The European Scrutiny System in the House of Lords

A short guide
By the staff of the European Union Committee
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Introduction

This guide describes the European scrutiny system in the House of Lords.

Further information is available from the website of the European Union Committee (www.parliament.uk/hleu).

Also available on our website are the Committee’s Reports, correspondence with Ministers, and details about the Committee’s current scrutiny work.

The Committee publishes a monthly newsletter, detailing its work and inquiries in progress. You can sign up to receive the newsletter by e-mailing the Committee at euclords@parliament.uk
The purpose of the European scrutiny system

EU scrutiny is one of the key activities of the House of Lords.

There are four main purposes to the Lords European scrutiny system:

1. To inform the work of the House;
2. To influence and hold to account the UK Government;
3. To influence and engage with the European Commission and other EU institutions; and
4. To engage widely with stakeholders.

The Lords’ European scrutiny system aims to ensure that the House of Lords is well informed about European policies, and contributes effectively to debates on European policies.

UK Ministers are directly accountable to both Houses of Parliament. The Lords’ system allows the House to hold Ministers to account for their actions at the European level, particularly in negotiating legislation at the Council of Ministers, and allows the House to influence Ministers’ actions.

The Lords also seeks to engage with and influence the key European institutions, particularly the Commission given its role in developing legislative proposals, and also the other major institutions such as the European Parliament.

The system also aims to allow a wide range of stakeholders to understand and make their views known about key European policies.

In addition, following the Lisbon Treaty, national parliaments have a direct role in monitoring compliance with the principle of subsidiarity (see page 16).

The system is transparent, and a wide range of information is available on the parliamentary website, particularly on the pages of the European Union Committee (www.parliament.uk/hleu)
The European Union Select Committee

Ever since the UK joined what was then the European Economic Community in 1973, the House of Lords has appointed a Committee to scrutinise European matters. The House’s European Union Committee is a ‘sessional’ (permanent) select committee with all of the usual select committee powers. The Committee has 19 members. 18 of these are drawn from across the party groupings and cross-benches, and the Chairman is a non-affiliated member.

The Committee has, in turn, appointed subject-specialist Sub-Committees, each with specific policy remits. There are currently six Sub-Committees:

A. Economic and Financial Affairs
B. Internal Market, Infrastructure and Employment
C. External Affairs
D. Agriculture, Fisheries, Environment and Energy
E. Justice, Institutions and Consumer Protection
F. Home Affairs, Health and Education

All members of the Select Committee, barring the Chairman, sit on one of these Sub-Committees, which typically have 12 members in total. As with other House of Lords Committees, composition broadly reflects the composition of the House. Sub-Committee members who are not on the Select Committee are ‘co-opted’ members, formally appointed by the Select Committee at the start of each parliamentary session.

According to its terms of reference, set out in full in Appendix A, the Committee has four main roles:

1. Considering EU documents deposited in Parliament by the Government;
2. Considering ‘other matters relating to the EU’;
3. Assisting the House in its role in monitoring compliance with the subsidiarity principle; and
4. Representing the House in interparliamentary cooperation within the EU.

The first of these is the basis of formal scrutiny work and is at the core of the Committee’s activity.
In fulfilling their four roles, the Committee aims to:

- Provide analysis of, and comment on, EU proposals;
- Monitor the actions of UK Ministers in the Council; and
- Monitor legal, procedural and institutional developments in the EU that may have implications for the UK and the House.

The Committee and the Sub-Committees make their analysis and conclusions on these issues available to the House and to the public by publishing their correspondence with Ministers, producing detailed reports, and making public the oral and written evidence that they receive. The Select Committee also publishes on its website, approximately every fortnight, a list of those proposals currently being scrutinised, known as Progress of Scrutiny.¹

The Committees have a staff of 24 in total, headed by the Clerk of the Select Committee. Each Sub-Committee typically has a staff of three: a clerk, a policy analyst, and a committee assistant. Two legal adviser posts also advise the Select Committee and its Sub-Committees.

¹ [http://www.parliament.uk/business/committees/committees-a-z/lords-select/eu-select-committee-/Publications/]
The scope of the House of Lords system

In accordance with the first limb of the Committee’s remit, the scrutiny system in the House of Lords is document-based: it concentrates on examining EU documents and the Government’s policy towards them. In 2012, the Committee received around 800 documents for scrutiny.

