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European Union Committee

17th Report of Session 2008–09

Codecision and national parliamentary scrutiny

Report with Evidence

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(Q) refers to a question in oral evidence
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SUMMARY

Codecision is the European legislative procedure whereby a proposal from the European Commission is negotiated and adopted jointly by the European Parliament and the Council of Ministers. For some time the perception has been that the codecision procedure, and the way in which its practice has developed, makes it harder for national parliaments to conduct effective scrutiny of EU legislation.

This report concludes that there are aspects of codecision which cause difficulties for us in seeking to influence the Government's position. In large part these difficulties arise because agreements are reached at first and second reading stages though the use of informal trilogues: small, private meetings between the Commission, Council and European Parliament.

To minimise these difficulties we review our procedures for conducting scrutiny of codedecided proposals and the systems operated by Government Departments for keeping us informed of progress in negotiations.

The key conclusions of this review are that:

- the existing system of updates before each reading should continue, but that it is not sufficient where early agreements are reached because it does not provide us with the opportunity to scrutinise changes proposed and agreed in informal trilogues;
- That we should be provided with details of every change with policy implications made to a proposal and that, where the UK Representation to the EU has alerted a Department to change, this should be the cue to the Department to update us;
- That all Departments must work hard to ensure that Parliament is kept fully informed of developments in negotiations and that the Cabinet Office should be more proactive in monitoring and enforcing good Departmental performance;
- That there are a number of trigger points in negotiations, such as where COREPER discusses a proposal, at which we should be provided with an update on negotiations; and
- That the marking of a document LIMITE should not be a bar to its provision to Parliament.

Codecision and national parliamentary scrutiny

CHAPTER 1: THE CODECISION PROCEDURE: ORIGINS, SCOPE, EXPANSION AND THE POSSIBLE EFFECT OF THE LISBON TREATY

1. Codecision is the European Union legislative procedure whereby a proposal from the European Commission is negotiated and adopted jointly by the Council of Ministers and the European Parliament. Under codecision the Parliament and the Council enjoy equal powers; neither can adopt a legislative act without the agreement of the other¹.
2. The procedure was introduced in the 1993 Maastricht Treaty. Since then the treaties of Amsterdam (1999) and Nice (2003) have expanded the areas which are subject to codecision to 44. The Lisbon Treaty would expand these areas significantly further into areas including agriculture, fisheries, justice and home affairs and the budget. The Treaty would also rename codecision the Ordinary Legislative Procedure and make very small changes to the procedure itself².

Our inquiry

3. For some time the perception has been that the codecision procedure makes it harder to conduct effective parliamentary scrutiny. We decided to conduct our inquiry to test this and, where appropriate, to consider updating our scrutiny procedures and practices. In addition we make a number of recommendations to the Government relating to the information they provide to us. For simplicity's sake we collate these updates and recommendations in Chapter 3.
4. The members of the Select Committee which conducted this inquiry are listed at Appendix 1. During this inquiry we have taken oral evidence from the then Minister for Europe, the UK and French Deputy Permanent Representatives to the European Union, two UK MEPs, and staff of the Commission, Council and European Parliament. We also received written evidence from a number of interested parties. The full list of those who gave evidence is printed at Appendix 2; the evidence itself is printed with this report. We wish to thank all of them for taking the time to send us their views.
5. We have also sought the views and practical experience of our own sub-committees. These are printed at Appendix 4.
6. The primary aim of this report is to present ways in which parliamentary scrutiny of negotiations on European legislation could be improved. In this respect interest in this House in our report may well be limited to those serving on our Committee and sub-committees. Nonetheless **we make this report for debate**. In addition we anticipate that there will be interest in this

¹ For example, the European Parliament rejected proposed legislation on the liberalisation of port services (in 2003) and on the harmonisation of laws on takeover bids (2001) at third reading.

² As outlined by Hubert Legal of the Council Legal Service at Q 203.

report from those who perform a similar function to us in the other national parliaments of the EU.

How codecision works—the procedures as laid down in the Treaties

7. The codecision procedure itself is a framework for negotiations between the Council and the European Parliament set out in Articles 250 and 251 TEC³.
8. The procedure allows for a maximum of three parallel stages in the European Parliament and Council called first reading, second reading and conciliation/third reading. The 1999 Amsterdam Treaty introduced the possibility for the procedure to be completed, and for a proposal to be adopted, in fewer than three readings. So, unlike the UK system, where a Bill must complete all its stages to become an Act, if the Council and Parliament reach agreement earlier in the process the legislation is adopted without recourse to the remaining stages.
9. Here we first set out the formal steps of the codecision procedure (Figure 1 sets them out in flow chart form) before reviewing the evidence we have received on how the procedure now works in practice.

BOX 1

Some jargon simplified—part one

The Council Presidency consists of the ministers and officials of the Member State which chairs all the meetings of the Council. The Presidency rotates every six months.

A Council Working Group is the first level at which negotiations are held in the Council on Commission proposals. A working group is attended by specialist officials from each of the Member States and is staffed by the General Secretariat of the Council. There are some 250 working groups.

A Rapporteur is the Member of the European Parliament appointed to draft the Parliament's report. The same rapporteur will work on all three readings of a legislative proposal.

Shadow rapporteurs are appointed by their political groups to follow the work of the rapporteur and to lead for their group on discussions on a proposal. Often there will be shadow rapporteurs appointed by all the main groups other than the group which appointed the rapporteur.

The General Approach is the first public expression of the views of the Council on a legislative proposal from the Commission. It usually lists the changes that the Council is likely to make to the proposal.

The Common Position is the text produced as a result of the Council's first reading of a proposal by which time the Council has usually had the opportunity to consider the Parliament's first reading position.

Conciliation is the mechanism by which the Parliament and Council meet together, prior to third reading, with the aim of producing a draft of a legislative proposal which is acceptable to both.

The Joint Text is the draft of the legislative proposal agreed in the Conciliation meeting. It must be adopted at third reading by both the Parliament and Council to become law.

³ Treaty establishing the European Community.

First reading

10. First reading is of the Proposal as presented by the Commission to the European Parliament and Council. There are no formal time limits to this stage so the speed of the negotiations depends on political impetus coming, usually, from the Council Presidency.
11. As it takes time for the European Parliament to take decisions on which members and committees will lead on the Proposal, the Council is usually able to begin work first. The relevant Council working group (made up of officials from the national representations) begins work with a view to producing a “General Approach”. This indicates the Council’s views on the Proposal and the changes that the Council is likely to make to it.
12. In the Parliament a member (or, on occasions, more than one member) is appointed to act as rapporteur. The rapporteur is responsible for taking the proposal through all its stages in the Parliament. This begins with drafting a report containing amendments to the Proposal for the rapporteur’s committee to consider, amend and agree. Where possible this also lists amendments that would be required to the Council’s General Approach. Once the committee has agreed the report, it is debated, amended (where necessary) and adopted in Plenary. This completes first reading in the Parliament.
13. The amendments the Parliament wishes to make to the Proposal are then considered by the Council in its first reading. At this point the Council has two options. First, it can approve the Parliament’s amendments and adopt the act (“First reading agreement”—see below). Second, it can disagree with some or all of the Parliament’s amendments, or propose its own, different amendments. In this case the Council adopts a “Common Position” (so called because it reflects the common view of the Member States in the Council, not because it reflects a common position between the Council and Parliament).

Second reading

14. Second reading must be completed within six months, extendible to eight. It begins with the Parliament considering the Council’s Common Position⁴.
15. On the basis of a report from the rapporteur, the Parliament’s second reading can (i) approve the Common Position and adopt the Proposal as set out there (“Early second reading agreement”—see below); (ii) reject the Common Position entirely, in which case the Proposal falls; or (iii) adopt amendments to the Common Position.
16. Where the Parliament has chosen to amend the Common Position, its amendments are considered at the Council’s second reading. At this stage the Council can approve all Parliament’s amendments and adopt the Proposal accordingly. If the Council is unable to agree all the Parliament’s amendments the process moves to conciliation/third reading.

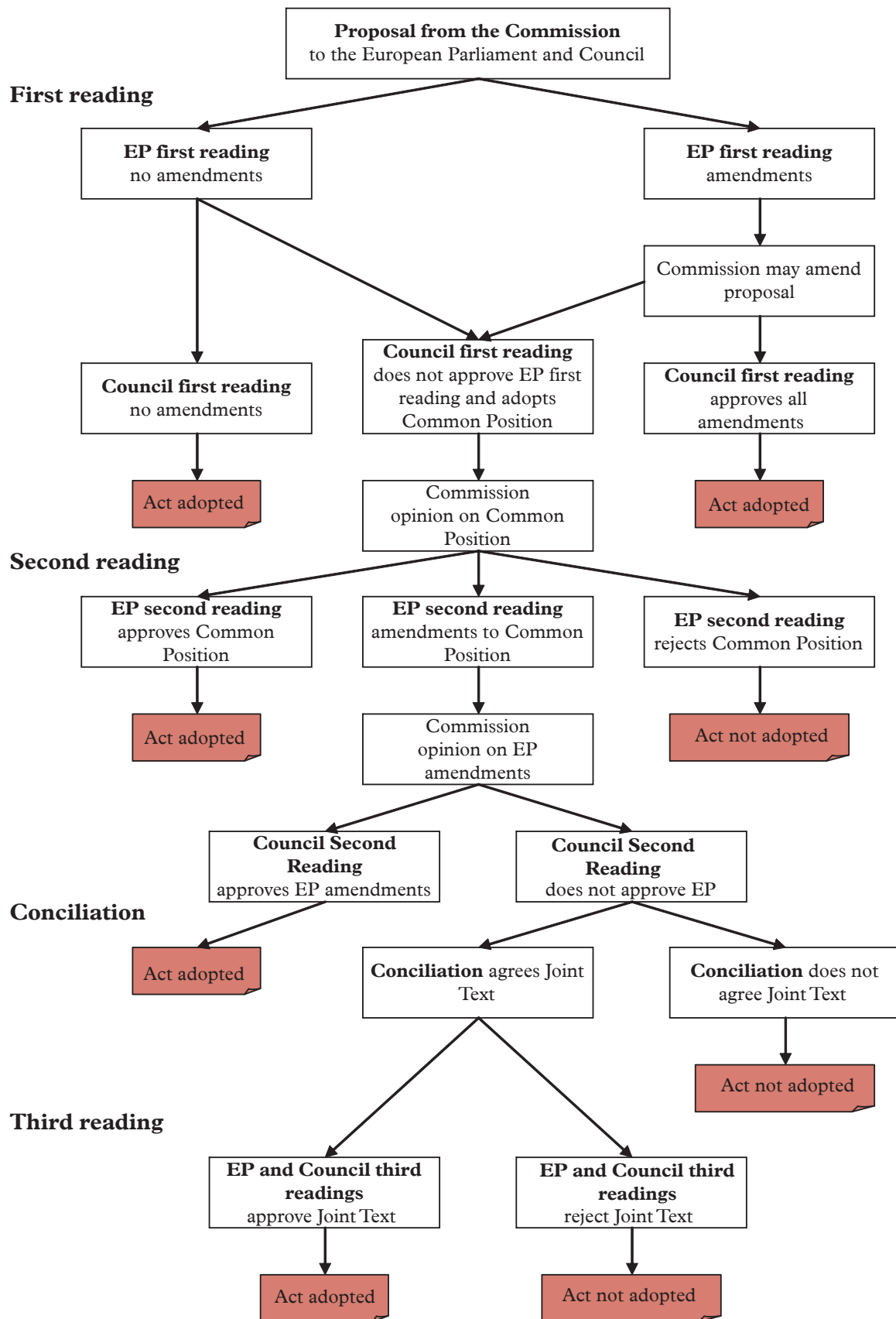
Conciliation and Third Reading

17. Third reading must be completed within 18 weeks, extendible to 24, of the Council’s second reading.

⁴ This would be changed slightly by the Lisbon Treaty. See Q 203.

18. The aim is to produce a “Joint Text”: a draft of the legislative proposal which is acceptable to both the Parliament and the Council. Initially this is done through informal three-way meetings, or trilogues, between the Parliament, Council and Commission. At a trilogue the Parliament is usually represented by a delegation including the rapporteur; the Council by the current Presidency’s Permanent (or Deputy Permanent) Representative; and the Commission by the relevant Director General.
19. When appropriate (for example, when agreement is thought to be close) a formal conciliation committee meeting is held. Here representatives from each of the 27 Member States attend on the Council’s side. They are matched by an equal number of MEPs. The meeting is co-chaired by the minister of the Presidency country and a vice president of the Parliament.
20. Any Joint Text agreed in a conciliation committee has to be approved, at third reading, by the Council and the Parliament. If no agreement is possible, or either Institution fails to approve the result of the conciliation, the proposal falls.

FIGURE 1
The Codecision Procedure—flowchart



How codecision works—the practice

21. As the Parliament and Council have become familiar with codecision the way they use the procedure has changed. Importantly, there has been a trend towards shortening the legislative process through (i) an increase in first reading agreements, and (ii) the development of early second reading agreements. As the Commission puts it, first reading agreements have “gradually become the norm [with] more than 70% of files now concluded” at that stage (p 79)⁵.
22. The recommended procedures for achieving agreement at these earlier stages are set out in a June 2007 Joint Declaration by the Parliament, Council and Commission on “Practical Arrangements for the Codecision Procedure”⁶.

BOX 2

Some jargon simplified—part two

First reading agreement is where the amendments to the Proposal in the Parliament’s first reading report are all agreed by the Council at its first reading.

Early second reading agreement is similar except that the agreement between the Council and Parliament is reflected in the Council’s Common Position rather than the Parliament’s first reading report. This may be because a compromise was reached between the two only after Parliament had adopted its first reading report⁷.

