ministers from the Member States, the exact composition depending on the subject under discussion. Its main function is to act as the Union' s principal decision-making body. Heads of State or Government meet three or four times a year as the European Council (or summit) to discuss broad areas of policy.

European Commission

The Commission is the EU' s executive organ and the "guardian of the Treaties" . It initiates legislation, implements agreed EU policies and acts as a negotiator on behalf of the Community, notably in relation to trade agreements with third countries. The Commission is responsible for ensuring that Member States apply the provisions of the Treaties and subsequent legislation, and it takes action to rectify breaches, including referring alleged violations to the European Court of Justice. Each Member State has one Commissioner, who is nominated by the Member State government and appointed by the Council of Ministers following approval by the European

¹ Strictly speaking this should be EC legislation, not EU legislation, as laws are made by the European Community, not the European Union. However, EU legislation is increasingly used to describe laws made by the EU institutions.

Parliament.

European Parliament

The European Parliament is composed of 736 Members (MEPs) directly elected from each member state, who serve for a period of five years. The UK elects 72 of these MEPs (59 in England, 6 in Scotland, 4 in Wales and 3 in Northern Ireland) and the next elections are due in 2014. As and when the *Treaty of Lisbon* comes into force, the UK will receive one additional EP seat. The EP's involvement in the EU legislative process is outlined below. The Parliament has an important role in the EU budgetary processes. It approves appointments to the Commission and, by a vote of censure, can require the resignation of the Commission.

European Court of Justice

The Court of Justice is the final arbiter of all legal questions submitted to it under the EU Treaties. In this context it may hear cases arising from disputes between Member States, between Member States and EU institutions, or between EU institutions and firms, individuals or EU officials. The *Single European Act*, which came into force in July 1987, provided for the establishment of a **Court of First Instance**. This Court, which began work in September 1989, hears certain classes of cases brought by individuals, including actions brought by officials of the Union.

The **Court of Auditors** was designated an official institution of the European Communities in the Treaty on European Union (the Maastricht Treaty) in 1993, although it has existed since the Community was established. It consists of twenty-seven auditors from the Member States. It examines the accounts of revenue and expenditure of the EU and of bodies set up by it and reports its findings to the Council and Parliament.

European Union Legislation

The Council and the Commission may:

- make regulations. These have general application, are binding in their entirety and are directly applicable in all Member States;
- issue directives. These are binding as to the result to be achieved by the Member States to which they are directed. However, the national authorities may decide upon the method and form of implementation;
- take decisions. These are binding in their entirety upon those to whom they are addressed (e.g. governments, companies etc);

Recommendations and opinions have no binding force and thus do not constitute legislation.

Both the Commission and the Council are empowered to make laws but only the Commission has the right to initiate legislation. There are two ways in which legislation is made:

1. Council legislation is subject to a procedure involving consideration and consultation by the Council and European Parliament of proposals formulated by the Commission. The *Single European Act* of 1987 made certain types of legislation subject to a **co-operation** procedure which gave the European Parliament a greater

influence in the decision-making process. The Maastricht Treaty introduced the **co-decision** procedure. This is a complex process, which built on the co-operation procedure and enhanced the powers of the Parliament still further, giving it a final right of veto in certain circumstances. Under the Amsterdam and Nice Treaties the co-decision procedure largely replaced the co-operation procedure.

2. In terms of volume, the great majority of EU legislation is made directly by the Commission, and is not subject to the procedures outlined above. It is generally of a technical, trivial or routine nature, much of it concerned with implementing provisions for previously agreed Council legislation. However, the Commission has a number of powers under the Treaties where it may legislate on its own account without reference to the Council, for example, in certain areas related to state aids (i.e. financial support from public funds for public or private commercial enterprises).

Implementation of EU Legislation in the United Kingdom

The general authority for EU legislation to apply in the United Kingdom comes from section 2(1) of the *European Communities Act 1972* but most EU legislation requires specific implementation in UK law as well. Regulations from the EU are, in theory, directly applicable but may need to be supplemented by United Kingdom legislation for their full implementation. Directives generally require UK legislation to implement them. This may be effected by primary legislation (i.e. an act) but is usually achieved by statutory instruments, Orders in Council made under section 2(2) of the *European Communities Act 1972*, or by subordinate legislation made under any other act which provides appropriate powers.

Implementation of EU obligations by administrative rather than legislative action is permitted only in certain limited circumstances.