The terms of reference do not fully define ‘EU documents’, but give examples of the types of documents that fall within the Committee’s remit, including:

- Publicly available documents that have been submitted by one EU institution to another;
- Draft legislative acts or proposals for amendments to such acts; and
- Draft decisions relating to the Common Foreign and Security Policy.

As well as draft EU legislation, documents which come under scrutiny include Green and White Papers, and Communications and reports from the Commission to the Council and the European Parliament.

In conjunction with the European Scrutiny Committee of the House of Commons, the Committee has agreed with the Government the types of documents that should be submitted, in order for the scrutiny system to operate effectively. Deposit – the submission of documents for scrutiny – means that the document is transmitted to the two Committees by the Foreign and Commonwealth Office, initiating the scrutiny process. The agreement includes provision for the Committee to request that a specific document – or type of document – be deposited in Parliament. Although this is at the discretion of the Government, it is expected that requested documents will be deposited.

The Committee may consider at its meetings any documents it wishes, whether or not they are subject to the formal scrutiny process; however, deposit ensures that the Government’s obligations (see page 8) and the Scrutiny Reserve Resolution (see page 15) bite.

The scrutiny system operates from Green Paper to amendments to legislation. This means that most EU policies are scrutinised not on the basis of a single document at a single time, but at several different junctures, as and when new documents are published. This allows the Committee to follow up its scrutiny work as legislation is negotiated and developed, and to continue to influence the Government and the EU institutions along the way. Members of the subject-specialist Sub-Committees build up considerable expertise in the policy areas they cover, allowing the Committee as a whole to make strong contributions to the full range of EU policies, and permitting the House to engage with policies consistently over a number of years.

The Committee also considers the annual Commission Work Programme, which gives early warning of new policies that will be considered over the subsequent 12 months.
The Explanatory Memorandum and other government undertakings

In order to facilitate the House’s European scrutiny, the Government has given a number of undertakings beyond the undertaking to deposit documents in Parliament.

The Explanatory Memorandum

The first of these is the commitment to submit an Explanatory Memorandum (EM) on each deposited document within ten working days of deposit. The responsibility for preparing an EM falls to the government Department with responsibility for the relevant policy area.

The structure of the EM has been agreed between the scrutiny committees of both Houses and the Cabinet Office. Some of the key points which an EM should generally cover include:

- A summary of the subject matter of the document;
- Any previous scrutiny history;
- A statement of where ministerial responsibility lies;
- The interests of devolved administrations;
- Note on legal and procedural issues, including the legal base of the document, the legislative procedure which applies, and the voting procedure;
- A statement on any human rights concerns;
- An assessment of whether the proposal complies with the subsidiarity principle;
- The Government’s view of the policy implications of the document;
- A statement on the impact on UK law;
- An impact assessment;
- Details of financial implications;
- Details on what consultation has taken place, including with the devolved administrations;
- The likely timetable for consideration of the document in the EU institutions; and
- The Minister’s signature.

The Minister’s signature means that the EM constitutes the Government’s evidence to Parliament regarding the EU document. The EM is therefore a useful source of the Government’s views for the Committee, stakeholders, and the broader public. The Cabinet Office makes EMs available on their website.²

If a proposal is substantially amended during the legislative process – for example, in a Council Common Position – then the Government must submit a supplementary EM in order to update the Committee and give it an opportunity to conduct further scrutiny.

2 http://europeanmemoranda.cabinetoffice.gov.uk/
Other government commitments

The Government has also made a number of other commitments in order to enable the scrutiny process to run smoothly. These include a commitment to respond to scrutiny correspondence within ten working days, and a commitment to respond to the Committee’s reports within two calendar months.

The Committee keeps track of how well Departments meet their commitments to provide EMs, correspondence and responses within the agreed deadlines, as well as their compliance with the Scrutiny Reserve Resolution (see page 15). The Committee staff work with Departments’ scrutiny co-ordinators and policy officials in order to improve understanding of the scrutiny process and emphasise the importance of scrutiny commitments being met.

If Departments are not meeting their scrutiny commitments, the Committee or the relevant Sub-Committee may call in a Minister to give evidence, in public, about specific issues and how the Department’s record might be improved.