Increase in first and early second reading deals

23. According to Dr Charlotte Burns from the School of Politics and International Studies at the University of Leeds, the Amsterdam Treaty introduced the possibility for agreement at first or second reading to “speed up decision making particularly on policies where there was no substantial disagreement between the European Parliament and Council or where the proposals concerned were merely technical” (p 76). However, Klaus Baier from the European Parliament’s codecision secretariat told us that in the current legislature (ending on 14 July 2009) almost 400 legislative acts were adopted under codecision of which 69 per cent were concluded at first reading (Q 125). Furthermore, as recent high profile examples such as the Climate Change Package⁸ show, early agreements are now sought on important and controversial proposals.
24. Indeed, the 2007 Joint Declaration encourages the Institutions to “cooperate in good faith with a view to reconciling their positions as far as possible so that, wherever possible, acts can be adopted at first reading”⁹. However, as we heard from Anthony Teasdale, Head of Strategy and Political Bodies in the Cabinet of the President of the European Parliament, “people have been slightly startled by the speed and intensity” of the take-up of opportunities

⁵ Appended to the Commission’s written evidence are lists of all legislative proposals concluded at each stage since the entry into force of the Amsterdam Treaty. There have been 438 agreements after first reading, 277 after second reading and 109 after conciliation

⁶ OJ 2007/C145/02. Also appended to the Commission’s written evidence to our inquiry.

⁷ *ibid.* paras 12 ff

⁸ COM (2008) 30

⁹ *Op cit* paragraph 11

for earlier agreement (Q 130). There are suggestions that it is by no means certain that the Parliament will continue to pursue so many early deals when it returns to legislative work after the elections.

25. The Conference of Presidents in the Parliament estimates that early second reading agreements now account for half of all second reading agreements¹⁰.

How these deals occur—informal trilogues

26. In practice, first readings in the Council and Parliament which make the same changes to the Commission's Proposal do not happen by accident. Rather, the Council, the Parliament and the Commission meet in an "informal trilogue" to negotiate an acceptable text. As Philippe L glise-Costa, French Deputy Permanent Representative to the EU, put it: "the real negotiation takes place in the trilogue" (Q 81). The deal arising from this negotiation is then presented to the Council and Parliament for their votes.

BOX 3

Some jargon simplified—part three

Informal trilogues are private meetings between representatives of the European Parliament, Council and Commission which take place at each stage of the codecision procedure. Contrary to popular belief these meetings are not small. Although numbers vary, usually they are attended by the Parliament's rapporteur, shadow rapporteurs and support staff, staff from the Council Presidency and staff from the Commission. In total there may be some 20 to 40 people in attendance. They are a vital part of the codecision procedure because they allow frank, face-to-face discussions between those leading on the Proposal under discussion from each of the Institutions. But, as M L glise-Costa told us, they are preceded by even more informal contacts between the rapporteur and Presidency at which the real decisions can be made: "there is a lot of preparation before the actual negotiation in order to assess with the Parliament ... what is the right way to proceed" (Q 83). In terms of a record, the Parliament requires a report back to the responsible committee. We understand that the Council Secretariat produces a summary of the discussions which it circulates to the Representations of the Member States.

COREPER is the regular meeting, at ambassador level, of representatives of the Member States. This is where many of the decisions relating to European legislation and policy are taken, before being approved at ministerial meetings. There are two formats: COREPER 1 which is attended by Deputy Permanent Representatives and currently handles most codecision, and COREPER 2 which is attended by the Permanent Representatives.

Committee coordinators are those members of the Parliament's committees who, rather like whips in the Westminster system, run the business of the committee. Typically there will be a coordinator from each political group.

Trilogues—composition

27. Trilogues, as the primary forum for negotiation, are attended by a surprisingly large number of people. M L glise-Costa told us that for the

¹⁰ Second interim report of the European Parliament's Working Party on Parliamentary Reform: "Legislative activities and Interinstitutional relations" p 25

Council there will usually be “the President of COREPER, assisted by staff of his own representation and the Secretariat of the Council and Legal Service of the Council”: typically this would be some ten people (Q 81).

28. Representation from the Commission would, for important negotiations, be of a similar size and headed by the relevant Director General.
29. The European Parliament has agreed a Code of Conduct for negotiating codecision files¹¹ which makes clear that the responsible committee should take the “decision on the composition of the EP negotiating team” and that “political balance shall be respected”¹². Arlene McCarthy MEP, chairman of the Parliament’s Internal Market Committee and veteran of many trilogues, told us that for her committee this means that she always leads negotiations on behalf of the Parliament because as chairman she is responsible for taking “forward the result of the Committee vote”. Usually she would be accompanied by the rapporteur, shadow rapporteurs, committee coordinators, Parliament staff and staff working for the political groups (Q 234).

Trilogues—mandates and accountability

30. For the Council’s part, the formal position is set out in the written evidence from the General Secretariat: trilogue negotiations “begin only after each Institution has established internally its own negotiating position”. However the Secretariat also recognise the possibility for “informal or exploratory contacts” between the Presidency, the Parliament and the Commission (p 86). In addition there are “bilateral meetings with, for instance, the Presidency and the Parliament” (Q 191). In these the Presidency cannot “commit the Council to anything that has not yet been formally mandated by COREPER” (p 86).
31. In practice, as we heard from M Législé-Costa, these informal contacts are frequent and extensive: the rapporteur and he “spent a lot of time assessing the position in the Council and in the Parliament ... what to propose to COREPER, what to say, how to transmit a document to the Parliament a bit ahead of the trilogue, how to organise the trilogue, what the rapporteur would say, what I can answer to that in order to progress and what other members from the other parties would understand from that and how to conclude at the end of the trilogue” (Q 84).
32. In terms of accountability, M Legal told us that after every trilogue meeting “there is always precise feedback to the delegations [viz. the Permanent Representations] by the Presidency on how the negotiations have been conducted” (Q 194). This would be either to the working group, where the trilogue was organised at that level, or to COREPER where it was attended by the Deputy Permanent Representative.
33. For the European Parliament the Code of Conduct requires that “in general, the amendments adopted in committee or in plenary shall form the basis of the mandate for the EP negotiating team”. In addition, the negotiating team is required to “report back to the committee on the outcome of the negotiations and make all text distributed available to the committee”. Should this not be possible, “for timing reasons [only]”, a report must be

¹¹ See Appendix 5

¹² Code of Conduct heading 3

circulated to the shadow rapporteurs and committee coordinators instead. Arlene McCarthy told us that she took it on herself to report the results of a trilogue back to the committee coordinators (Q 234).

34. Professor Simon Hix, from the London School of Economics, told us that since 2004 “94 percent of codecision bills (201 out of 219 agreements) were discussed via the informal trilogue procedure before open deliberations and votes could take place in committee” (p 92). However, Jonathan Dancourt-Cavanagh, from the General Secretariat of the Council, reinforced the importance that the Parliament places on ensuring that a rapporteur has a mandate before beginning negotiations: he assured us that in his “experience of over 100 codecision negotiations it is very rare for the Parliament to seriously commence a negotiation before the Committee has voted in first reading” (Q 202).

Council, European Parliament and Trilogue meetings—Transparency

35. When the Council itself meets its deliberations on acts to be adopted under codecision must be open to the public¹³ as must the results and explanations of votes and any statements made in the minutes of proceedings¹⁴. Non-confidential documents are available to all on the Council’s public register. All other supporting documents are available internally and to the national administrations of the Member States through their Permanent Representations and the Ministries of Foreign Affairs.
36. All this has not prevented a tide of criticism over a perceived lack of transparency in the Council’s deliberations. As Richard Corbett MEP points out, “even if the Council itself now meets in public when finalising legislation, COREPER proceedings, conciliation meetings and trilogue talks are behind closed doors” (p 59). In practice this means that publicly accessible deliberation in the Council on codecided legislation is usually limited to ministers formally approving the results agreed in private meetings only. Added to this is what Professor Hix describes as “incomplete access to legislative deliberations of Ministerial meetings of the Council” (p 93). All this means that there is no public access to trilogues, nor to discussions at which the mandates for informal trilogues are agreed, nor where the Presidency reports back on them.
37. In contrast, European Parliament committee meetings are, almost without exception, open to the public (Q 126). Meetings of committee coordinators are, however, held in private.

Implications for national parliaments seeking to keep abreast of negotiations

38. Much of the evidence we have received suggests that both the codecision procedure itself and these trends in codecision practice make it harder for national parliaments to follow the procedure. The points raised most often are that:
 - Codeciding legislation can mean that a proposal will change substantially from the Commission’s initial text: it is therefore not sufficient for us only to scrutinise the proposal proposed by the Commission;

¹³ Article 8 of the Council’s Rules of Procedure

¹⁴ Ibid. Article 9

- Agreement at first or early second reading hinders scrutiny;
- The speed at which legislation is adopted is too fast to enable effective scrutiny; and
- The use of informal trilogues is not conducive to effective scrutiny.

39. We consider each of these in turn.

Scrutiny of changes made during codecision negotiations

40. Richard Corbett's evidence to us is clear that the codecision procedure can, and does, make substantial changes to a proposal. He told us that "the Commission proposal really is a first draft and is almost always amended" (p 59). In his view this means that "national parliamentary deliberations must be couched in [terms of] responding to the initial proposal" (p 59), suggesting improvements and setting down limits on what would be acceptable. This is the approach taken by, for example, the French Sénat who communicate their position "quickly and as early as possible after the presentation of the legislative proposal" to their government (p 90).
41. The value of commenting at the earliest possible stage has been made clear to us by many of those we have spoken to. Una O'Dwyer, Acting Director of Legislation in the Commission's Secretariat General, told us that the "pre-legislative phase" is most important (Q 154).
42. However, commenting on the initial proposal only is rejected by Dr Helle Krunke, Associate Professor at the University of Copenhagen's Faculty of Law. Dr Krunke's argument is that, because "quite extensive alterations" can be made during codecision negotiations, giving national parliaments the ability to scrutinise proposals only at the beginning of the procedure "can undermine the quality/effectiveness of parliamentary scrutiny" (p 105).
43. Our own experiences of scrutiny reinforce Dr Krunke's view. When Sub-Committee F was scrutinising the proposed Returns Directive, it was faced with the situation where the Council and Parliament were holding negotiations on the basis of a significantly different document to that which had originally been scrutinised¹⁵. The Sub-Committee did not have access to this document. The initial Proposal, presented in September 2005, had proved controversial and had been dormant for much of 2006 and 2007. However, the Slovenian Presidency in the first six months of 2008 had revived the Proposal and restarted informal trilogue talks which resulted in the adoption of a text which, in the words of the Government, "developed along lines different than [sic] those originally proposed"¹⁶. In this situation it was clearly not effective that our committee was forced to rely on scrutiny of the Commission's original Proposal only.

Conclusion

44. Whilst it is important that our scrutiny procedures enable us to give our views promptly on the Commission's Proposal, we do not accept that our scrutiny of codediced legislation should be limited to commenting at this stage alone. The fact that we clear an initial proposal from scrutiny does not mean that we should not scrutinise it again if changes with policy

¹⁵ See Appendix 4

¹⁶ EM 10737/08

implications occur during codecision. **The Government must provide us with sufficient information on changes and proposed changes to proposals to allow us to comment before UK Ministers agree to them.**

Agreements at early stages

45. Professor Simon Hix, from the London School of Economics, noted that whilst legislative debates used to span several readings with formal debates held in Council and Parliament, currently legislation was adopted via “a deal between a small group of MEPs and the Council Presidency ... and then rubber stamped”. As a result, “full scrutiny by MEPs, let alone by national parliaments or the wider public, is increasingly difficult” (p 93).
46. His point is that, for a proposal adopted after conciliation, versions of or amendments to it would be formally available as follows:
 - (1) The Commission’s original proposal;
 - (2) Council General Approach;
 - (3) European Parliament first reading;
 - (4) Council Common Position;
 - (5) Parliament second reading;
 - (6) Council second reading; and
 - (7) Conciliation Joint Text (which represents the agreement).
47. But for a proposal adopted at first reading this is diminished dramatically. Only the Commission’s proposal and the Council’s General Approach are available for comment before the agreed text is presented in the Parliament’s and Council’s first readings. For Anthony Teasdale, from the Cabinet of the President of the Parliament, this means that the “paper trail disappears” (Q 135).
48. Even Richard Corbett, who is perhaps the strongest supporter of the codecision procedure we have heard from, acknowledged that second and third readings made national parliamentary scrutiny potentially easier and that first reading agreements “limit” the “advantage” national parliaments have (p 59). Una O’Dwyer felt that “second reading negotiations do give everybody within and outside the institutions a better handle on the negotiations” (Q 147). This is a particularly important observation given that early agreements are now reached on proposals which raise complex issues rather than those restricted to technical adjustments.

Conclusion

49. **Whilst we recognise that the reduction in the number of readings to which a proposal is subjected speeds up the process of lawmaking, diminishing the number of versions which are made available and debated in public and which are deposited by the Government for parliamentary scrutiny can and does have an impact on the ability of national parliaments to scrutinise changes made to proposals during negotiations.**

Fast agreements

50. Professor Hix's evidence is clear that "legislation is now passed at a significantly quicker pace". His research indicates that in 2000–01 codecided legislation was passed in an average of 686 days, whilst in 2006–07 the average was a mere 206 days (p 92). Whilst he saw this as hindering parliamentary scrutiny others use this as evidence of more efficient lawmaking by the EU. Una O'Dwyer, for example, told us that "we all want the best and most efficient deals possible and, therefore ... it is not really a question of having fewer first reading deals"(Q 147).
51. It is not the absolute length of time from adoption of a proposal by the Commission to agreement in Parliament and Council that is the biggest problem. Rather, timing issues arise when negotiations are bunched together over a short period. Typically this is driven by the Council and occurs towards the end of a six-month Presidency as the Member State in the chair strives to reach as many agreements as possible so as to succeed on what Anthony Teasdale referred to as the "Presidency Scorecard" (Q 135).
52. The European Parliament has recognised the importance of allowing sufficient time for all its members to assess a trilogue deal before voting on it in plenary. The Parliament has agreed a Code of Conduct that advises that a "cooling off period" (Q 127) be inserted between the Committee and plenary votes. For Anthony Teasdale this is "to ensure that the political groups and the plenary as a whole has an adequate opportunity to reflect upon whether the balance struck in the negotiation [in the informal trilogues] is one they can in fact endorse"(Q 137). The Parliament's Conference of Presidents had recommended that the "cooling off period" should normally be one month.

