



House of Commons

European Scrutiny Committee

**Subsidiarity –
monitoring by national
parliaments:
challenging a measure
before the EU Court of
Justice**

Sixteenth Report of Session 2013–14



House of Commons

European Scrutiny Committee

**Subsidiarity –
monitoring by national
parliaments:
challenging a measure
before the EU Court of
Justice**

Sixteenth Report of Session 2013–14

Report, together with formal minutes

*Ordered by the House of Commons
to be printed 11 September 2013*

HC 671

Published on 16 September 2013
by authority of the House of Commons
London: The Stationery Office Limited
£0.00

The European Scrutiny Committee

The European Scrutiny Committee is appointed under Standing Order No. 143 to examine European Union documents.

Current membership

Mr William Cash MP (*Conservative, Stone*) (Chair)
Andrew Bingham MP (*Conservative, High Peak*)
Mr James Clappison MP (*Conservative, Hertsmere*)
Michael Connarty MP (*Labour, Linlithgow and East Falkirk*)
Geraint Davies MP (*Labour/Cooperative, Swansea West*)
Julie Elliott MP (*Labour, Sunderland Central*)
Tim Farron MP (*Liberal Democrat, Westmorland and Lonsdale*)
Nia Griffith MP (*Labour, Llanelli*)
Chris Heaton-Harris MP (*Conservative, Daventry*)
Kelvin Hopkins MP (*Labour, Luton North*)
Chris Kelly MP (*Conservative, Dudley South*)
Stephen Phillips MP (*Conservative, Sleaford and North Hykeham*)
Jacob Rees-Mogg MP (*Conservative, North East Somerset*)
Mrs Linda Riordan MP (*Labour/Cooperative, Halifax*)
Henry Smith MP (*Conservative, Crawley*)
Ian Swales MP (*Liberal Democrat, Redcar*)

The following members were also members of the committee during the parliament:

Sandra Osborne MP (*Labour, Ayr, Carrick and Cumnock*)
Jim Dobbin MP (*Labour/Co-op, Heywood and Middleton*)
Penny Mordaunt MP (*Conservative, Portsmouth North*)
Mr Joe Benton MP (*Bootle*)

Powers

The committee's powers are set out in House of Commons Standing Order No 143.

The scrutiny reserve resolution, passed by the House, provides that Ministers should not give agreement to EU proposals which have not been cleared by the European Scrutiny Committee, or on which, when they have been recommended by the Committee for debate, the House has not yet agreed a resolution. The scrutiny reserve resolution is printed with the House's Standing Orders, which are available at www.parliament.uk.

Committee staff

The staff of the Committee are Sarah Davies (Clerk), David Griffiths (Clerk Adviser), Terry Byrne (Clerk Adviser), Leigh Gibson (Clerk Adviser), Peter Harborne (Clerk Adviser), Paul Hardy (Legal Adviser) (Counsel for European Legislation), Joanne Dee (Assistant Legal Adviser) (Assistant Counsel for European Legislation), Hannah Finer (Assistant to the Clerk), Julie Evans (Senior Committee Assistant), Jane Lauder (Committee Assistant), Alex Hunter (Committee Assistant), John Graddon (Committee Assistant), and Paula Sanderson (Office Support Assistant).

Contacts

All correspondence should be addressed to the Clerk of the European Scrutiny Committee, House of Commons, 7 Millbank, London SW1P 3JA. The telephone

number for general enquiries is (020) 7219 3292/5465. The Committee's email address is escom@parliament.uk

Contents

Report	<i>Page</i>
Subsidiarity — monitoring by national parliaments: challenging a measure before the EU Court of Justice	3
Protocol 2 to the EU Treaties	3
The Memoranda of Understanding	3
Rights of initiative and procedure in the House	4
The House of Lords	4
Conclusion	5
Annex	6
MEMORANDUM OF UNDERSTANDING ON IMPLEMENTING ARTICLE 8 OF THE PROTOCOL ON THE APPLICATION OF THE PRINCIPLES OF SUBSIDIARITY AND PROPORTIONALITY	6
SUPPLEMENTARY MEMORANDUM OF UNDERSTANDING ON IMPLEMENTING ARTICLE 8 OF THE PROTOCOL ON THE APPLICATION OF THE PRINCIPLES OF SUBSIDIARITY AND PROPORTIONALITY	8
Formal Minutes	9

Subsidiarity — monitoring by national parliaments: challenging a measure before the EU Court of Justice

Protocol 2 to the EU Treaties

1. Protocol 2 to the EU Treaties provides for national parliaments to monitor EU legislative proposals for their compliance with the principle of subsidiarity, and to submit a Reasoned Opinion in relation to a proposal which fails to comply with the principle. If a sufficient number of Reasoned Opinions is received —either a quarter or a third depending on the type of legislation— the Commission has to consider withdrawing its draft proposal (the “yellow card” procedure).
2. Under Article 8, the Protocol further provides for a measure which has been adopted by the EU to be challenged, on subsidiarity grounds, before the Court of Justice:

The Court of Justice of the European Union shall have jurisdiction in actions on grounds of infringement of the principle of subsidiarity by a legislative act, brought in accordance with the rules laid down in Article 263 of the Treaty on the Functioning of the European Union by Member States, or notified by them in accordance with their legal order on behalf of their national Parliament or a chamber thereof (underlining added).