Parliamentary Scrutiny of European Legislation

None of the institutions of the European Union are answerable to any national Parliament; national parliaments can exercise their powers and influence directly only upon their own Ministers as national representatives in the Council of Ministers. The scrutiny system is needed to make this process effective.

Scrutiny of EU legislation is underpinned by the **Scrutiny Reserve**. This means that Ministers should not normally agree to the adoption of EU legislation in the Council without giving Parliament an opportunity to scrutinise that legislation. The first stage of this scrutiny is the **European Scrutiny Committee** which is required to consider all European Union documents. It must report its opinion on the legal and political significance of each document and recommend further action to the House. In around two-thirds of cases, no further action on the document is recommended. For the others, the Committee can report the issues a document raises but take no further action, refer the document for debate in one of the three **European Committees (Previously European Standing Committees)**, or recommend that the document be debated on the Floor of the House. Once a motion has been passed following a debate on the Floor of the House, or after the European Committee debate on a document, the scrutiny process is completed.

Other methods of holding Ministers to account, such as oral and written questions and debates, can also be used in relation to EU matters.

One issue facing the House of Commons has been the scrutiny of documents relating to Economic and Monetary Union (EMU). Although the UK is not currently a participant, the Government might at a later date and after a national referendum adopt the single currency. Following consultation between the European Select Committees in both Houses, it was agreed that proposals relating to EMU should be treated in the same way as other EU proposals and be subject to scrutiny.

The Scrutiny Reserve

The formal scrutiny of EU legislation in the UK Parliament is underpinned by the understanding that Ministers will not normally agree to European legislative proposals ahead of parliamentary scrutiny clearance. Originally resting on the undertakings of successive governments, this understanding was formalised by Resolution of the House on 30 October 1980. The Resolution related only to proposals recommended by the Scrutiny Committee for debate, although in 1984 the Government agreed that its spirit should apply to all proposals, and this was enshrined in a new Resolution of 24 October 1990. The Scrutiny Reserve may apply during parliamentary recesses, when the Scrutiny Committee does not meet, although this can present a problem for the scrutiny process. In its response to the 1989 Procedure Committee Report, which recommended that the recess should not normally be given as the reason for a Minister agreeing to a proposal in the Council, the Government said that it would have to bear in mind the length of the delay before the opportunity for debate and decide accordingly.

The introduction of the “co-decision procedure” in 1993² brought in a third reading legislative stage in some circumstances, occurring after the Scrutiny Committee has concluded its consideration of the original Commission proposal, including scrutiny of any European Parliament amendments. If there is disagreement between the Council and the European Parliament, a Conciliation Committee is convened and a compromise proposal may emerge which has not been subject to scrutiny by the Committee. Until 1998, the Scrutiny Reserve did not cover the Conciliation Committee deliberations. With the increase in the use of co-decision under the *Treaty of Amsterdam*, the need for the Reserve to apply to what the Select Committee called the “crucial stages” of the procedure became more pressing. It also became increasingly necessary for the Scrutiny Reserve to apply to the EU’s intergovernmental action in the Common Foreign and Security Policy (Title V of the *Treaty on European Union*) and in Provisions on Police and Judicial Cooperation in Criminal Matters (Title VI of the TEU). A new Resolution of 17 November 1998 provided that no Minister should give agreement to any legislative proposal or to any agreement under Titles V or VI which is still subject to scrutiny or awaiting consideration by the House.

In the Resolution the definition of any ‘agreement’ includes:

- agreement to a programme, plan or recommendation for European Community legislation;
- political agreement;
- in the case of a proposal on which the Council acts in accordance with the

² *Treaty on European Union (TEU)*, Article 189b (now Article 251 TEU)

procedure referred to in Article 251 of the Treaty of Rome (co-decision; now Article 294 TFEU, the Ordinary Legislative Procedure), agreement to a common position;

- to an act in the form of a common position incorporating amendments proposed by the European Parliament, and to a joint text; and in the case of a proposal on which the Council acts in accordance with the procedure referred to in Article 252 of the Treaty of Rome (co-operation, now Article 294 TFEU, Ordinary Legislative Procedure), agreement to a common position.