Conclusions

53. We do not see a case for a general slowing of the pace of negotiations on codecided legislation. In the exceptional cases where legislation is adopted too quickly to allow us to scrutinise it effectively, it is open to us to make this case to the Government. **Where this happens we would expect them to refuse to lift their scrutiny reserve until national parliamentary scrutiny is complete.**
54. However, where the majority of discussions take place in informal trilogues, we see the tendency to hold a series of trilogues on a single proposal in quick succession as creating difficulties for national parliaments and others seeking to follow negotiations. This appears to us to be a consequence of the rotating six-month Presidency system. In this respect the introduction of the Permanent President of the European Council by the Lisbon Treaty will have no effect as the European Council does not legislate and the rotating Presidency will continue to set the agenda with regard to the majority of codecided legislation. **We urge the Government to ensure that an arrangement similar to the cooling off period provided for by the Parliament's Code of Conduct is applied to lessen the difficulties often faced by those seeking to follow the negotiations on legislative proposals at the end of a Presidency.**

Agreements reached in informal trilogues

55. Davor Jančić, PhD candidate at Utrecht University and visiting fellow at Sciences Politiques, Paris, argued that because informal trilogues "lack

visibility both to the public and to the parliamentary institutions” they could impede national parliaments’ ability to scrutinise the agreements reached (p 98). This is, in general, backed up by those national parliaments we have heard from.

56. In Denmark the use of informal trilogues has made it increasingly “more difficult for the Danish Government to determine when exactly ministers should appear before the European Affairs Committee and obtain a negotiation mandate” (p 107). In The Netherlands, the confidential nature of first and second reading deals “can make it hard” for both the government and the national parliament to “control the process” (p 94). This is complicated by the lack of “standard reporting procedures” from informal trilogues (p 94). In Finland the problem is slightly different: pressure put on the Council to agree deals made in informal trilogues requires “a reassessment at short notice of a national position that may have been the result of careful and lengthy deliberation. The Eduskunta is simply faced with a document (that the government may or may not support) and told that Finland has the option of approving it immediately, or being outvoted” (p 109).
57. Arlene McCarthy told us that even in the European Parliament there had been complaints “that there was not enough transparency, that people did not understand what was going on, that the pace was sometimes very fast” (Q 245). To counter this, the Code of Conduct includes rules requiring detailed oral reports back to the responsible committee and the provision of supporting documents to MEPs. We receive summaries of these reports via our EU Liaison Officer in Brussels; they can be a useful way to follow negotiations.
58. The experiences of our sub-committees reinforce the view that informal trilogues are often too opaque. Sub-Committee D, on environment and agriculture, reports that “the emerging consensus between the European Parliament and Council can be almost impossible to determine. Updates from the Government are usually too infrequent, and negotiations proceed too rapidly and opaquely for accurate tracking of the inter-institutional negotiations”. It gives the example of the proposal for a directive on stage II petrol vapour recovery during refuelling of passenger cars at service stations¹⁷. This is a case of particularly poor information from a Department: the Explanatory Memorandum was submitted two months after the Commission had adopted the Proposal; an updating letter was received a month later stating that the Institutions “appear agreed on fast-tracking this proposal” but providing no further details; finally a supplementary explanatory memorandum was submitted on 1 May noting the rapid progress of negotiations and that agreement was expected at the beginning of May.
59. Conversely, in some cases the information provided by the Government has greatly assisted the Committee in following the negotiations in informal trilogues. Sub-Committee G, on social policy and consumer affairs, scrutinised a proposal on the organisation of working time (commonly known as the Working Time Directive)¹⁸. As part of the sub-committee’s scrutiny the Government provided (i) “substantial” information during the UK Presidency, including a summary of the proposed compromise; (ii)

¹⁷ COM (2008)812

¹⁸ COM (2004)607

informal briefing to officials before sub-committee meetings during the UK Presidency; and (iii) the texts of the Portuguese and Slovene draft Presidency compromise texts.

Conclusions

60. We consider that informal trilogues, whilst helpful to expeditious agreement of legislation, make effective scrutiny of codecided legislation by national parliaments very difficult. There are two reasons for this:
 - (a) Their informal and confidential nature is not transparent: as a result it is difficult for us to follow the course of negotiations and comment usefully to the Government; and
 - (b) The Council is represented only by the Presidency which tends to hold its cards close to its chest: as a result it may be difficult for all governments other than the Presidency to follow the course of negotiations and to represent the views of their national parliament at the appropriate point.
61. The increased use of informal trilogues to the point that they are now the primary form of negotiation between the European Parliament and the Council has magnified the difficulties we face. As a result **it is important that the system under which the Government keeps us updated on negotiations is effective and operated uniformly and rigorously by all Departments. The Government must ensure that this happens without the delays that have sometimes occurred in the past.**
62. Should the Lisbon Treaty come into force, these difficulties will be magnified by the expansion of codecision into new areas: notably agriculture, fisheries and justice and home affairs. **Departments that will gain responsibility for negotiating codecided legislation must devise and put in place effective systems for ensuring Parliament is fully kept up to date. This must be done in good time to ensure that they are ready to do so properly as soon as and when the Lisbon Treaty comes into force.**
63. We turn to these systems in the next chapter.

CHAPTER 2: NATIONAL PARLIAMENTARY SCRUTINY

Principles behind the UK System

Our role

64. Under our terms of reference we are asked by the House to “consider European Union documents and other matters relating to the European Union”. This is complemented by a resolution of the House of 6 December 1999 under which a Government Minister should not normally agree to a proposal in the Council before we have completed our scrutiny of it¹⁹.
65. Along with general provisions, this *Scrutiny Reserve Resolution* makes specific reference to the codecision procedure. It states that ministers should not agree to “a Common Position, to an act in the form of a Common Position incorporating amendments proposed by the European Parliament, [or] to a Joint Text” before we have completed our scrutiny.
66. In addition, the then Minister for Europe, Jim Murphy MP, wrote to us on 1 July 2008 announcing that the Government would interpret the Scrutiny Reserve Resolution as applying to agreement to a General Approach too. In other words, for the Minister to give his agreement to a General Approach, Common Position or Joint Text in the Council both the Lords and Commons Committees need to have completed scrutiny of the proposal.

The Government’s role in providing information to facilitate this scrutiny

BOX 4

Some jargon simplified—part four

An explanatory memorandum is the paper submitted to Parliament by the Government on a European document. It provides a summary of the document and its implications for UK law and sets out the Government’s views on it.

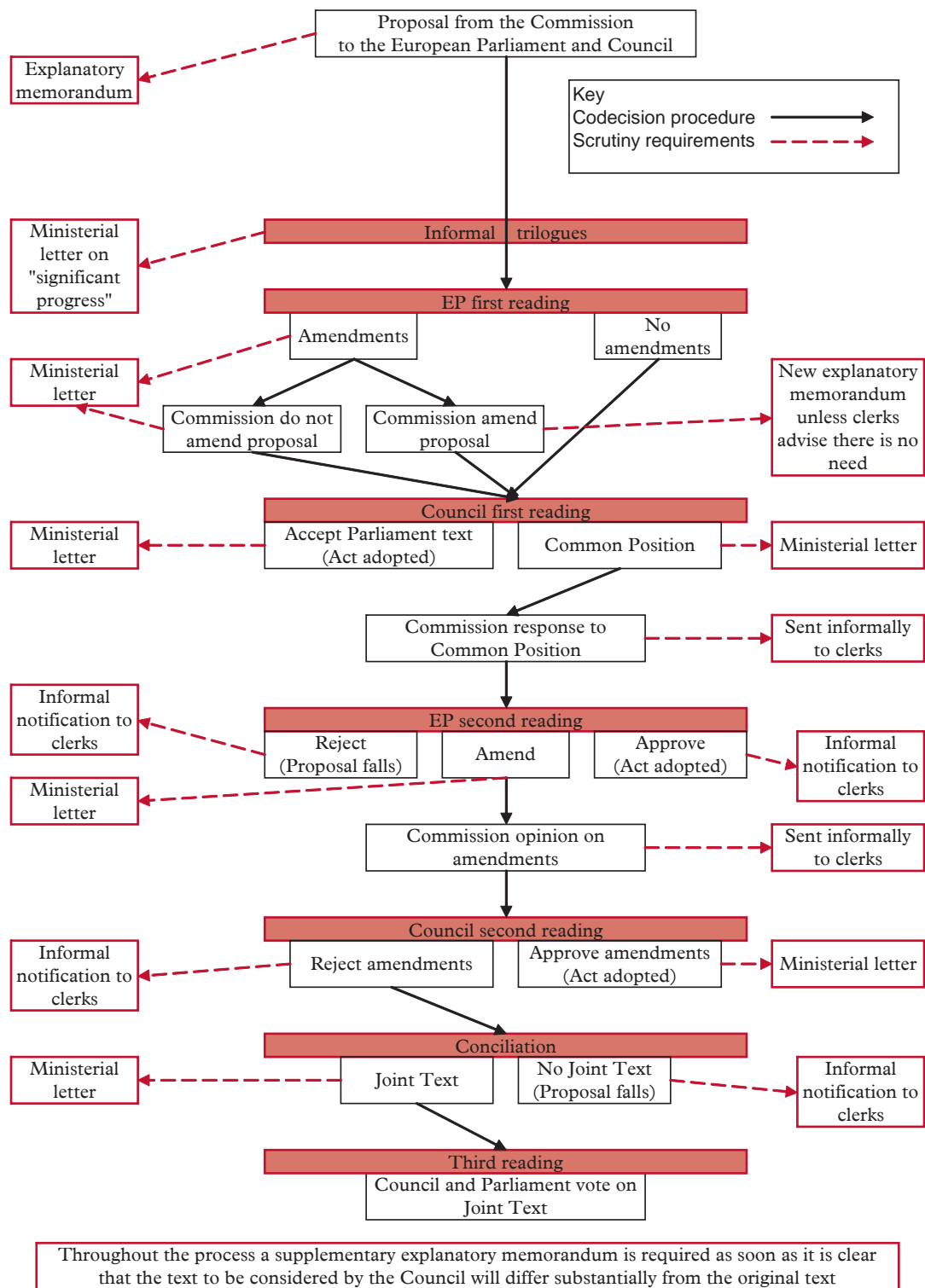
A supplementary explanatory memorandum is an additional paper submitted to Parliament by the Government in cases where the document analysed in the original explanatory memorandum has changed enough to require an update. It provides analysis of similar points.

67. Our scrutiny is based, in large part, on information provided to us by the Government. The Cabinet Office issues detailed Guidance to Departments outlining how and when they should keep Parliament informed of European proposals and the negotiations being held on them. This is, at present, not available publicly. The Director for the EU at the Foreign and Commonwealth Office, Matthew Rycroft, provided written evidence to us on behalf of the Government. His evidence announced a revision of the Guidance and included those aspects of the revision related to codecision.
68. As Mr Rycroft points out, the revision of the Guidance aims to make clear to “Departments that it is their responsibility to consider carefully and proactively at every stage when an update to Parliament is needed” (p 1).

¹⁹ The full text of the Terms of Reference and the Scrutiny Reserve Resolution can be found here: <http://www.parliament.uk/documents/upload/EU%20ToR.doc>

69. He goes on to note that the revision of the Guidance is a move away from “a purely document-based approach (‘we must deposit x document when it arrives’) and towards a significance-based approach (‘this piece of information/decision is or will be significant in negotiations and we must therefore update Parliament’)” (p 1). In addition, the annex to his evidence contains the text of the section of the Guidance which deals with codecision; Box 5 outlines the most significant points at which the Guidance requires Parliament to be informed.
70. These guidelines are, by necessity, complex. Figure 2 sets out the requirements on Departments in flow chart form.

FIGURE 2
Scrutiny actions flowchart



71. The Cabinet Office's Scrutiny Guidance to Departments is not currently available to the public; Matthew Rycroft's exposition of the changes made to it with regard to codecision is, to our knowledge, the most substantial instance of the Guidance being made public. **We consider that the case for publishing the Guidance is strong and consequently ask the Government to put the Scrutiny Guidance in the public domain.**

BOX 5

Key information the Government should provide to the Committee under the Scrutiny Guidance

Mr Rycroft's evidence gives details of what the Guidance requires Departments to provide to Parliament in the course of the codecision procedure. The key points in this are:

Proposal and first reading

- An explanatory memorandum on the publication of the Commission's proposal;
- A written alert where an early agreement is likely;
- A ministerial letter as soon as it is clear that "significant progress" is being made towards such an agreement;
- A ministerial letter setting out the European Parliament's first reading report (including the amendments to the proposal it puts forward), the Government's views on these amendments, the prospects for these amendments in the Council and the Commission's views on them;
- A ministerial letter when a Common Position is reached, normally with a copy of the text and an assessment of the prospects for second reading;
- Informal transmission of the Commission's response to the Common Position;

Second reading

- A ministerial letter on the results of the Parliament's second reading, where the Parliament makes amendments;
- Informal notification where the Council rejects the European Parliament's second reading or a ministerial letter where the Council accepts it;

Conciliation and Third Reading

- A rapid ministerial letter on any Joint Text agreed by the Conciliation Committee offering to deposit the Text for scrutiny, or, where no Text is agreed, informal notification.

In addition, paragraph 3.4.1 of the Guidance requires that we are to be updated through a supplementary explanatory memorandum as soon as it is clear that the text to be considered by the Council differs substantially from that analysed in the original explanatory memorandum.

Assessment of the adequacy of the information we have from the Government

The opportunity to give our views at each reading or where a text has changed substantially

72. The Guidance makes clear that the Committee is updated on a proposal before each reading regardless of whether we have lifted the scrutiny reserve or not. To allow us to do this we are provided with:

- an explanatory memorandum on the Commission’s proposal: the text on which the first readings in the Parliament and Council are based;
 - a ministerial letter on the Council’s Common Position: the text on which the Parliament conducts its second reading;
 - a ministerial letter on the Parliament’s second reading: the text which the Council considers at its second reading; and
 - a ministerial letter on the Joint Text: the text on which Parliament and Council must vote at third reading.
73. In addition, paragraph 3.4.1 of the Guidance requires that “as soon as it is clear that the proposal to be considered by the Council will differ substantially from the original text, the Scrutiny Committees must be informed by a supplementary explanatory memorandum or by ministerial letter even if the proposal was cleared previously by the Committees”. The deposit of a supplementary explanatory memorandum also has the effect of re-imposing the scrutiny reserve. Caroline Flint stressed that this is to allow the Government to explain the changed “policy implications” of a text which is “substantially” different (Q 2).