Details of the Committee’s records and correspondence on these issues are available on the website.³

³ [http://www.parliament.uk/business/committees/committees-a-z/lords-select/eu-select-committee-/role/](http://www.parliament.uk/business/committees/committees-a-z/lords-select/eu-select-committee-/role/)
The Committee’s consideration of documents

Although the deposit of a document is the formal trigger for the scrutiny process, the House of Lords procedure is only initiated upon the submission of an EM. This is because the Committee’s scrutiny is usually targeted primarily towards the UK Government, and so there is generally little point in formal consideration of documents beginning before the Government’s evidence is available. However, with fast-moving dossiers – such as those relating to the euro area crisis, or those about to be discussed imminently by the Council – the Committee can and does look at documents before an EM has been received. However, the Government’s EM is still vital to our work, as it is the means by which the Committee can hold the Government to account.

The Sub-Committees conduct the bulk of the scrutiny work, but the main Select Committee has responsibility for a few cross-cutting areas, such as the EU’s multiannual financial framework, the Commission’s Annual Work Programme, and EU enlargement.

A flow-chart setting out the scrutiny process is given in Appendix C, and you can find a more detailed description of the process on our website. What follows is a short summary of the key steps of the Committee’s scrutiny process after a document is deposited.

The sift process

On the Tuesday of every week during which Parliament is sitting – and at pre-arranged times during recesses – the Chairman of the EU Select Committee conducts a ‘sift’ of all those documents for which an EM has been received in the past week.

Not every document merits scrutiny. For example, annual reports of EU agencies may be of interest to the Committee, but as they are not policy or legislative proposals, they are unlikely to merit detailed scrutiny, and there is no use in maintaining the Committee’s Scrutiny Reserve over them (see page 15). The sift process therefore allows the Chairman to determine which documents merit substantive work by a Committee, and which do not.

On the advice of the Committee’s clerks, policy analysts and legal advisers, the Chairman decides whether each document should be:

- Cleared from scrutiny;
- Cleared from scrutiny but sent to a Committee for information; or
- Held under scrutiny and sent to a Committee for examination.

The Chairman bases his decision on the political, practical and legal significance of the document and the policy area. This includes taking account of the nature of the document

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(e.g. whether it is a Green or White paper, a routine report, or a draft legislative proposal), the document’s policy implications, and the previous activity of the Committee on the area. More than half of the documents are cleared at the sift, allowing the Sub-Committees to concentrate on the most important documents and the most important policy areas.

Clearing a document lifts the Scrutiny Reserve. However, the relevant Committee may wish to write to the Government regarding documents sent to it for information, and it is still expected that the Government will comply with their undertaking to respond to correspondence within 10 working days (see page 9).

Once a document has been sent for examination, conduct of the scrutiny process – and the decision over whether to clear or hold the document under scrutiny – lies entirely with the relevant Committee.

**Examination**

Examination involves the relevant Committee considering the document, the Government’s EM, and a scrutiny note produced by the Committee’s staff, which provides an analysis of the documents.

The relevant Committee will have several options:

- To clear the document from scrutiny;
- To clear the document from scrutiny and write to the Minister;
- To hold the document under scrutiny and write to the Minister;
- To hold the document under scrutiny and conduct ‘enhanced scrutiny’ (see below); or
- To hold the document under scrutiny and conduct a full inquiry.

If the EM is comprehensive and of sufficient quality, and no doubts or questions arise, the relevant Committee may clear the document immediately. This does not mean that there has been an error in the sifting process; rather, it means that the Committee has been able to analyse the proposal and the Government’s position, based on its significant experience of the policy area, and give its view, without any need for further information.

There is no limit to the time that a document can be held under scrutiny by the Committee. However, all documents will ultimately be cleared, either because scrutiny has been completed or because the document has been superseded.
Correspondence with Ministers

The usual outcome of scrutiny is correspondence with the relevant UK Minister. This correspondence may simply be to set forth the relevant Committee’s views. More commonly, the Committee’s letters seek further information or clarification on the Government’s views.

It is only when the Committee is satisfied that it fully understands the Government’s position, the proposal’s likely impact on the UK, and has made its views known to the Government, that the correspondence will be closed. This is one of the most important aspects of the scrutiny process, and all of the correspondence sent and received is made available on the relevant Committee website.