There is no requirement to have issued a Reasoned Opinion before Article 8 is invoked.

3. The legal challenge under Article 8 was introduced by the Lisbon Treaty and so is entirely different from proposals for a “red card” for national parliaments mentioned by the Foreign Secretary and Minister for Europe in recent speeches, which are as yet undeveloped.
4. The previous European Scrutiny Committee (ESC) and House of Lords European Union Committee agreed that discussions with the Government should take place on the mechanism for implementing Article 8. These began in December 2009. Following extensive consultation at official level between the two Committees and the Government the ESC considered two linked Memoranda of Understanding (MoUs) in July 2013. The first Memorandum is to be signed by the Chairs of the ESC and the Lords European Union Committee and the Government, and sets out how litigation arising from such a decision of either House would be managed. The second is to be signed by the Accounting Officers of both Houses, reflecting the understanding that the House initiating such an action would pay the legal fees incurred.

The Memoranda of Understanding

5. The purpose of having two linked MoUs is to separate the procedural from the financial arrangements. The texts are set out in an annex to this Report. The main features of the MoUs are as follows:

They set out arrangements agreed by the Government with both scrutiny committees, but are not legally binding.

The conduct of any litigation will be managed by the Treasury Solicitor's EU litigation team which acts as Agent for the UK in all proceedings before the EU courts in which the Government is involved.

The terms of the House's challenge will be set by the motion calling for the challenge. An action will only be brought if this motion is agreed to by the House. The motion may be tabled by the Government (as has been the case to date with Reasoned Opinions) but could instead be tabled by backbench Members.

The oversight of the litigation will be the responsibility of the ESC (or of the ESC and Lords Committee if both decide to challenge) – if it is ESC which has initiated the challenge, and the Memoranda are drafted assuming that this is the case. All aspects of the management of the litigation in this scenario must be agreed between the Treasury Solicitor and the initiating Committee.

6. The House which has initiated the challenge will be responsible for the costs of the litigation in any case. The cost of the work of officials of the House will be absorbed in the cost of administration of the Committee. Expenditure on a case from House funds will be needed to cover Counsel's fees for advice, settling the written pleadings submitted to the Court and for advocacy at the oral hearing, and travel and subsistence expenses associated with the hearing. The House would benefit from advantageous rates of fees which the Government negotiates with Counsel. The Treasury Solicitor will not charge the cost of its EU litigation team. We are informed by the Treasury Solicitor that the total cost of a case would be expected to be in the range of £20,000 to £35,000.

7. In the unlikely event that the Government is concerned that the way in which the House seeks to pursue its case could adversely affect the UK's wider policy interests, the MoU provides for discussion to resolve the matter between the Chairman in question and the Minister responsible for the MoU. There is no general dispute resolution clause but if anything were to arise, the Chairman would resolve the point in discussion with the Minister.

Rights of initiative and procedure in the House

8. The terms of the House's challenge will be set by a motion and, as in the case of a Reasoned Opinion, we would expect the Government to table such a motion if proposed by this Committee. An action will only be brought if the House agrees to the motion. A motion could, conceivably, also be prompted by another Committee or by backbench Members. The ESC would be likely to comment on any proposals for a challenge emanating from another source.

The House of Lords

9. Throughout this process we have been careful to ensure that the approaches of the Scrutiny Committees of the two Houses are co-ordinated as much as is possible. The

House of Lords European Union Committee has also agreed these Memoranda of Understanding and has referred the matter to that House's Procedure Committee.

Conclusion

10. We are publishing this short report in order to draw the possibility of the House challenging EU legislation on the grounds that it is in breach of the principle of subsidiarity to the attention of the Procedure Committee, Departmental Select Committees, and Members of the House. In the event that the House agrees to bring such an action on the basis of a Report which is not by the European Scrutiny Committee, we hope that the originating Committee or Member(s) would follow the processes set out in the first Memorandum of Understanding about the management of such litigation, adapted as appropriate.

Annex

MEMORANDUM OF UNDERSTANDING ON IMPLEMENTING ARTICLE 8 OF THE PROTOCOL ON THE APPLICATION OF THE PRINCIPLES OF SUBSIDIARITY AND PROPORTIONALITY

Her Majesty's Government, the European Union Committee of the House of Lords and the European Scrutiny Committee of the House of Commons (the "Scrutiny Committees") have agreed the following arrangements regarding the implementation of Article 8 of the Protocol on the Application of the Principles of Subsidiarity and Proportionality. This provides :

"The Court of Justice of the European Union shall have jurisdiction in actions on grounds of infringement of the principle of subsidiarity by a legislative act, brought in accordance with the rules laid down in Article 263 of the Treaty on the Functioning of the European Union by Member States, or notified by them in accordance with their legal order on behalf of their national Parliament or a chamber thereof."