Conclusions

74. We consider that the existing requirement for an update before each reading is useful for those proposals which are agreed after the full cycle of three readings. **This requirement should continue for all proposals.**
75. However, where we have cleared a proposal from scrutiny, the provision of a ministerial letter would not have the effect of re-imposing the scrutiny reserve. Only a newly deposited document or Supplementary Explanatory Memorandum has this effect²⁰. Hence, at paragraph 3.4.1, the Guidance requires that Departments consult us, on a case-by-case basis, as to whether a supplementary explanatory memorandum is required or whether a ministerial letter is sufficient. The effect of this is to allow us to re-impose the scrutiny reserve where we judge changes made to a proposal to be sufficiently important. **Again, this requirement should continue for all proposals.**
76. Nonetheless, where proposals are agreed at early stages this approach is not sufficient because we are not always given the opportunity to scrutinise changes proposed and agreed in informal trilogues.

Ensuring effective scrutiny of proposals adopted at early stages: about what should we be informed

77. The Guidance recognises the importance of keeping our Committee up to date on the progress of negotiations in informal trilogues. Paragraph 3.5.2(i) requires that the Government updates us “as soon as it is clear that significant progress is being made” towards an early deal. We sought clarification of this from Caroline Flint. She told us that significant progress is to be interpreted as “where there is a real chance of a first or second reading deal being reached ... where the changes to reach that deal would alter the text of the document but not substantially change the policy”(Q 2).

²⁰ Para 1.16 and 4.7 of the Scrutiny Guidance

78. There remains, however, the question of how to define when progress should be deemed to be “significant” or a difference “substantial”. Connected to this is the question of how many updates on changes we need to receive. It is clear that a text may be reissued a very large number of times during negotiations and that the majority of these versions of a text would not be of use to us in our scrutiny. Andy Lebrecht, the UK’s Deputy Permanent Representative to the EU, put this tension to us succinctly: it is not normally possible to say “‘Yes, this document matters and that one does not matter’ and [to know] that objectively and in advance. On the other hand, if committees were to get every single document, you would be swamped and it would be meaningless” (Q 65).
79. Mr Lebrecht did, however, indicate that staff at the UK Representation to the EU were responsible for identifying which iterations of a proposal are important: “our responsibility is to make sure the Departments know what is going on, certainly know if it is significant and if it is new” (Q 68). Under the current system it is up to each Department to decide whether to pass this on to Parliament. We would assume that in the majority of cases a development judged to be significant and new by the Representation in Brussels would also be of interest to us in our scrutiny work.
80. We recognise that there is a genuine difficulty in determining whether a change in a proposal is sufficient to warrant an update to us. There would be little merit in receiving every iteration of a proposal. **In this respect we agree with the general approach taken by Caroline Flint that we should always be updated where a change has “policy implications”. We consider that this language should be used in the Cabinet Office Guidance in place of references to “significant” or “substantial” changes or progress.**
81. **We consider that, where the UK Representation has alerted a Department to a change, that should be a cue to the Department to update the Committee immediately.**

Ensuring effective scrutiny of proposals adopted at early stages: Departmental performance

82. Despite the clear requirement in the Guidance for an update to Parliament where changes with policy implications are likely to be made, there have been occasions where we have not been kept up to date on negotiations which have led to the adoption of a substantially different text to that which we originally scrutinised.
83. The experience of our sub-committee on environment and agriculture, for example, is that “Government Departments (DEFRA in this case) can be sluggish in providing updates on the progress of inter-institutional negotiations, sometimes only providing them when prompted by Committee staff. There is also a problem with updates only being received after a first or second reading deal has been struck”²¹. Notification of the Common Position reached on the Plant Protection Products (Pesticides) Regulation²² was, for example, not received until three months after the vote in the Council. This is a particularly important example since the proposal, although always

²¹ See Appendix 4

²² COM (2006) 388

subject to criticism, was modified in the course of codecision and became more controversial in the UK. Other sub-committees reported similar difficulties.

84. **We can see no justification for a Department withholding or delaying information on changes with policy implications. We urge Ministers to recognise the importance of every Department working hard to keep Parliament fully informed of the progress of negotiations on EU legislation and to impress this on their officials.** In this respect we commend the initiative taken by the previous Minister for Europe in writing to senior staff in the Foreign and Commonwealth Office in May 2009 reminding them of the obligations of the scrutiny reserve.
85. **Additionally the Cabinet Office should be more proactive in monitoring and enforcing the application of the Guidance by Departments.**
86. For our part, we note the opportunities taken by the House of Commons European Scrutiny Committee in questioning Ministers over the scrutiny performance of their Departments. **We and our sub-committees will be more active in arranging witness sessions to seek oral explanations from Ministers where their Department has provided us with insufficient or untimely information. In future we will not hesitate to name and shame those Departments consistently providing insufficient or untimely information.**

Ensuring effective scrutiny of proposals adopted at early stages: some safeguards

87. The procedures set out in the Scrutiny Guidance are in stark contrast to the systems operated in some other Member States. In France, for example, the information available to the parliament is much more extensive than that provided to us. The written evidence from the Sénat indicates that they are well informed on negotiations through “receipt of diplomatic telegrams” (p 90). M Léglise-Costa clarified this: “the reports of the Permanent Representation [to the Paris-based secretariat for European affairs] are transmitted” to the parliament with very few exceptions (Q 100). In addition two members of staff from the French parliament are housed in the French Permanent Representation where they are able to access documents from the Council (Q 103). Where they consider that a Council document related to a codecided proposal would be of interest to their parliamentary committees they are free to forward this to them.
88. It is rightly the Government’s responsibility to be open to Parliament on the negotiations it is conducting in Europe and to keep us informed of the progress on these. However, **we consider that an arrangement, similar to that operated between the French Permanent Representation and the staff from the French Parliament, to allow our EU Liaison Officer to view and forward Council documents related to codecision negotiations would be beneficial.** This would in no way prejudice the requirements in the Scrutiny Guidance for the Government to provide information directly to the Committee as the obligation on the Government to provide this information is an important part of being accountable to Parliament. However it would be a useful safeguard in ensuring that we are able to conduct our inquiries on the basis of prompt access to the right documents.

89. In the previous chapter²³ we cited the negotiations on the Returns Directive as an example of where we were not given sufficient information by a Department. In this case we, and a large part of the media in Brussels, were aware that the negotiations were being held on a very different text. Given the role of the UK Representation in ensuring that Departments are always aware of important changes and negotiations, it is inconceivable to us that the Home Office was not aware of the renewed negotiations. However repeated staff requests for an update were rebuffed by the Home Office.
90. To prevent a recurrence of this situation we consider that **there should be an obligation on Departments to provide a full update on the progress of negotiations or a supplementary explanatory memorandum to us as and when we request one.** Again, this would not compromise the important principle that the Government is responsible for providing documents to Parliament without request.

Key points in the negotiations

91. In spite of the difficulties presented by the differing path of negotiations on each Proposal, a number of those we spoke to sought to identify points in the negotiations where an update to Parliament would almost always be useful. From the Commission's point of view Una O'Dwyer identified two: first when a rapporteur presents their draft report to their committee, and second when COREPER holds a discussion on a proposal (Q 154). Hubert Legal, from the Council Legal Service, agreed that the first COREPER discussion was usually a "milestone" and added that the "decision to send a letter to the President of Parliament indicating that the Council would be ready to support [certain European Parliament] amendments" was also a very important, and legally binding, step (Q 197).
92. **For those proposals which we are holding under scrutiny only, we consider that we should be provided with a short update on negotiations after a discussion is held in COREPER on a proposal.**
93. **In addition we consider that where we are holding a proposal under scrutiny we should always be notified in advance of a decision taken by COREPER to send a letter from the Presidency to the Parliament indicating Council's agreement to amendments to be proposed by the Parliament. This should enable us to give our views in good time.**
94. The experience of our sub-committees also indicates that a Presidency compromise text has often been the trigger for renewed negotiations and that such texts would be useful for scrutiny. **Presidency compromise texts which aim to restart stalled negotiations on a proposal or which introduce changes with policy implications should be made available to the Committee regardless of whether we are holding the proposal under scrutiny or not.**

Limité documents: provision

95. Throughout our inquiry we have been aware of a potential obstacle to our receipt of those documents we need to be able to conduct effective scrutiny: the LIMITE marking. This is not a security classification but a distribution marking. It is applied to a document by the Council's administration based

²³ Paragraph 43

on its view as to the application of EC Regulation 1049/2001 on access to documents²⁴. Article 4(3) of the Regulation provides that disclosure is to be refused if it would “seriously undermine the institutions’ decision making process, unless there is an overriding public interest in disclosure”. Hubert Legal told us that the Council Secretariat might mark a document LIMITE because it, for example, (i) includes an opinion from the Legal Service, (ii) refers to the views of a particular Member State, or (iii) makes preparatory or provisional drafting proposals (Q 208).

96. Note 5847/06²⁵ from the General Secretariat of the Council sets out more detail on the LIMITE marking and instructs that documents marked LIMITE may be given to “any member of a national administration of a Member State”²⁶. This the Government has generally, though inconsistently, interpreted as prohibiting the provision of LIMITE documents to Parliament even though, as they acknowledge, “this may have an impact on national parliamentary scrutiny” (p 1).
97. It is clear to us that not providing LIMITE documents can and does adversely affect our ability to scrutinise effectively. Sub-Committee F put this succinctly: “only in the minority of cases are the right documents provided for scrutiny. Most of them are LIMITE and therefore not given to us”. Members are, however, sometimes able to obtain these documents unofficially from the internet, from the websites of lobby groups or other national parliaments.
98. Both Caroline Flint and Matthew Rycroft signalled the Government’s willingness to come to an arrangement under which we could receive LIMITE documents (p 1; Q 20). As a result we raised the issue with Hubert Legal from the Council’s Legal Service. He told us that the decision on whether a national parliament should be given LIMITE documents was entirely for the government of each Member State (Q 207) and that the Council Secretariat “see no problem” with giving automatic access to LIMITE documents to national parliaments (Q 208). Indeed, many Member States already provide LIMITE documents to their parliaments. M Leglise Costa, for example, confirmed that France interpreted LIMITE to include national parliaments (Q 94).
99. In line with the practice in many other Member States and the evidence from the Council’s Legal Service we consider that there is nothing in the Council’s Rules of Procedure to prevent provision of LIMITE documents to the Committee. **In future we expect the Government to provide relevant documents to the Committee even if they are marked LIMITE.**

Limité documents: constraints on use

100. Note 5847/06 sets out the restrictions imposed by the LIMITE marking. These are not burdensome: LIMITE documents may be sent by email, may be disposed of without shredding and require no “specific protection measures”. However their content may not be published either on the internet or in hard copy. Hubert Legal put this in context: “if the consequence of a document being given to a parliament is that it becomes

²⁴ See paragraphs 27–34 of our report, *Access to documents*, 15th Report, Session 2008–09, HL Paper108

²⁵ REF—Supplementary written evidence FCO

²⁶ 5847/06 paragraph 2

immediately and automatically accessible to the general public then it is no longer being treated as a LIMITE document". This he said would include making reference to positions taken in LIMITE documents in documents which are made available to the public (Q 208).

101. A UK parliamentary committee can publish what it chooses. However, because of the way in which we in the Lords conduct scrutiny and fuller inquiries, we consider that there would not be any significant difficulty under our current practice in observing the rules on the treatment of LIMITE documents. Under current practice we publish our scrutiny letters to the Government and their responses but do not publish the documents this scrutiny is based on. So there is nothing to suggest that we should start publishing LIMITE documents.
102. In our scrutiny correspondence and reports we do make reference to the documents we have used during our work. Given, however, that the reason for receiving these documents is to allow us better to follow the negotiations and to ask the right questions, we consider that it will always be possible, again on a voluntary basis, to phrase our correspondence and reports in such a way as to respect the requirement that the contents of the LIMITE document are not disclosed.

Addressing the results of our scrutiny to other parliaments

103. The primary purpose of our scrutiny work, as set out in the Scrutiny Reserve, is to seek to influence the Government and to hold ministers to account for the decisions and actions they take in the Council. However, the evidence we received indicates that there is also interest in our work in Brussels and the Member State capitals. The FCO told us that our work is "clearly valued in Brussels and would benefit from a wider audience" (p 2). Arlene McCarthy MEP gave the example of our report on the Timeshare Directive²⁷ which she had used to table amendments (Q 233). Tim Ambler and Professor Francis Chittenden, from London Business School and Manchester Business School, saw no reason why we should not seek to influence legislation as this leads to better laws being adopted.
104. For some time our practice has been to make our reports available to MEPs; we note the interest that has been expressed in our work. **In future we will seek to make the results of our scrutiny on codecided proposals available to MEPs involved in negotiations. We will keep other national parliaments updated through the IPEX database²⁸.**

²⁷ COM (2007) 303

²⁸ www.ipex.eu is a public website which allows national parliaments to share their scrutiny of European legislation.