Enhanced scrutiny

Sometimes, the Committee may wish to pursue its scrutiny further than correspondence with the Government would allow. For example, the Committee may wish to hear stakeholders’ views or to question the Minister directly. The Committee could conduct one or more evidence sessions or hold a seminar in order to discuss a document or set of proposals in greater detail.

The outcomes of such enhanced scrutiny, such as transcripts, a detailed letter to the Minister, or a note of the seminar, will be made available online. Based on the outcome of this enhanced scrutiny, the Committee may also choose to express its views to the European institutions through correspondence, for example with the relevant Commissioner.
Inquiries

The EU Sub-Committees, and the main Committee itself, conduct in-depth inquiries into the most important European Union policies. Some of these inquiries are into specific documents under scrutiny; others examine key policy areas more widely.

Inquiries are an opportunity for anyone with an interest in a policy to make their views known. At the start of an inquiry, a public Call for Evidence is normally issued, and organisations and individuals contribute their views on the form of written evidence, which is published on the Committee’s web pages. There are also oral evidence sessions, during which the Committees hear evidence in person from a range of people including Ministers, academics, representatives of non-governmental organisations and business leaders. When necessary Committees make visits to enable them better to understand the policy under investigation, sometimes going to Brussels to hold discussions with Commissioners, Members of the European Parliament, and others.

Inquiries typically run for several months, and conclude with the Committee publishing a report explaining and analysing the policy, and making recommendations. Formally, the report is made to the House. However, its recommendations are aimed primarily at Her Majesty’s Government, to seek to influence the Government’s negotiating approach; and also directly to the EU institutions, including the Commission and relevant committees of the European Parliament. The UK Government is required to respond in writing to each report within two months. The Commission has also undertaken to respond to each report sent to it by national parliaments. Reports are also usually sent to the relevant committee of the European Parliament.

The Committees’ reports are debated in the House of Lords, providing an opportunity to debate the issues with the Minister, and allowing all Members of the House, and not just those who conducted the inquiry, to make their views known. If the inquiry is into a document under scrutiny, that document is normally cleared once the debate has taken place.

Recent inquiries and reports by the European Union Committee

- EU approach to migration and mobility (published December 2012)
- European Banking Union (December 2012)
- Women on Boards (December 2012)
- The EU Sugar Regime (September 2012)
- Turning the tide on piracy: building Somalia’s future (August 2012)
- EU policy on criminal procedure (April 2012)
**Consideration of European matters by the House**

There is a range of ways for EU matters to be considered and debated by the House.

In addition to the work done by the European Union Committees, the House’s other Select Committees often examine matters which have EU aspects to them. Members can put questions to Ministers, and initiate general debates, on European matters. Ministers also make statements to Parliament about European Councils, and other important developments.

You can sign up to receive a newsletter about forthcoming business in the House of Lords, which lists business relating to the European Union: [http://lords-subscriptions.parliament.uk/](http://lords-subscriptions.parliament.uk/)
The Scrutiny Reserve Resolution

The full Scrutiny Reserve Resolution (SRR), as agreed by the House on 30 March 2010, is set out in Appendix B. In essence, the Resolution constrains Ministers from giving agreement in the Council of Ministers in relation to any document before the Committee has completed its scrutiny.

The SRR has no legal status in the EU, but is a direction given by Parliament to the Government, indicating the importance of parliamentary scrutiny. The SRR therefore aims to impose a discipline on Ministers and Departments to provide timely assistance to the Committee in carrying out its scrutiny function. While the SRR has no legal status in the EU, the Council of Ministers recognizes “parliamentary reserves” made by Ministers on behalf of their national parliaments which have a matter under consideration, and generally postpones decisions on the matter until such reserves have been lifted.

Giving agreement in the Council includes political agreements or an agreement on a particular approach. If a Minister gives agreement before scrutiny has been completed, this is classed as an override of the SRR, unless the Committee has given prior agreement – a scrutiny waiver – or the proposal is one that is confidential, routine or trivial, or is substantially the same as one on which scrutiny has been completed.

If none of these apply, then the Minister must explain his or her reasons for overriding scrutiny at the first opportunity. Often, this takes the form of a letter to the Committee. However, if a Minister overrides scrutiny without what the Committee regards as good cause, then the Minister may be called to give oral evidence in order to explain the circumstances of the override and how they and their Department will seek to avoid unnecessary overrides in the future.