The Government may give agreement to a proposal still awaiting scrutiny or consideration by the House if it is considered to be “confidential, routine or trivial or is substantially the same as a proposal on which scrutiny has been completed” , or if the Scrutiny Committee has indicated that agreement “need not be withheld pending consideration” by the House. The Minister may also agree to a proposal that has not completed the scrutiny process “if he decides that for special reasons agreement should be given” , but he should explain his reasons to the Committee and to the House at the first opportunity.

The arrangements described above relate only to prospective measures (other than to the extent that a few legislative proposals are adopted before parliamentary scrutiny is complete). There is no corresponding systematic arrangement by which Parliament monitors progress of implementation of EU obligations arising from adopted EU legislation. The European Commission monitors national implementation measures, drawing governments' attention to any shortcomings or failings, and in certain circumstances, referring these to the European Court of Justice.

The Government has also undertaken to keep Parliament informed of major developments in the course of negotiations on proposals. This is done by supplementary explanatory memoranda, which are also considered by the Commons and Lords Committees.

European Scrutiny Committee

Over 1,000 documents a year are classed as European Union documents and are subject to scrutiny. These include drafts of legislation and also any amended later stages. Green and white papers of the Commission are included, as are Communications to the Council and draft recommendations, resolutions and conclusions. These latter documents are not formally binding but when endorsed by the Council may commit it to policies or actions in the future. The full range of documents is set out in Standing Order No. 143. A government department must deposit a European document in Parliament within two days of receiving it.³ The document should be sent to both the Vote Office and the European Scrutiny Committee.

The European Scrutiny Committee is an all-party select committee with the usual select committee powers including that to require submission of written evidence, to examine witnesses and to obtain specialist advice. In addition, it has the unique power to ask other select committees for their opinion on a document.

There are sixteen Members of the Committee with a quorum of five. These are nominated by the House, not on a motion from the Committee of Selection (as with departmental select committees), but on a Government motion, after consultations. The Committee has a staff of 14 headed by the Clerk of the Committee. As well as the usual select committee staff, the Committee can call on the assistance of Speaker' s Counsel and Clerk Advisers to provide expert scrutiny of the large number of documents it receives.

³ Direct e-mail transmission of draft legislative proposals and consultation documents from the Commission to national parliaments began on 1 September 2006

There are five main roles of the Committee:

- to assess the political and/or legal importance of European Union documents, and to decide which should be further considered in European Committee or on the Floor of the House;
- to be a source of analysis and information, by reporting in detail on each document it judges to be important (about 475 a year), and by taking the oral or written evidence it requires to come to a decision;
- to monitor business in the Council, the negotiating position of UK Ministers, and the outcome;
- keeping under review legal, procedural and institutional developments in the European Union which may have implications for the UK and for the House;
- in co-operation with the equivalent Committee in the House of Lords, policing the scrutiny system to ensure that it works effectively and that the Government complies with undertakings to Parliament.

The Committee supplements its scrutiny work by taking oral evidence from Ministers; by visits to the EU institutions; and by visits to each Presidency country shortly before it takes up the Presidency of the Union.

The Committee receives copies of documents, together with an explanatory memorandum prepared by the relevant Government department, which provides information about the general effect of the document. This includes its financial, legal and policy implications, and any other relevant information, such as whether the document is awaiting further consideration by other European Union bodies. The explanatory memorandum must be produced within ten days of depositing the document. In the case of fast-moving proposals for which a formal Commission proposal to the Council is not yet available, departments often produce an unnumbered explanatory memorandum forecasting the likely contents, in order to keep Parliament informed. These documents provide the backbone of the arrangements for influencing forthcoming developments.

These are considered by the Committee, which generally meets once a week whilst the House is sitting. Following such meetings the Committee publishes a report⁴ on the documents considered, highlighting any which it considers raise questions of legal and/or political importance, with any recommendations for further consideration by the House. It may also call witnesses to give oral or written evidence as necessary.

Around two-thirds of the documents considered by the Committee are found to be insignificant in legal and political terms and no further action is recommended. There are three actions the Committee can take on the remaining documents. It can:

- report on the issues raised but recommend no further action;
- recommend that the document is debated in one of three European Committees;
- recommend that the document is debated on the floor of the House

⁴ These are all published and are available from the home page of the committee on www.parliament.uk. The reports do not have specific titles but are named "First report", "Second report" etc.

When debate in European Committee is recommended, the document is automatically referred. This is noted in the general committee appendix to that day' s Votes and Proceedings. When the recommendation is for debate on the floor of the House, the Government' s agreement is necessary.