CHAPTER 3: SUMMARY OF CONCLUSIONS

Principles underlying scrutiny of codecided proposals

105. Whilst it is important that our scrutiny procedures enable us to give our views promptly on the Commission's Proposal, we do not accept that our scrutiny of codecided legislation should be limited to commenting at this stage alone. The fact that we clear an initial proposal from scrutiny does not mean that we should not scrutinise it again if changes with policy implications occur during codecision. The Government must provide us with sufficient information on changes and proposed changes to proposals to allow us to comment before UK Ministers agree to them. (paragraph 44)
106. Whilst we recognise that the reduction in the number of readings to which a proposal is subjected speeds up the process of lawmaking, diminishing the number of versions which are made available and debated in public and which are deposited by the Government for parliamentary scrutiny can and does have an impact on the ability of national parliaments to scrutinise changes made to proposals during negotiations. (paragraph 49)
107. We do not see a case for a general slowing of the pace of negotiations on codecided legislation. In the exceptional cases where legislation is adopted too quickly to allow us to scrutinise it effectively, it is open to us to make this case to the Government. Where this happens we would expect them to refuse to lift their scrutiny reserve until national parliamentary scrutiny is complete. (paragraph 53)
108. However, where the majority of discussions take place in informal trilogues, we see the tendency to hold a series of trilogues on a single proposal in quick succession as creating difficulties for national parliaments and others seeking to follow negotiations. This appears to us to be a consequence of the rotating six-month Presidency system. In this respect the introduction of the Permanent President of the European Council by the Lisbon Treaty will have no effect as the European Council does not legislate and the rotating Presidency will continue to set the agenda with regard to the majority of codecided legislation. We urge the Government to ensure that an arrangement similar to the cooling off period provided for by the Parliament's Code of Conduct is applied to lessen the difficulties often faced by those seeking to follow the negotiations on legislative proposals at the end of a Presidency. (paragraph 54)
109. We consider that informal trilogues, whilst helpful to expeditious agreement of legislation, make effective scrutiny of codecided legislation by national parliaments very difficult. There are two reasons for this:
 - (a) Their informal and confidential nature is not transparent: as a result it is difficult for us to follow the course of negotiations and comment usefully to the Government; and
 - (b) The Council is represented only by the Presidency which tends to hold its cards close to its chest: as a result it may be difficult for all governments other than the Presidency to follow the course of negotiations and to represent the views of their national parliament at the appropriate point. (paragraph 60)

110. The increased use of informal trilogues to the point that they are now the primary form of negotiation between the European Parliament and the Council has magnified the difficulties we face. As a result it is important that the system under which the Government keeps us updated on negotiations is effective and operated uniformly and rigorously by all Departments. The Government must ensure that this happens without the delays that have sometimes occurred in the past. (paragraph 61)
111. Should the Lisbon Treaty come into force, these difficulties will be magnified by the expansion of codecision into new areas: notably agriculture, fisheries and justice and home affairs. Departments that will gain responsibility for negotiating codecided legislation must devise and put in place effective systems for ensuring Parliament is fully kept up to date. This must be done in good time to ensure that they are ready to do so properly as soon as and when the Lisbon Treaty comes into force. (paragraph 62)

The existing scrutiny system

112. We consider that the existing requirement for an update before each reading is useful for those proposals which are agreed after the full cycle of three readings. This requirement should continue for all proposals. (paragraph 74)
113. However, where we have cleared a proposal from scrutiny, the provision of a ministerial letter would not have the effect of re-imposing the scrutiny reserve. Only a newly deposited document or Supplementary Explanatory Memorandum has this effect²⁹. Hence, at paragraph 3.4.1, the Guidance requires that Departments consult us, on a case-by-case basis, as to whether a supplementary explanatory memorandum is required or whether a minister letter is sufficient. The effect of this is to allow us to re-impose the scrutiny reserve where we judge changes made to a proposal to be sufficiently important. Again, this requirement should continue for all proposals. (paragraph 75)
114. Nonetheless, where proposals are agreed at early stages this approach is not sufficient because we are not always given the opportunity to scrutinise changes proposed and agreed in informal trilogues. (paragraph 76)
115. The Cabinet Office's Scrutiny Guidance to Departments is not currently available to the public; Matthew Rycroft's exposition of the changes made to it with regard to codecision is, to our knowledge, the most substantial instance of the Guidance being made public. We consider that the case for publishing the Guidance is strong and consequently ask the Government to put the Scrutiny Guidance in the public domain. (paragraph 71)

Adding to this system to ensure effective scrutiny negotiations at first and second reading

116. We recognise that there is a genuine difficulty in determining whether a change in a proposal is sufficient to warrant an update to us. There would be little merit in receiving every iteration of a proposal. In this respect we agree with the general approach taken by Caroline Flint that we should always be updated where a change has "policy implications". We consider that this language should be used in the Cabinet Office Guidance in place of references to "significant" or "substantial" changes or progress. (paragraph 80)

²⁹ Para 1.16 and 4.7 of the Scrutiny Guidance

117. We consider that, where the UK Representation has alerted a Department to a change, that should be a cue to the Department to update the Committee immediately. (paragraph 81)
118. We can see no justification for a Department withholding or delaying information on changes with policy implications. We urge Ministers to recognise the importance of every Department working hard to keep Parliament fully informed of the progress of negotiations on EU legislation and to impress this on their officials. In this respect we commend the initiative taken by the previous Minister for Europe in writing to senior staff in the Foreign and Commonwealth Office in May 2009 reminding them of the obligations of the scrutiny reserve. (paragraph 84)
119. Additionally the Cabinet Office should be more proactive in monitoring and enforcing the application of the Guidance by Departments. (paragraph 85)
120. For our part, we note the opportunities taken by the House of Commons European Scrutiny Committee in questioning Ministers over the scrutiny performance of their Departments. We and our sub-committees will be more active in arranging witness sessions to seek oral explanations from Ministers where their Department has provided us with insufficient or untimely information. In future we will not hesitate to name and shame those Departments consistently providing insufficient or untimely information. (paragraph 86)
121. For those proposals which we are holding under scrutiny only, we consider that we should be provided with a short update on negotiations after a discussion is held in COREPER on a proposal. (paragraph 92)
122. In addition we consider that where we are holding a proposal under scrutiny we should always be notified in advance of a decision taken by COREPER to send a letter from the Presidency to the Parliament indicting Council's agreement to amendments to be proposed by the Parliament. This should enable us to give our views in good time. (paragraph 93)
123. Presidency compromise texts which aim to restart stalled negotiations on a proposal or which introduce changes with policy implications should be made available to the Committee regardless of whether we are holding the proposal under scrutiny or not. (paragraph 94)

Two safeguards

124. An arrangement, similar to that operated between the French Permanent Representation and the staff from the French Parliament, to allow our EU Liaison Officer to view and forward Council documents related to codecision negotiations would be beneficial. This would in no way prejudice the requirements in the Scrutiny Guidance for the Government to provide information directly to the Committee as the obligation on the Government to provide this information is an important part of being accountable to Parliament. However it would be a useful safeguard in ensuring that we are able to conduct our inquiries on the basis of prompt access to the right documents. (paragraph 88)
125. There should also be an obligation on Departments to provide a full update on the progress of negotiations or a supplementary explanatory memorandum to us as and when we request one. Again, this would not

compromise the important principle that the Government is responsible for providing documents to Parliament without request. (paragraph 90)

LIMITE documents

126. In line with the practice in many other Member States and the evidence from the Council's Legal Service we consider that there is nothing in the Council's Rules of Procedure to prevent provision of LIMITE documents to the Committee. In future we expect the Government to provide relevant documents to the Committee even if they are marked LIMITE. (paragraph 99)

Addressing our views to MEPs and other national parliaments

127. For some time our practice has been to make our reports available to MEPs; we note the interest that has been expressed in our work. In future we will seek to make the results of our scrutiny on codecided proposals available to MEPs involved in negotiations. We will keep other national parliaments updated through the IPEX database. (paragraph 104)

APPENDIX 1: EUROPEAN UNION COMMITTEE LIST OF MEMBERS

The members of the Select Committee which conducted this inquiry were:

Baroness Cohen of Pimlico
Lord Dykes
Lord Freeman
Lord Hannay of Chiswick
Baroness Howarth of Breckland
Lord Jopling
Lord Kerr of Kinlochard
Lord MacLennan of Rogart
Lord Mance
Lord Paul
Lord Plumb
Lord Powell of Bayswater
Lord Richard
Lord Roper (Chairman)
Lord Sewel
Baroness Symons of Vernham Dean
Lord Teverson
Lord Trimble
Lord Wade of Chorlton

Declaration of Interests

Lord Hannay of Chiswick
Member Advisory Board, Centre for European Reform
Member Advisory Board, European Foreign Affairs Review

Lord Kerr of Kinlochard
Chairman, Centre for European Reform
Vice-President, European Policy Centre
Member of Council, Business for New Europe

A full list of Members' interests can be found in the Register of Lords Interests:
<http://www.publications.parliament.uk/pa/ld/ldreg.htm>

APPENDIX 2: LIST OF WITNESSES

The following witnesses gave evidence. Those marked ** gave both oral and written evidence; those marked * gave oral evidence; those marked without an asterisk gave written evidence only.

- Tim Ambler & Francis Chittenden
- Dr Giacomo Bendetto, University of London
- Dr Charlotte Burns, University of Leeds
- ** Richard Corbett MEP
- * Commission Secretariat General
- * Council General Secretariat
- * DG IPOL, Legislative Coordination and Codecision Secretariat, European Parliament
- * Directorate for Relations with National Parliaments, European Parliament
- * Environment Committee, European Parliament
- European Commission
- European Council
- Federal Trust for Education and Research
- ** Foreign & Commonwealth Office
- * French Deputy Permanent Representative to the EU
- French Sénat
- German Bundesrat
- German Bundestag
- House of Representatives, The Netherlands
- Professor Simon Hix, London School of Economics
- Irish Parliament
- Davor Jančić, Utrecht University
- Dr Helle Krunke, University of Copenhagen
- * Arlene McCarthy MEP
- * Office of the President, European Parliament
- Parliament of Denmark
- Parliament of Finland
- Parliament of Sweden
- Tapio Raunio, University of Tampere, Finland
- Dr Christine Reh, University College London
- Romanian Parliament
- Dr Klára Szalay
- * UK Deputy Permanent Representative to the EU

APPENDIX 3: CALL FOR EVIDENCE

The House of Lords Select Committee on the European Union, chaired by Lord Roper, is conducting an inquiry into the implications of the codecision legislative procedure for parliamentary scrutiny in the Lords. The aim of the inquiry is better scrutiny and therefore, ultimately, better legislation. The Committee seeks evidence from anyone with an interest.

Written evidence is sought by 14 April. Public hearings will be held in May and June. The Committee aims to report to the House, with recommendations, in July. The report will receive a response from the Government, and may be debated in the House.

The inquiry will aim to:

- assess the effect that the process and developments in its practice, in particular the increase in first and early second reading deals, have had on the Committee's ability to scrutinise legislative proposals effectively;
- assess the Government's practice in keeping the Committee up to date on developments in negotiations on legislative proposals subject to codecision and whether this needs improvement;
- compare this aspect of the UK system with that operating in some other Member States;
- assess whether the current scrutiny procedures need adjustment; and
- assess how to increase the impact of the Committee's scrutiny on the Government and, if considered appropriate, on the European Parliament.

The inquiry will not assess the pros and cons of the codecision procedure itself.

As part of this inquiry the Select Committee is seeking views on the following questions:

The codecision procedure itself

- (1) Are there aspects of the codecision procedure which make it particularly difficult to achieve effective parliamentary scrutiny?
 - (a) What effects have "first reading deals" and "early second reading deals" had on the ability of national parliaments to conduct effective scrutiny?
 - (b) Does the confidential nature of some negotiating documents hinder national parliamentary scrutiny of codecision legislation? If so, how can this problem be resolved?
- (2) Are there any examples of legislative proposals negotiated under codecision which have been particularly difficult or complex to scrutinise effectively in national parliaments?

Governments and the EU Institutions

- (3) What role is there for governments and the EU's Institutions in ensuring that national parliaments can conduct effective scrutiny of proposals

negotiated under codecision? What information should be provided, when and by whom? Is this role being performed satisfactorily?

- (4) What role is there for parliaments to address the results of their scrutiny to those beyond their own government: for example, the European Parliament, Commission or other national parliaments?

Scrutiny procedures in parliaments

- (5) How effective are the scrutiny procedures in national parliaments (or your own parliament) at ensuring effective scrutiny of proposals subject to codecision? Which particular aspects of the parliamentary scrutiny procedure are key to effective scrutiny?
- (6) At which points in the codecision procedure should parliaments seek to scrutinise the proposals? Should they maintain oversight throughout the negotiations or should they scrutinise only the initial legislative proposal from the Commission?
- (7) You need not address all these questions, and you may wish to draw the Committee's attention to other issues.

17 March 2009

APPENDIX 4: SUB-COMMITTEE RESPONSES TO CODECISION QUESTIONNAIRE

Sub-Committee A

- (1) How many codecision dossiers have you scrutinised so far this year?**

Sub-Committee A has scrutinised five codecision documents in 2009, out of a total of 28.

- (2) Do the Sub-Committee's procedures for scrutinising codecision dossiers differ from the procedures to scrutinise other dossiers? If so, how?**

No, however scrutiny notes may need to take into account proposal as amended by the European Parliament and the Government's view on the EP amendments.

- (3) How does the Sub-Committee keep updated on progress in negotiations at each stage in the codecision procedure?**

(a) Is this effective?

(b) How could it be improved?

The Sub-Committee is kept informed for the most part informally, through contact between officials and the Clerk and particularly the Committee Specialist. Where the Committee has asked to be kept updated on progress of negotiations, the Minister has provided formal updates although this tends to be a slower process than informal information gathering. The Minister's letters are often brief and in one case (Capital Requirements Directive) the Minister explained where compromises had been reached between the EP and Council, but gave no details on the contents of the agreement. However, Minister's letters on other documents have gone into great detail on compromises agreed with the EP (Preliminary Draft Budget for 2009).

This could be improved through access to compromise texts at an unofficial level on a more regular basis, so the Committee team can inform the Committee of what has been suggested/ agreed on a faster timescale. This could then be followed by a formal Ministers letter.

In general Government departments must be more rigorous in keeping the Committee informed on likely developments so that they can be taken into account in the scrutiny process. This should be formalised to ensure the Committee receives the correct documents.

- (4) At each stage of the codecision procedure, does the Sub-Committee have access to the right documents to ensure that it is able to scrutinise effectively?**

(a) Which documents are particularly useful?

(b) Which additional documents would be helpful?

In one case the Sub-Committee has received documents giving details of Government negotiating positions, but this has been in the minority of cases. Receiving this type of document on a more regular basis would significantly improve Sub-Committee scrutiny of codecision dossiers and should be formalised.

(5) Have first reading deals and early second reading deals impacted on the ability of the Sub-Committee to scrutinise effectively?

(a) Does the Sub-Committee employ special procedures to scrutinise dossiers which are likely to be agreed at an early stage?

First reading deals have a negative impact on the ability of the Committee to scrutinise properly due to the rapidity of the process underpinning the deal.

(6) Does the Sub-Committee communicate its views on codecision dossiers to those other than HMG?

The Sub-Committee had initially planned to send a letter to interested MEPs on the credit rating agencies scrutiny dossier. This was intended to inform the MEPs of the Sub-Committee's views as they would be voting on the dossier in advance of their report on the EU response to the financial crisis, during the inquiry for which evidence was taken upon this subject. Upon reflection the Committee decided not to continue with this plan as the Sub-Committee concluded it should not pre-empt the conclusions of its report, particularly as there may not have been unanimous agreement amongst the Committee.