It is usually straightforward to identify whether agreement is being given in relation to a document, but sometimes this can be more difficult to identify. Therefore, both the Committee and the Departments maintain a record of the overrides that are believed to have taken place. The Committee’s is included in Progress of Scrutiny so that it is available to the public and to departmental scrutiny coordinators.

Every six months, these records are compared and a final list agreed. The number of overrides is then the subject of a Question for Written Answer from the Chairman of the Select Committee, putting the number on the record. Full lists of documents on which the SRR has been overridden are published on the Committee’s website.
Scrutiny of the principle of subsidiarity

The principle of subsidiarity and the Reasoned Opinion procedure

Action should only be taken at EU level when it can achieve the sought-after objectives better than action at national or regional level. For example, EU-level action might be more effective for reasons of scale, or because it may be more efficient to have one set of laws. This is the principle of subsidiarity.

The principle of subsidiarity is enshrined in EU law through Article 5 of the Treaty on European Union. In 2009, the Treaty of Lisbon came into force and gave national parliaments new powers to raise concerns about whether proposals for EU laws complied with the principle, sometimes known as the ‘yellow and orange card’ procedures.

National parliaments are now empowered to issue Reasoned Opinions when they consider that an EU proposal for legislation breaches the subsidiarity principle. They have eight weeks from publication of a proposal in which to do so. Each parliament has two ‘votes’; in bicameral systems such as the UK’s, each chamber holds one vote, which it uses by issuing a Reasoned Opinion.

If one-third or more of the votes are cast against a specific proposal (currently 18 votes), a ‘yellow card’ is played, and the EU institution – usually the Commission – that issued it must review the proposal and reach a decision about whether it should be maintained, amended or withdrawn.

If a majority of the votes is cast against a proposal that will proceed under the ordinary legislative procedure, an ‘orange card’ is played. Should the issuing Institution wish to maintain its proposal, it must give its own Reasoned Opinion for doing so, and the Council and the European Parliament must consider all the Opinions before deciding whether the proposal complies with the principle of subsidiarity.

The House of Lords procedure

The EU Committee carries out the initial scrutiny of each proposal for compliance with the principle.

If the Committee or the relevant Sub-Committee considers that a proposal is in breach of the principle of subsidiarity, then it will publish a subsidiarity assessment report setting out its views and recommending that a Reasoned Opinion be issued. This subsidiarity assessment report will be debated in the House along with a motion that it be sent to the EU institutions as a Reasoned Opinion. The decision to send a Reasoned Opinion therefore rests with the House as a whole.
As of February 2013, five Reasoned Opinions have been sent by the House of Lords in total, most recently on the proposal for quotas for gender on company boards.

More information about the Reasoned Opinion procedure and the Committee’s scrutiny of subsidiarity is available on our subsidiarity webpage.\(^5\)

\(^5\) http://www.parliament.uk/business/committees/committees-a-z/lords-select/eu-select-committee-/committee-work/parliament-2010/subsidiarity/
Inter-parliamentary co-operation

The European Union committees seek to maintain effective links with the other parliaments of the European Union.

Members of the Committee attend twice-yearly COSAC conferences – meetings of members of the European affairs committees of national parliaments, together with candidate countries and the European Parliament. Members also attend subject-specific conferences, organised either under the auspices of COSAC, or by the European Parliament.

Within the UK, the Chairmen of the European Union Committee, and the House of Commons European Scrutiny Committee, meet informally twice a year with members dealing with European matters in the Scottish Parliament, the National Assembly for Wales and the Northern Ireland Assembly. The two Westminster scrutiny committees also organise informal meetings twice a year with the UK’s MEPs.

The UK Parliament has a small National Parliament Office in Brussels, staffed by one person from the House of Lords, and two people from the House of Commons. The Office assists the European scrutiny committees of the two Houses in the tasks which they carry out on behalf of each House. The Office also assists other committees of the two Houses with their engagement on European issues.
Appendix A: Terms of reference

The Committee’s terms of reference, as agreed by the House on 16 May 2012 are as follows. These terms of reference apply to the Select Committee and its Sub-Committees.