One further option is that a document could be "tagged" . This means that a document that does not merit debate in its own right is recommended as relevant to a debate in the House or in a European Committee. A tagged document will appear in italics below the motion for debate.

The second report of the Modernisation of the House Select Committee of 2004-05, Scrutiny of European Business⁵, made recommendations on changing the scrutiny system. In a written statement on 4 February 2008 the Deputy Leader of the House, Helen Goodman, announced that the Government was proposing improvements to the European scrutiny procedures.⁶ The Government proposed "the alerting of the Scrutiny Committee by the Government at an early stage to consultation exercises on important EU proposals; and"improved opportunities for Members to receive directly EU documents in areas in which they have expressed a particular interest" .

The House debated and agreed changes to Standing Order No. 143 on 7th February 2008,⁷ including the provision that the ESC and its Sub-Committees would generally sit in public, which commenced with immediate effect. However, after a debate in November 2008 on an amendment to Standing Order No. 143, from 1 January 2009 the Committee reverted to deliberating in private. Since the Lisbon Treaty came into force, with new powers for national parliaments, the Government has been discussing the role of parliamentary scrutiny of EU business.

European Committees

European Union documents recommended by the European Scrutiny Committee for further consideration by the House, unless the House otherwise orders, are referred to one of three European Committees set up under Standing Order No. 119.⁸ Under amendments to Standing Order 19 the thirteen members of the European Committees shall be nominated by the Committee of Selection in respect of any European Union document referred to it. In addition, the Committee of Selection will seek to nominate at least two members of the European Scrutiny Committee and at least two members of the relevant departmental select committee. The ESC member may also be permitted to make a brief statement explaining the decision to refer the document(s) to a European Committee.

The Chairman is chosen from the Chairmen' s Panel and may change from sitting to sitting. The quorum is three, excluding the Chairman. Any Member of the House may attend and speak at a European Committee but only members of the Committee can move a motion, vote or be counted as part of the quorum.

⁵ HC 465 2 004-05

⁶ HC Deb 4th February 2008 vol 471 c52-3ws

⁷ HC Deb 4th February 2008 vol 471 c52-3ws

⁸ There were just two committees before November 1998

The three European Committees have different subject responsibilities. These are based on the work of government departments and are:

- **A** - Energy and Climate Change; Environment, Food and Rural Affairs; Transport, Communities and Local Government; Forestry Commission; and analogous responsibilities of Scotland, Wales and Northern Ireland Offices.
- **B** - HM Treasury (including HM Revenue and Customs); Work and Pensions; Foreign and Commonwealth Office; International Development; Home Office; Ministry of Justice (excluding those responsibilities of the Scotland and Wales Office which fall to European Committee A); together with any matters not otherwise allocated .
- **C** – Business, Innovation and Skills; Education; Culture Media and Sport; Health

In making its recommendations for further consideration, the European Scrutiny Committee specifies the Committee to which it considers that documents should be referred.

Proceedings begin with up to an hour of questions to the responsible Minister or Ministers. . This period may be extended by up to half an hour at the Chairman' s discretion. The Chairman may also permit a member of the European Scrutiny Committee to make a statement of no more than 5 minutes, at the beginning of the sitting, explaining the decision to refer a document to the European Committee. The Committee then debates the motion moved by the Minister for up to 1½ hours. Amendments may also be moved (subject to selection by the Chairman). Business must be disposed of not later than 2½ hours after the commencement of proceedings.

The Chairman reports to the House any resolution to which the Committee has come, or that it has come to no resolution. A motion relating to the documents is then usually moved in the House a few days later. Any such proceedings in the House are purely formal and there is no further debate. Once this motion has been voted on, the scrutiny process is complete.

Debates on the Floor of the House

Each year the Scrutiny Committee recommends around three documents which it considers to be of particular importance for debate on the floor of the House. A debate can only take place following such a recommendation if the Government is prepared to find time. The document is automatically referred to a European committee but if the Government accepts the Committee' s recommendation, it tables a motion to "de-refer" the document from committee. As with documents referred to European committee, it is for the Government to decide the terms of the motion that is tabled in the House.

As mentioned earlier, documents can also be "tagged" to another debate but in this case they do not form part of the motion.