There was also some discussion in the Committee as to whether it was appropriate to attempt to influence the views of MEPs, who are not accountable to the House of Lords nor its Committee's.

(7) Please give details of a dossier where the Sub-Committee has been able to scrutinise codecision negotiations effectively.

(a) Why was this effective?

(8) Please give details of a dossier where the Sub-Committee has not been able to scrutinise codecision negotiations effectively.

(a) Why was this not effective?

Questions 7 and 8:

The only significant codecision dossiers Sub-Committee A have scrutinised recently are the capital requirements directive and the regulation on credit rating agencies. Our scrutiny of these documents formed part of the current inquiry into EU financial supervision and regulation in response to the financial crisis. This showcased both effective and less effective procedures for the scrutiny of codecision dossiers.

We took evidence from British MEPs (of all parties) who had a significant interest in both these dossiers. This helped provide more effective scrutiny of the dossiers as the Sub-Committee was informed of the views and debates within the European Parliament first hand, which in turn helped inform the views of the Committee on these issues. We also received regular updates on the progress of the documents through contact at official level and information gained by the Committee Specialist and Advisor. This enabled the Committee to keep up-to-date on the progress of negotiations. However, it may have been useful for there to be a more formal structure for receiving updates on negotiations.

The speed at which these documents were agreed first in Council and then in the European Parliament reduced the effectiveness of the scrutiny as the dossiers formed only a part of a larger report. Although we spoke to many witnesses about the dossiers we did not publish our conclusions before the dossiers were agreed in

Parliament. This perhaps is more informative of the speed at which these dossiers were agreed than the process by which the Sub-Committee scrutinised them.

In conclusion, the scrutiny of these dossiers was made more effective by the informal updates by officials and by meeting with MEPs. However, the effectiveness was reduced by the speed of agreement and the relative scarcity of official updates on the progress of negotiations.

Sub-Committee B

- (1) How many codecision dossiers have you scrutinised so far this year?**

So far in 2008–09, Sub-Committee B has scrutinised 20 codecision dossiers.

- (2) Do the Sub-Committee's procedures for scrutinising codecision dossiers differ from the procedures to scrutinise other dossiers? If so, how?**

No. Agreement at Council is the deadline for scrutiny rather than First Reading. On some occasions, the Committee has continued to hold items under scrutiny simply to await the outcome of First Reading negotiations (e.g. 11285/08 on the remit of the European Aviation Safety Agency).

- (3) How does the Sub-Committee keep updated on progress in negotiations at each stage in the codecision procedure?**

(a) Is this effective?

(b) How could it be improved?

This varies. Usually we receive an update letter just before the First Reading deal is agreed. It would be useful to know a little more about what positions have been taken in codecision negotiations and why, preferably before a deal has been agreed.

- (4) At each stage of the codecision procedure, does the Sub-Committee have access to the right documents to ensure that it is able to scrutinise effectively?**

(a) Which documents are particularly useful?

(b) Which additional documents would be helpful?

The documents the Committee has access to are usually the original proposal and an update letter from the Government.

- (5) Have first reading deals and early second reading deals impacted on the ability of the sub-committee to scrutinise effectively?**

(a) Does the Sub-Committee employ special procedures to scrutinise dossiers which are likely to be agreed at an early stage?

In most cases the Committee has accounted for First Reading deals by holding the item under scrutiny until it knows what the deal consists of. For example, it is holding a proposal about spectrum use at the moment (16115/08). The Committee has no questions about it and it is happy with the proposal and the Government's view. However, the details of the proposal mean that the European Parliament has shown a particular interest in it. The Committee is therefore

holding the item under scrutiny to await the details of the expected First Reading deal.

(6) Does the Sub-Committee communicate its views on codecision dossiers to those other than HMG?

No.

(7) Please give details of a dossier where the Sub-Committee has been able to scrutinise codecision negotiations effectively.

(a) Why was this effective?

Because of their nature, the Committee has not been able to scrutinise codecision negotiations. It has been able to scrutinise original proposals and make its view known to the government and it has also been able to scrutinise the contents of proposed First Reading deals. The process of agreeing First Reading deals, however, has not been open to the Committee to scrutinise.

(8) Please give details of a dossier where the Sub-Committee has not been able to scrutinise codecision negotiations effectively.

(a) Why was this not effective?

See above.

Sub-Committee C

(1) How many codecision dossiers have you scrutinised so far this year?

None.

(2) Do the Sub-Committee's procedures for scrutinising codecision dossiers differ from the procedures to scrutinise other dossiers? If so, how?

No, however scrutiny notes may need to take into account proposal as amended by the European Parliament and the Government's view on the EP amendments.

(3) How does the Sub-Committee keep updated on progress in negotiations at each stage in the codecision procedure?

(a) Is this effective?

(b) How could it be improved?

The Sub-Committee is kept informed for the most part informally, through contact between officials and the Committee Specialist or Clerk. Where the Committee has asked to be kept updated on progress of negotiations, the Minister has provided formal updates although this tends to be a slower process than informal information gathering.

This could be improved through access to compromise texts at an unofficial level on a more regular basis, so the Committee team can inform the Committee of what has been suggested/agreed on a faster timescale. This could then be followed by a formal Ministers letter.

In general Government some departments could have been more rigorous in keeping the Committee informed on likely developments so that they can be taken

into account in the scrutiny process. This should be formalised to ensure the Committee receives the correct documents.

(4) At each stage of the codecision procedure, does the Sub-Committee have access to the right documents to ensure that it is able to scrutinise effectively?

(a) Which documents are particularly useful?

(b) Which additional documents would be helpful?

The Sub-Committee has occasionally been kept in touch with Government negotiating positions, and this should be continued and perhaps made more systematic. Receiving such information on a more regular basis could improve Sub-Committee scrutiny of codecision dossiers.

(5) Have first reading deals and early second reading deals impacted on the ability of the Sub-Committee to scrutinise effectively?

(a) Does the Sub-Committee employ special procedures to scrutinise dossiers which are likely to be agreed at an early stage?

No special procedures, but the Sub-Committee seeks to adapt its timing of scrutiny to the Brussels machinery.

(6) Does the Sub-Committee communicate its views on codecision dossiers to those other than HMG?

In the past (2008) the Sub-Committee has informed selected UK MEPs of the Committee's views on a particular dossier, but we have not had any co-decision dossiers in 2009.

(7) Please give details of a dossier where the Sub-Committee has been able to scrutinise codecision negotiations effectively.

(a) Why was this effective?

(8) Please give details of a dossier where the Sub-Committee has not been able to scrutinise codecision negotiations effectively.

(a) Why was this not effective?

Sub-Committee D

(1) How many codecision dossiers have you scrutinised so far this year?

11 (See Annex)

(2) Do the Sub-Committee's procedures for scrutinising codecision dossiers differ from the procedures to scrutinise other dossiers? If so, how?

In general, the Sub-Committee approaches scrutiny of the Government position in the same way as it would for other dossiers. When scrutinising codecision dossiers, however, greater attention is paid to the amendments proposed by the European Parliament, and to the Council's emerging approach to those amendments.

(3) How does the Sub-Committee keep updated on progress in negotiations at each stage in the codecision procedure?

When responding to the Government in writing, the Sub-Committee always requests that it be kept up to date formally on the progress of negotiations. Informal updates also take place through officials.

(a) Is this effective?

This is sometimes effective although it is heavily dependent on the Department's willingness to provide updates promptly, and on the information available to departmental officials themselves, as also on the timescale of the negotiations.

(b) How could it be improved?

Government departments (DEFRA in this case) can be sluggish in providing updates on the progress of inter-institutional negotiations, sometimes only providing them when prompted by Committee staff. There is also a problem with updates only being received after a first or second reading deal has been struck.

The Government must ensure the accuracy of the information provided and, should there be doubt as to what progress might be made on a dossier, this must be indicated. When scrutinising the pesticides regulation (see Annex), the Sub-Committee was inadvertently misled by the Government ahead of a Council meeting

(4) At each stage of the codecision procedure, does the Sub-Committee have access to the right documents to ensure that it is able to scrutinise effectively?

The Government's usual practice is to summarise the emerging approach to the key issues rather than to provide copies of Council documents. An exception to that most recently was the Government's provision of a Presidency Compromise document relating to the proposed Regulation on the protection of animals at the time of killing.

The emerging consensus between the European Parliament and Council can be almost impossible to determine. Updates from the Government are usually too infrequent, and negotiations proceed too rapidly and opaquely to allow for accurate tracking of the inter-institutional negotiations. We must give thought to how we can keep systematically abreast of discussions in the European Parliament and to how we might actively feed in to those discussions as appropriate.

(a) Which documents are particularly useful?

Pre-council Presidency compromises

(b) Which additional documents would be helpful?

Whether in the form of official documents, or in the form of summarised information provided either formally in a letter or informally, greater indication of the emerging consensus between institutions would be useful, particularly if a first or second reading deal is expected.

(5) Have first reading deals and early second reading deals impacted on the ability of the Sub-Committee to scrutinise effectively?

Yes. The ability of the Sub-Committee to scrutinise first reading deals and early second reading deals depends on the willingness of Departments to keep Parliament updated promptly, whether formally or informally.

(a) Does the Sub-Committee employ special procedures to scrutinise dossiers which are likely to be agreed at an early stage?

When necessary, the Sub-Committee is content to work with the Government to provide the conditions for timely release from scrutiny as long as the Government supply the information required. Recourse may be made to informal telephone updates from officials.

(6) Does the Sub-Committee communicate its views on codecision dossiers to those other than HMG?

Reports are widely communicated but its views on other codecision dossiers are not routinely communicated to those other than HMG. Exceptionally, the Committee wrote to Commission President Barroso with regard to the proposed Regulation on the placing on the market of Plant Protection Products (pesticides) due to the Committee's strong concerns about the inadequacy of the impact assessment process.

(7) Please give details of a dossier where the Sub-Committee has been able to scrutinise codecision negotiations effectively.

The revision of the Emissions Trading System Directive and the linked Proposal on the geological storage of carbon dioxide in October-December 2008.

(a) Why was this effective?

The Committee was conducting an inquiry into the revision of the Emissions Trading System at the time, so was already in touch with the relevant officials. We received a regular and comprehensive flow of information from Government officials. A feature of this was that the information was generally provided informally to Sub-Committee officials over the phone. While not necessarily ideal, this did allow the Sub-Committee to be kept up to date on a major dossier which moved extremely quickly towards a first reading agreement.

(8) Please give details of a dossier where the Sub-Committee has not been able to scrutinise codecision negotiations effectively.

First reading deal: The proposed directive on Stage II petrol vapour recovery during refuelling of passenger cars at service stations

(a) Why was this not effective?

The dossier moved swiftly from initial publication of the Commission's proposal on 4 December 2008 to a first reading deal adopted by the European Parliament on 5 May. The information that we received from the Government was poorly timed and insufficient. Indeed, the initial EM was submitted two months after publication of the Commission's Proposal (4 February 2009) and indicated a lack of clarity as to possible progress before the European Parliament elections. Towards the beginning of March, the Government wrote to the Committee and simply stated that the Presidency, Commission and European Parliament "appear agreed on fast-tracking this proposal". No further information was made available. A Supplementary EM (SEM) was subsequently provided on 1 May in which it was noted that negotiations were in fact proceeding very rapidly, and that a first reading agreement was envisaged at the beginning of May. A very brief indication of the issues at the heart of the negotiations was given but no text was supplied and the SEM did not reflect trilogue discussions on 14 April (having apparently been drafted prior to that meeting, but not submitted to the Committee until 1 May).

Second reading deal: The proposed regulation on the placing on the market of Plant Protection Products (pesticides). See Annex for a full explanation

(a) Why was this not effective?

Incomplete and misleading information by the Government led the Sub-Committee to release the Proposal from scrutiny at Council First Reading. The Common Position that was finally agreed proved to be unsatisfactory to both the Sub-Committee and the Government. Communication with the Sub-Committee after that stage was weak, including a paucity of information as regards the evolution of the eventual Second Reading deal with the European Parliament. Information on the deal reached in December 2008 was provided by the Government on 30 April 2009.

The Sub-Committee and Government also found the poor quality of impact assessment to be a major problem in discussions on this Proposal. This concern was raised with President Barroso by the Sub-Committee in a letter of 17 December.

ANNEX

Plant Protection Products (Pesticides) Regulation

The Commission's Proposal was published on 27 July 2006. The Committee raised a number of concerns, with which the Government concurred. There was no prospect of a first reading deal and the European Parliament adopted its position on 23 October 2007. By letter of 27 April 2008, the Government informed the Committee that the Slovenian Presidency had developed a compromise text, which the Government summarised and considered to be reasonable. On the basis of the information provided by the Government, the Committee released the proposal from scrutiny on 14 May in advance of the 19 May Agriculture Council.

At the Council, it became clear that the Commission would not support the compromise text, and a number of Member States also withdrew their support for that reason. The Slovenian Presidency therefore put a revised compromise text to the June Agricultural and Fisheries Council. The UK could not support that revised compromise text, and abstained. Several other Member States also abstained, but the text was nevertheless adopted as a Common Position.

Three months later, the Government wrote to the Committee, informing it of this turn of events. The Committee responded on 10 October, expressing the Committee's regret at the delay in informing the Committee of the failure of the compromise text and the tabling of a revised compromise, which the UK had strong reservations about. The Committee expressed support for the Government's intention to lobby all the parties involved in the negotiations, and asked to be kept informed of the progress of negotiations. The Government subsequently did so by letter of 5 December and during an oral evidence session on 10 December.

At that point, the Minister made it clear that the French Presidency was seeking a second reading deal, and the Government remained concerned that the end result would not be satisfactory to them, nor would it fully address the Committee's concerns. The Minister also revealed that agreement at the May Council was less likely than implied by the letter of 27 April 2008. Ultimately, a second reading agreement was reached in December 2008. We were warned about this aspiration by letter of 5 December, but no further communication was received from the Government until 30 April 2009, when the Government informed the Committee that they would vote against the Regulation when the final text as agreed in December is put to Council.