(1) To consider European Union documents deposited in the House by a Minister, and other matters relating to the European Union;

The expression “European Union document” includes in particular:

(a) a document submitted by an institution of the European Union to another institution and put by either into the public domain;
(b) a draft legislative act or a proposal for amendment of such an act; and
(c) a draft decision relating to the Common Foreign and Security Policy of the European Union under Title V of the Treaty on European Union;

The Committee may waive the requirement to deposit a document, or class of documents, by agreement with the European Scrutiny Committee of the House of Commons;

(2) To assist the House in relation to the procedure for the submission of Reasoned Opinions under Article 5 of the Treaty on European Union and the Protocol on the application of the principles of subsidiarity and proportionality;

(3) To represent the House as appropriate in interparliamentary co-operation within the European Union.
Appendix B: Scrutiny reserve and opt-in resolutions

The Committee’s Scrutiny Reserve Resolution, as agreed on 30 March 2010, is as follows:

That—
(1) Subject to paragraph (5) below, no Minister of the Crown shall give agreement in the Council or the European Council in relation to any document subject to the scrutiny of the European Union Committee in accordance with its terms of reference, while the document remains subject to scrutiny.

(2) A document remains subject to scrutiny if—

(a) the European Union Committee has made a report in relation to the document to the House for debate, but the debate has not yet taken place; or
(b) in any case, the Committee has not indicated that it has completed its scrutiny.

(3) Agreement in relation to a document means agreement whether or not a formal vote is taken, and includes in particular—

(a) agreement to a programme, plan or recommendation for European Union legislation;
(b) political agreement;
(c) agreement to a general approach;
(d) in the case of a proposal on which the Council acts in accordance with the procedure referred to in Article 289(1) of the Treaty on the Functioning of the European Union (the ordinary legislative procedure), agreement to the Council’s position at first reading, to its position at second reading, or to a joint text; and
(e) in the case of a proposal on which the Council acts in accordance with Article 289(2) of the Treaty on the Functioning of the European Union (a special legislative procedure), agreement to a Council position.

(4) Where the Council acts by unanimity, abstention shall be treated as giving agreement.

(5) The Minister concerned may give agreement in relation to a document which remains subject to scrutiny—

(a) if he considers that it is confidential, routine or trivial, or is substantially the same as a proposal on which scrutiny has been completed;
(b) if the European Union Committee has indicated that agreement need not be withheld pending completion of scrutiny; or
(c) if the Minister decides that, for special reasons, agreement should be given; but he must explain his reasons—

(i) in every such case, to the European Union Committee at the first opportunity after reaching his decision; and
(ii) if that Committee has made a report for debate in the House, to the House at the opening of the debate on the report.
The Committee’s Opt-in Scrutiny Resolution, also agreed by the House on 30 March 2010, reads as follows:

That, in relation to notification to the President of the Council of the European Union of the wish of the United Kingdom to take part in the adoption and application of a measure following from a proposal or initiative presented to the Council pursuant to Title V of Part Three of the Treaty on the Functioning of the European Union—

(1) No Minister of the Crown may authorise such notification within 8 weeks after the proposal or initiative has been presented to the Council.

(2) A Minister may however authorise such notification sooner than provided by paragraph (1) if he decides that for special reasons this is essential; but he should explain his reasons—

(a) in every such case, to the European Union Committee at the first opportunity after giving that authorisation; and

(b) in the case of a proposal awaiting debate in the House, to the House at the opening of the debate.

(3) Where the European Union Committee is scrutinising the question of notification independently of the substance of the measure to which it relates, scrutiny of the substance of the measure will continue to be governed by the Resolution of the House of 30 March 2010, as amended.
Appendix C: Scrutiny flowchart

1. Deposit of documents

2. Submission of Explanatory Memorandum (within 10 working days)

3. Weekly Sift

3a. Sift advice
3b. Chairman's sift

Document cleared
Document cleared but sent to a Subcommittee for information
Document held under scrutiny and sent to a Sub-Committee for examination

A letter may be sent setting out the Committee's views

4. Examination

4a. Correspondence with Ministers – a letter may be sent setting out the Committee's views
4a. Correspondence with Ministers – a letter may be sent requesting further information
4b. Enhanced scrutiny (seminar or one-off evidence session)

5. Full inquiry