House of Lords Scrutiny

In the House of Lords the **European Union Committee** also examines proposals and decides whether they require further attention. It produces brief reports on fewer documents than the Commons Committee. Its general practice is to conduct detailed enquiries based on particular proposals or subject areas (e.g. fraud, EMU, 'third

pillar' matters), selected because of their general importance, and to report either for information purposes or with recommendations for debate in the House of Lords. Much of its work is conducted through five or six sub-committees that concern themselves 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.

Pre- and Post-Council Scrutiny

An essential aspect of the scrutiny process is its relationship with the actions of UK Ministers in the EU Council of Ministers. The Committee's pre- and post-Council scrutiny is thus an important part of the system.

Although "the Council" is technically the same body whenever it meets, it is in practice convened to consider particular subject areas, and is attended by the Member State Ministers with responsibility for that area; thus the Agriculture Council, the Environment Council, the Industry and Energy Council and so on. The agenda for a particular Council is often not known very far in advance, and this can pose problems for parliamentary scrutiny. Some three weeks before a Council, the government department with responsibility for that subject area submits to the Scrutiny Committee an "annotated agenda". This lists the matters which are expected to come before the Council, with a note on the latest state of play from the UK point of view. The Committee examines the annotated agenda at its next meeting and considers whether to apply pre-Council scrutiny to it.

Factors in the decision will include the legal or political importance of the proposals to be considered, and the progress made in accommodating UK interests. In practice the Committee has usually decided to focus on one important issue to be considered by the Council. The Committee can then take oral evidence from the Minister who will represent the UK. The Committee may instead take evidence from departmental officials, or ask the Government for a memorandum on particular points.

When the outcome of the Council is known, the Committee may take oral evidence from the Minister on the line he took in negotiations, or on the implications for the UK of the decisions reached by the Council. Evidence sessions are held in public and a full transcript is published later.

The Committee obtains a written report on each Council by means of a parliamentary question tabled by the Chairman. During adjournments, reports are in the form of letters from Ministers to the Chairman. The letters are published as an Appendix to the Report when the House returns.

Other methods of scrutiny

In addition to the scrutiny processes described above, all the usual means of holding Ministers to account apply in respect of EU matters; oral and written parliamentary questions may be tabled on European matters, Ministerial statements (usually written), are made on the outcome of meetings of the Council of Ministers and the European Council, and relevant European matters may be raised in the course of debates. Members may table subjects relevant to the European Union for discussion in the half hour adjournment debates at the end of the day's sitting. The Foreign and Commonwealth Office is the overall 'lead' department for European matters but the

lead on particular matters rests with the government department having the principal responsibility for the policy area concerned. Departmental select committees are also free to examine their department's European policy responsibilities in the same way as any other departmental policies.

Conclusion

The processes of scrutiny of EU legislation have changed since the initial entry of the UK in 1973. Until 1989 the system of scrutiny essentially derived from the reports of a committee set up in 1972. This select committee was appointed "to consider procedures for scrutiny of proposals for European Community Secondary Legislation". The Committee, chaired by Sir John Foster MP, 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 Communities and how it might develop machinery for the scrutiny of proposals for legislation.

In 1989 the Select Committee on Procedure undertook an enquiry into the effectiveness of that system, particularly in the light of the changes in the European legislative process brought about by the Single European Act and the increasing volume of legislation emerging from the Communities. Many of the recommendations in its Report (HC 622, 1988-89) were accepted by the Government in its Response (Cm 1081). After agreement by the House, changes to the scrutiny system were put into effect from the beginning of the 1990-91 session.

The Maastricht Treaty brought about further institutional, political and economic changes, including an increase in the areas of EU activity or competence 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 it is this system that largely remains today.

It is argued that the strengths of the European scrutiny system are:

- wide coverage
- written evidence by Ministers on every document
- rapid scrutiny and reporting
- sifting for legal and political importance
- analysis of any document found to be of legal or political importance
- public access to Explanatory Memoranda and, via the Internet or in hard copy, to the Scrutiny Committee's reports
- a process of written or oral questioning of Government until the Scrutiny Committee has the information it needs to reach a decision on a document
- debates on the most important documents
- the European Committee format
- a scrutiny reserve
- pre- and post-Council scrutiny of the Government's policy towards negotiations and the outcome

The system provides information and seeks to ensure accountability, but it is in addition to, and not instead of, all the other means by which the House and its Members are able to consider European business. Also, the scrutiny system is not an end in itself. Its product needs to be used in a wider political forum to complete the process of parliamentary accountability.

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Factsheet L11 European Communities Legislation

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