Throughout the procedure, the Committee was concerned about the potential impact of the Regulation, and the lack of appropriate impact assessments. The Committee wrote to the Commission President expressing those concerns.

Sub-Committee E

- (1) How many codecision dossiers have you scrutinised so far this year?**

9 (out of 19)

- (2) Do the Sub-Committee's procedures for scrutinising codecision dossiers differ from the procedures to scrutinise other dossiers? If so, how?**

No. We would normally ask the Government to keep the Sub-Committee informed of any developments on the dossier, regardless of whether it is codecision. However, a codecision procedure may result in more opportunities for the Government to provide us with updates and for us to continue asking, particularly if the scrutiny reserve still applies.

- (3) How does the Sub-Committee keep updated on progress in negotiations at each stage in the codecision procedure?**

We would normally do this informally, through contact at officials level, but also through the aforementioned requests to be kept informed.

- (a) Is this effective?**

No.

- (b) How could it be improved?**

Greater disclosure of documents over the course of the process of authorisation and negotiation, and more frequent contact with the committee where legislation is moving away from the term of the original proposal.

- (4) At each stage of the codecision procedure, does the Sub-Committee have access to the right documents to ensure that it is able to scrutinise effectively?**

No.

- (a) Which documents are particularly useful?**

- (b) Which additional documents would be helpful?**

The final compromise text on which agreement is to be reached would be useful, however, due to the nature of codecision, this text is only likely to emerge very late in the process. If the text is likely to change significantly from that considered by the Sub-Committee, earlier versions of a compromise might be useful if they provide a strong indication of the likely content of the final text. This is particularly the case when a first reading deal is anticipated; it would be useful to see the text agreed by COREPER as the basis for negotiation with the Parliament, although it is not formally depositable.

- (5) Have first reading deals and early second reading deals impacted on the ability of the Sub-Committee to scrutinise effectively?**

These deals can sometimes progress so quickly that scrutiny of any emerging compromise text is impossible. Details of occasions when this has happened are provided in the answer to Q 8.

(a) Does the Sub-Committee employ special procedures to scrutinise dossiers which are likely to be agreed at an early stage?

No.

(6) Does the Sub-Committee communicate its views on codecision dossiers to those other than HMG?

No?

(7) Please give details of a dossier where the Sub-Committee has been able to scrutinise codecision negotiations effectively.

Procedure for Member States to make bilateral agreements with third countries in the field of contractual and non-contractual obligations.

(a) Why was this effective?

The Minister and officials were timely in keeping the Committee informed of progress, including by providing texts. The matter did not proceed as quickly as the Presidency intended.

The Commission proposal was made on 12 January 2008 with updates from the Minister on 18 March and 21 April. Prior to 18 March in particular there was useful contact from MOJ officials enabling paperwork to be turned around quickly in the Committee Office when the formal letter from the Minister arrived.

Scrutiny was assisted by fact that the matter was not ready to go to the Council in April, as at one time had been expected.

The European Parliament agreed the text 7 May.

(8) Please give details of a dossier where the Sub-Committee has not been able to scrutinise codecision negotiations effectively.

(a) Why was this not effective?

Ship Source Pollution (1st reading deal)

The dossier was cleared by the Sub-Committee in November 2008, after an exchange of correspondence with the Minister. The Sub-Committee had expressed doubts about the quality of drafting, and in October the Government provided an amended Presidency text which improved the drafting of the measure.

The European Parliament's Transport Committee Report was published in February 2009. On 24 April, the Committee received a letter from Lord Bach, explaining the state of the negotiations. The EP amendments were to be further discussed on 27 and 28 April. On 29 April, Lord Bach wrote again, enclosing a *Limité* compromise text, which was due to be agreed at COREPER that afternoon for agreement by the European Parliament (which was given on 5 May). Sub-Committee E therefore had no opportunity to consider the revised proposal. In the event, this was not a problem, as the proposal was not radically different from the original one. Had it been significantly different, we would have expected the new proposal to have been deposited, as suggested in the revised CO Scrutiny Guidelines, or at the very least to have received a Ministerial letter in good time. However, due to the rapid development of the situation, this would not have been possible.

The House of Commons European Scrutiny Committee has encountered more serious difficulties with this dossier as they had not cleared it from scrutiny (although in October 2008 they had indicated that agreement to the proposal could nevertheless be given—26th Report of session 2007–8). Not only had the scrutiny reserve been overridden originally at Council but it was still in place during the negotiation of the deal as described above. The ESC is due to take oral evidence from Lord Bach on the subject shortly.

Shipowner's Liability Proposal (2nd reading deal)

No effective scrutiny was possible due to lack of timely information from the Minister, the speed of negotiations after a long period when the proposal was dormant, and interposition of the summer recess.

This was a proposal made by the Commission and formed part of a package of measures concerning maritime safety. The original proposal was made as far back as November 2005. The proposal was amended by the Commission in the light of the view taken by the European Parliament at its first reading and a fresh Explanatory memorandum was submitted in November 2007 to cover the amended proposal. In July 2008 the Minister updated the Committee indicating that, despite failure at a Transport Council in April to secure the support of a majority of Member States for such a measure, the French presidency would be seeking to pursue the matter in the latter half of 2008, with a scheduled debate at a Transport Council in December. No text was submitted.

On 1 October the Minister wrote “In recent weeks the French Presidency has sought the co-operation of the Member States in a concerted effort to achieve political agreement at the 9 October Transport. The proposal as currently drafted is now very close to what the Government can accept...” with limited further information and still no text. Sub-Committee E felt unable to clear this on the information provided.

On 28 October the Minister reported on the political agreement that had been reached in exercise of the scrutiny override and provided a text that had been agreed at the Transport Council. He indicated that there was no depositable document since the amended Commission proposal that the fast moving nature of the negotiations during the run up to the Council meant that it was impossible to provide a definitive description of the changes made. Even at this stage the explanation did not address subsidiarity concerns raised by the Government themselves.

The Sub-Committee considered that the letter of 1 October pointed to sufficient information being available by 1 October at the latest to enable effective scrutiny to take place.

The Common Position was adopted on 24 November 2008 and it was agreed by the European Parliament on 11 March 2009.

Sub-Committee F

(1) How many codecision dossiers have you scrutinised so far this year?

8 (see annex)

(2) Do the Sub-Committee's procedures for scrutinising codecision dossiers differ from the procedures to scrutinise other dossiers? If so, how?

Not the procedure as such, but scrutiny notes may need to pay greater attention to the position of the European Parliament so to be aware of any difficulties with the dossier. Briefings on discussions of European Parliament draft reports and HMG briefings to MEPs are a valuable source in this respect.

(3) How does the Sub-Committee keep updated on progress in negotiations at each stage in the codecision procedure?

In theory by being informed by the Home Office. In practice they seldom used to do this until we had asked what (if anything) was going on with a dossier where we suspected there should be something happening. Things are now improving.

(a) Is this effective?

Not until recently, since the initiative was usually ours. Often it still is, but Home Office are now sometimes acting off their own bat.

(b) How could it be improved?

By the Home Office following para 3.5 of the Cabinet Office Guidelines.

(4) At each stage of the codecision procedure, does the Sub-Committee have access to the right documents to ensure that it is able to scrutinise effectively?

Only in a minority of cases are the right documents provided for scrutiny. Most of them are LIMITE and therefore not given to us. Committee staff are in some instances able to obtain LIMITE documents informally from the internet.

(a) Which documents are particularly useful?

Working Group documents which annotate in bold significant changes from previous texts; compromise texts of the Presidency.

(b) Which additional documents would be helpful?

A report on negotiations issued by the Presidency, deposited with an EM. This was done for the PNR Framework Decision. Although not a codecision matter, it shows how codecision dossiers should ideally be handled.

(5) Have first reading deals and early second reading deals impacted on the ability of the Sub-Committee to scrutinise effectively?

Yes, they generally impact negatively as not enough information is provided or advance notice given that such a deal is likely.

(a) Does the Sub-Committee employ special procedures to scrutinise dossiers which are likely to be agreed at an early stage?

Only reminding the Home Office to keep us posted.

(6) Does the Sub-Committee communicate its views on codecision dossiers to those other than HMG?

No, unless they are the subject of an inquiry in which case the report is distributed widely.

(7) Please give details of a dossier where the Sub-Committee has been able to scrutinise codecision negotiations effectively

Proposal for a Regulation amending Council Regulation (EC) No 2252/2004 on standards for security features and biometrics in passports and travel documents issued by Member States (Document 14217/07)

This dossier has been under scrutiny since November 2007. Although this is a Schengen-building measure and so (after an ECJ challenge failed) not binding on the UK, what is agreed is likely to influence the Government, which is participating in the negotiations. The Committee engaged in intense correspondence over a fundamental rights issue arising from the dossier over which the EP had concerns too. Home Office informed us in December 2008 about forthcoming deal with EP (which was reached in January 2009) but has since failed to inform us that dossier was coming up for adoption at the GAER Council on 27 April. This is therefore a scrutiny override.

(a) Why was this effective?

This was a relatively simple dossier amending an existing Regulation on a single issue. We shared the concern of the EP on the human rights issue that arose (in particular the age at which children should first be fingerprinted: the Government wanted 6, we and the EP both said 12, and this is what prevailed). This standoff protracted negotiations until first reading deal was reached in January 2009.

(8) Please give details of a dossier where the Sub-Committee has not been able to scrutinise codecision negotiations effectively.

Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (document 10737/08)

The Returns Directive was first proposed by the Commission in September 2005 and sifted to Sub-Committee F who launched an inquiry and reported on 9 May 2006. The report was subsequently debated and the document cleared from scrutiny. Note that the UK opted out of the Directive (although this does not change the scrutiny requirements on the Government).

In the months following the publication of the Report discussions in the Council stalled and the Committee received no updates on negotiations from the Home Office. However, significant informal trilogue work was undertaken under the Slovenian Presidency (first semester 2008). This led to political adoption of a compromise text by the Council in June 2008 in advance of the EP voting in favour of a first reading deal that month. The view of the Committee Specialist to sub-committee F was that the adopted text differed “significantly from what was originally proposed by the Commission.” However the Department did not seek to update the Committee until a revised text was issued after the first reading deal. At that stage the Department’s EM stated that “The proposed directive has developed along lines different from those originally proposed”.

(a) Why was this not effective?

Because the original Commission proposal had been the subject of a report and cleared by debate, the Home Office seemed to assume that this was of no further interest to us.

Annex: Session 2008–09: Codecision dossiers

Draft Regulation of the European Parliament and of the Council amending the Common Consular Instructions on visas for diplomatic and consular posts in relation to the introduction of biometrics including provisions on the organisation

of the reception and processing of visa applications (Document 5090/09) **Cleared from scrutiny**

Proposal for a Council Regulation on laying down a uniform format for visas (codified version) (Document 5256/09)³⁰ **Under scrutiny**

Proposal for a Regulation amending Council Regulation (EC) No 2252/2004 on standards for security features and biometrics in passports and travel documents issued by Member States (Document 14217/07) **Under scrutiny (scrutiny override)**

Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third country national or a stateless person (Document 16929/08) **Under scrutiny**

Proposal for a Regulation of the European Parliament and of the Council concerning the establishment of “Eurodac” for the comparison of fingerprints for the effective application of [the Dublin] Regulation (Document 16934/08) **Under scrutiny**

Proposal for a Directive of the European Parliament and of the Council laying down minimum standards for the reception of asylum seekers (Document 16913/08) **Under scrutiny**

Proposal for a Regulation of the European Parliament and of the Council establishing a European Asylum Support Office (Document 6700/09) **Under scrutiny**

Proposal for a Decision of the European Parliament and the Council amending Decision 573/2007/EC establishing the European Refugee Fund for the period 2008 to 2013 by removing funding for certain community actions and altering the limit for funding such actions (Document 6702/09) **Under scrutiny**

Sub-Committee G

(1) **How many codecision dossiers have you scrutinised so far this year?**

14 (See Annex)

(2) **Do the Sub-Committee’s procedures for scrutinising codecision dossiers differ from the procedures to scrutinise other dossiers? If so, how?**

Broadly speaking, no. Scrutiny of the Government’s position is comparable to the approach taken for other dossiers that are subject to alternative decision-making procedures.

Greater attention is, however, paid to the amendments proposed by the European Parliament and the Government’s view on those amendments. The Committee would in all cases wish to remain alert to the possibility of first or second reading deals.

³⁰ It is not clear whether this dossier is subject to co-decision or consultation, procedural arrangements in the European Parliament are pending.

(3) How does the Sub-Committee keep updated on progress in negotiations at each stage in the codecision procedure?

The Committee asks the Government to keep the Committee up to date and makes use of informal contacts between officials. Most recently, Department of Health officials informed Committee officials that the Council is moving towards agreement, in June on the proposed Cross Border Healthcare Directive. Officials in the UK Permanent Representation can be particularly useful, often due to the fact that they may have good informal contacts within the European Parliament. Specialist media can also be a useful source of information.

(a) Is this effective?

The effectiveness or otherwise is somewhat dependent on the Department or officials involved. We have noted that the ability of the Government to update the Committee is also dependent on the information received by the Government from the Presidency, and the timing of such information.

(b) How could it be improved?

While not exclusive to codecision dossiers, the failure or reluctance of Presidencies to release details of compromises to national delegations until a short time before a Council or COREPER meeting can render scrutiny particularly problematic. In the example given below of a codecision dossier which was scrutinised effectively, the Committee experienced both good and bad practice in that regard. More generally, it is important that Government departments are aware of the importance of giving the Committee as early a warning as possible on likely developments.

(4) At each stage of the codecision procedure, does the Sub-Committee have access to the right documents to ensure that it is able to scrutinise effectively?

On some occasions, the Committee has been provided with copies of Presidency compromise documents. This is not always the case. For reasons of confidentiality, the Government may sometimes prefer to offer a summary of the content of such documents.

The emerging consensus between the European Parliament and Council can be difficult to determine (see example below of a codecision dossier which proved difficult to scrutinise).

(a) Which documents are particularly useful?

Pre-council Presidency compromises

(a) Which additional documents would be helpful?

Whether in the form of documents, or in the form of summarised information, greater indication of the emerging consensus between institutions would be useful, particularly if a first or second reading deal is expected.