1. Under Article 263 TFEU, actions must be brought within **two months** of the publication of the measure. An additional ten days are allowed under the Court of Justice's rules of procedure, but no further extension of time is permitted.
2. When either of the Scrutiny Committees is proposing to recommend to the House concerned that an action be brought pursuant to Article 8, the Committee will, at the earliest opportunity, notify the UK Agents to the Court of Justice of the proposed recommendation.
3. Where either the House of Lords or the House of Commons decides that an action should be brought pursuant to Article 8, the Government will lodge an application at the Court of Justice. Such an action will be brought in the name of the United Kingdom and the application will state that the action is brought on behalf of the House concerned or of Parliament, as the case may be, pursuant to Article 8.
4. The action will be conducted by the UK Agents to the Court of Justice, in the EU Litigation Team of the European Division of the Treasury Solicitor's Department, who act under the oversight and authority of the Attorney General. As with all UK actions before the Court of Justice, the Agents will ensure that the UK's submissions are presented as effectively as possible, in order to maximise the prospects of success before the Court.
5. For all communications with the UK Agents, each Committee will be represented by its Legal Adviser or such other person who may be notified to the Agents.
6. The Scrutiny Committee concerned will notify the UK Agents as soon as possible of the decision referred to at paragraph 3. The Committee's representative will at the earliest opportunity discuss choice of Counsel with the UK Agents. The Committee will provide all information and documentation available to it that is relevant to the conduct of the proceedings.

7. The application and other submissions to the Court of Justice will be made in accordance with the decision referred to at paragraph 3. All matters concerning the conduct of the proceedings, including the choice of Counsel, instructions to Counsel, the written statements to be submitted to the Court and the submissions to be made at any hearing, will be agreed between the UK Agents and the Committee concerned. In order to protect the good standing of the United Kingdom before the Court of Justice, the conduct of proceedings will avoid anything which could adversely affect the reputation of the United Kingdom before the Court of Justice.

8. If the UK agents consider that the conduct of proceedings could undermine the United Kingdom's wider policy interests in relation to the European Union, and these concerns cannot be resolved in discussion with the representative of the Committee concerned, they shall convene a meeting of the Minister and the Chairman of the Committee concerned to resolve the disagreement.

9. The UK Agents will undertake the conduct of proceedings. This includes instructing Counsel on the basis of written instructions, approving the text of the UK's pleadings and speech for any oral hearing, determining whether to request an oral hearing, and instructing Counsel in person at any hearing. The UK Agents may consult the lead UK Government Department or Departments with responsibility for the subject matter of the measure at issue in the proposed challenge with a view to drawing on their expertise and knowledge of the measure concerned.

10. This memorandum is not intended to create legal obligations.

[Signed by the two Chairmen and the Minister]

SUPPLEMENTARY MEMORANDUM OF UNDERSTANDING ON IMPLEMENTING ARTICLE 8 OF THE PROTOCOL ON THE APPLICATION OF THE PRINCIPLES OF SUBSIDIARITY AND PROPORTIONALITY

This memorandum is supplemental to one of [date] between Her Majesty's Government and the Scrutiny Committees of the two Houses on the management of actions under Article 8 of the Protocol.

Her Majesty's Government and the Accounting Officers of the House of Commons and the House of Lords have agreed the following arrangements regarding the implementation of Article 8 of the Protocol on the Application of the Principles of Subsidiarity and Proportionality. This provides :

“The Court of Justice of the European Union shall have jurisdiction in actions on grounds of infringement of the principle of subsidiarity by a legislative act, brought in accordance with the rules laid down in Article 263 of the Treaty on the Functioning of the European Union by Member States, or notified by them in accordance with their legal order on behalf of their national Parliament or a chamber thereof.”

The House or Houses on whose behalf an action is brought will be responsible for:

- the costs of conducting the proceedings, including any costs for preparation of a case which does not in the event proceed to Court. Such costs include the costs of instructing Counsel, any translation costs, attending the hearing and the reasonable costs of the UK Agents; and
- any costs awarded by the Court against the United Kingdom in the course of the proceedings¹.

This memorandum is not intended to create legal obligations.

11. [Signatures of the Accounting Officers of both Houses and the Minister]

¹ There is a convention that the UK does not seek to enforce costs awards against the EU institutions, and likewise they have not enforced costs awards against the UK.

Formal Minutes

Wednesday 11 September 2013

Members present:

Mr William Cash, in the Chair

Andrew Bingham
James Clappison
Michael Connarty
Nia Griffith

Chris Heaton-Harris
Kelvin Hopkins
Henry Smith

The Committee deliberated.

Draft Report, (Subsidiarity-monitoring by national parliaments: *challenging a measure before the EU Court of Justice*) proposed by the Chair, brought up and read.

Ordered, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 10 read and agreed to.

Annex agreed to.

Resolved, That the Report be the Sixteenth Report of the Committee to the House.

Ordered, That the Chair make the Report to the House.

[Adjourned till Wednesday 9 October at 2.00 p.m.]