(5) Have first reading deals and early second reading deals impacted on the ability of the Sub-Committee to scrutinise effectively?

It is easier to scrutinise a dossier that passes more formally through the decision making procedure as the Government themselves have more complete information (see example of Working Time Directive below).

(a) Does the Sub-Committee employ special procedures to scrutinise dossiers which are likely to be agreed at an early stage?

See the analysis below, indicating that an extraordinary meeting was held in order to provide the Government with scrutiny clearance in advance of a Council discussion on working time two days later, the day when the Committee would normally have met. This was an exceptional case, but the Committee would often seek to assist, rather than impede, the process of releasing a document from scrutiny (or of allowing a Minister to agree in Council without the Committee considering the scrutiny reserve to have been overridden, under paragraph 3(b) of the scrutiny reserve resolution).

(6) Does the Sub-Committee communicate its views on codecision dossiers to those other than HMG?

Reports are widely communicated but its views on other co-decision dossiers are not routinely communicated to those other than HMG.

(7) Please give details of a dossier where the Sub-Committee has been able to scrutinise codecision negotiations effectively.

Working Time Directive—see below

(a) Why was this effective?

Regular and comprehensive flow of information from HMG, both formally and informally. The Council and European Parliament positions were distinct which meant that there was less room for informal negotiations between the European Parliament and Council than might have otherwise been the case.

(8) Please give details of a dossier where the Sub-Committee has not been able to scrutinise codecision negotiations effectively.

Proposal for an amended Directive on the Safety of Toys (see Annex)

(a) Why was this not effective?

Incomplete provision of information by the Government, due partly to the speed of negotiations in Brussels.

Working Time Directive

Scrutiny of this Proposal took place against the background of a Committee Report (8 April 2004) assessing possible review of the Directive. The Commission published its Proposal for to revise the Directive on 22 September 2004. The Committee was in regular contact with the Government through a series of letters, giving clear views based on the Conclusions of the Report, which were broadly in line with the Government's proposed negotiating position, and receiving regular updates from the Government, including with regard to the failure to secure agreement at either the December 2004 or June 2005 Council meetings.

Following the European Parliament's adoption of a position in May 2005, the European Commission published an amended Proposal, which became the subject of a new scrutiny procedure. The Government provided the Committee with substantial information in the course of the UK Presidency (July–December 2005), including a summary (letter dated 29 November 2005) of the proposed Presidency compromise. It appears that the Sub-Committee held an extraordinary meeting on Tuesday 6 December 2005 in order to consider the latest information from the Government ahead of the Council meeting on Thursday 8 December. In

addition to formal information from the Government, further informal clarification was provided to officials prior to that meeting of the Committee.

Agreement was not reached at Council in December 2005. The subsequent work of the Committee in the first half of 2006 was hampered by a paucity of information from the Austrian Presidency in advance of the COREPER meeting on 24 May 2006 and Council on 2 June 2006. The Finnish Presidency later in the year provided more information, but a formal compromise proposal was still unavailable when the Minister wrote to the Committee on 30 October 2006 in advance of the Council meeting on 7 November. Again, the Council failed to reach agreement. The next stage was possible agreement under the Portuguese Presidency on 5 December 2007. On that occasion, the Government supplied the Committee with the Presidency compromise. Agreement was not reached. In May 2008, the Government formally deposited (under cover of an EM) a copy of the draft Slovene Presidency compromise. Further to the 9 June 2008 Employment Council, where agreement was finally reached, the Minister wrote to the Committee explaining the agreement and the Committee then explored the issues further with the Minister in an oral evidence session on 10 July 2008.

The European Parliament's Second Reading started formally on 22 September. In advance of that process, the Minister informed the Committee that the Government would engage with the European Parliament. By letter of 23 February 2009, the Government informed the Committee that they and the Council as a whole were unable to accept the European Parliament's Second Reading amendments and that the Conciliation Committee would be convened formally on 17 March. He promised to write as necessary to update the Committee on the progress of those negotiations. No formal information was received although officials were contacted after the first Conciliation Committee meeting and were informed that no progress had been made. The Conciliation process collapsed on 27 April with no agreement, and the proposal therefore fell.

Toy Safety Directive

First discussed by the Committee on 20 March 2008, at which point progress on the draft proposal was expected to be slow. The Committee were supportive of the Commission's draft but were not entirely clear of the impact of the proposal. The Government indicated that, once the detail of the proposed revisions to the Directive became clearer, a full UK impact assessment would be prepared and submitted.

A supplementary EM and partial Impact Assessment were submitted on 18 November and considered by the Committee on 4 December 2008, although it was noted by the Government that preparation of the Impact Assessment was difficult because: a) in Council discussions, the negotiations had commenced from a wide range of options, making it unclear what form the final directive would be likely to take; b) the European Parliament had also tabled a wide range of options, though the Parliament's position was becoming clearer; and c) Council Working Groups negotiations were proceeding weekly, with some emerging consensus. Despite this range of doubt, the Minister did suggest that the final directive would reflect the original Commission draft "fairly closely".

On the basis of the Minister's judgement, and the Committee's support for the original draft, the Committee chose to release the proposal from scrutiny at its meeting of 4 December in advance of an expected first reading agreement in mid-December.

Annex 1: Codecision dossiers scrutinised this year (or under scrutiny this year)

- Proposal for a Directive of the European Parliament and of the Council on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Directive 86/613/EEC
- Proposal for a Directive of the European Parliament and of the Council amending Council Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding
- Proposal for a European Parliament and Council Directive on consumer rights
- Proposal for a Directive amending Directive 2002/15/EC on the organisation of the working time of persons performing mobile road transport activities
- Proposal for a Directive of the European Parliament and of the Council on standards of quality and safety of human organs intended for transplantation
- Amended proposal for a Directive concerning certain aspects of the organisation of Working Time
- Proposal for a Regulation on the provision of food information to consumers
- Proposal for a Regulation amending, as regards information to the general public on medicinal products for human use subject to medical prescription, Regulation (EC) 726/2004 laying down Community procedures for the authorisation and supervision of medicinal products for human and veterinary use and establishing a European Medicines Agency
- Proposal for a Directive amending, as regards information to the general public on medicinal products for human use subject to medical prescription, Directive 2001/83/EC on the Community code relating to medicinal products for human use
- Proposal for a Regulation amending, as regards pharmacovigilance of medicinal products for human use, Regulation (EC) 726/2004 laying down Community procedures for the authorisation and supervision of medicinal products for human and veterinary use and establishing a European Medicines Agency
- Proposal for a Directive of the European Parliament and of the Council amending, as regards pharmacovigilance, Directive 2001/83/EC on the Community code relating to medicinal products for human use
- Proposal for a Directive of the European Parliament and of the Council amending Directive 2001/83/EC as regards the prevention of entry into the legal supply chain of medicinal products which are falsified in relation to their identity, history or source
- Proposal for a Decision of the European Parliament and of the Council Establishing an Audiovisual Co-operation Programme with Professionals from Third Countries—MEDIA Mundus
- Proposal for a Directive of the European Parliament and of the Council on the application of patients' rights in cross-border healthcare

APPENDIX 5: EP CODE OF CONDUCT FOR NEGOTIATING CODECISION FILES³¹

1. Introduction

This code of conduct sets out general principles within Parliament, on how to conduct negotiations during all stages of the codecision procedure with the aim of increasing their transparency and accountability, especially at an early stage of the procedure³². It is complementary to the “Joint Declaration on practical arrangements for the codecision procedure” agreed between Parliament, Council and the Commission which focuses more on the relationship between these institutions.

Within Parliament, the lead parliamentary committee shall be the main responsible body during negotiations both at first and second reading.

2. Decision to enter into negotiations

As a general rule, Parliament shall make use of all possibilities offered at all stages of the codecision procedure. The decision to seek to achieve an agreement early in the legislative process shall be a *case-by-case* decision, taking account of the distinctive characteristics of each individual file. It shall be politically justified in terms of, for example, political priorities; the uncontroversial or ‘technical’ nature of the proposal; an urgent situation and/or the attitude of a given Presidency to a specific file.

The possibility of entering into negotiations with the Council shall be presented by the rapporteur to the full committee and the decision to pursue such a course of action shall be taken either by broad consensus or, if necessary, by a vote.

3. Composition of negotiating team

The decision by the committee to enter into negotiations with the Council and the Commission in view of an agreement shall also include a decision on the composition of the EP negotiating team. As a general principle, political balance shall be respected and all political groups shall be represented at least at staff level in these negotiations.

The relevant service of the EP General Secretariat shall be responsible for the practical organisation of the negotiations.

4. Mandate of the negotiating team

As a general rule, the amendments adopted in committee or in plenary shall form the basis for the mandate of the EP negotiating team. The committee may also determine priorities and a time-limit for negotiations.

In the exceptional case of negotiations on a first reading agreement before the vote in committee, the committee shall provide guidance to the EP negotiating team.

³¹ As adopted by the Working Party on Parliamentary Reform at its meeting on 23 April 2008.

³² Special attention needs to be given to negotiations taking place at those stages of the procedure, where the visibility within Parliament is very limited. This is the case for negotiations: (a) before the committee vote at first reading with the aim of reaching a first reading agreement; (b) after Parliament’s first reading with the aim of reaching an early second reading agreement.

5. Organisation of trilogues

As a matter of principle and in order to enhance transparency, trilogues taking place within the European Parliament and Council shall be announced.

Negotiations in trilogues shall be based on one joint document, indicating the position of the respective institution with regard to each individual amendment, and also including any compromise texts distributed at trilogue meetings (e.g. established practice of a four-column document). As far as possible, compromise texts submitted for discussion at a forthcoming meeting shall be circulated in advance to all participants.

If necessary, interpretation facilities should be provided to the EP negotiating team.³³

6. Feedback and decision on agreement reached

After each trilogue, the negotiating team shall report back to the committee on the outcome of the negotiations and make all texts distributed available to the committee. If this is not possible for timing reasons, the negotiating team shall meet the shadow rapporteurs, if necessary together with the coordinators, for a full update.

The committee shall consider any agreement reached or update the mandate of the negotiating team in the case that further negotiations are required. If this is not possible for timing reasons, notably at second reading stage, the decision on the agreement shall be taken by the rapporteur and the shadow rapporteurs, if necessary together with the committee chair and the coordinators. There shall be sufficient time between the end of the negotiations and the vote in plenary to allow political groups to prepare their final position.

7. Assistance

The negotiating team shall be provided with all the resources necessary for it to conduct its work properly. This should include an ‘administrative support team’ made up of the committee secretariat, political advisor of the rapporteur, the codecision secretariat and the legal service. Depending on the individual file and on the stage of the negotiations, this team could be enlarged.

8. Finalisation

The agreement between Parliament and Council shall be confirmed in writing by an official letter. No changes shall be made to any agreed texts without the explicit agreement, at the appropriate level, of both the European Parliament and the Council.

9. Conciliation

The principles laid down in this code of conduct shall also be applicable for the conciliation procedure, with the EP delegation as the main responsible body within Parliament.

³³ In line with the decision taken by the Bureau of 10 December 2007.

APPENDIX 6: RECENT REPORTS FROM THE SELECT COMMITTEE

Session 2008–09

Priorities of the European Union: evidence from the Ambassador of the Czech Republic and the Minister for Europe (8th Report, Session 2008–09, HL Paper 76)

Enhanced scrutiny of EU Legislation with a United Kingdom opt-in (2nd Report, Session 2008–09, HL Paper 25)

Session 2007–08

Government and Commission responses Session 2006–07 (34th Report, Session 2007–08, HL Paper 199)

Annual Report 2008 (32nd Report, Session 2007–08, HL Paper 191)

Correspondence with Ministers October 2006–April 2007 (30th Report, Session 2007–08, HL Paper 184)

Priorities of the European Union: evidence from the Minister for Europe on the June European Council (28th Report, Session 2007–08, HL Paper 176)

Priorities of the European Union: evidence from the Ambassador of France and the Minister for Europe (24th Report, Session 2007–08, HL Paper 155)

The Commission's Annual Policy Strategy for 2009 (23rd Report, Session 2007–08, HL Paper 151)

Priorities of the European Union: evidence from the Minister for Europe and the Ambassador of Slovenia (11th Report, Session 2007–08, HL Paper 73)

The Treaty of Lisbon: an impact assessment (10th Report, Session 2007–08, HL Paper 62)

Minutes of Evidence

TAKEN BEFORE THE SELECT COMMITTEE ON THE EUROPEAN UNION ON
TUESDAY 5 MAY 2009

Present	Dykes, L	MacLennan of Rogart, L
	Hannay of Chiswick, L	Mance, L (Chairman)
	Jopling, L	Teverson, L
	Kerr of Kinlochard, L	Wade of Chorlton, L

Memorandum by Matthew Rycroft, Director EU, Foreign and Commonwealth Office

1. Thank you for your letter of 17 March to the Minister for Europe, inviting us to submit evidence to your inquiry "The implications of codecision for national parliamentary scrutiny".
2. Given the Easter recess and your deadline, I hope that you don't mind this evidence coming from me as EU Director in the FCO, rather than from the Minister. The Minister has agreed to give oral evidence on this subject at the end of her scheduled session with your committee on the Spring European Council on 5 May. I know you are also visiting UKREP Brussels as part of the inquiry.
3. In our response I have highlighted relevant sections of the scrutiny guidance which the Cabinet Office issues to all Departments. This has recently been revised with the aim of improving the service which the Government provides to the Committees. This revised guidance is attached. Your Clerk saw it in advance and thought it represented a helpful revision of the procedures. It is particularly relevant to questions 1, 5 and 6.
4. One of the main aims of this revision is to make even clearer to Departments that it is their responsibility to consider carefully and proactively at every stage when an update to Parliament is needed. It aims to steer them away from a purely document-based approach ("we must deposit x document when it arrives") and towards a significance-based approach ("this piece of information/decision is or will be significant in negotiations and we must therefore update Parliament.")
5. So, for example, the new guidance recognises that the deposit of Commission-amended proposals in the light of the EP's first reading amendments, Commission opinions on EP second reading amendments and Joint Texts should be handled on a case by case basis, in consultation with the Committee Clerks, rather than being automatically deposited. The debate has often moved on by the time these documents are available formally.
6. Conversely, the guidance encourages Departments to be much more rigorous in keeping the Committees informed at key stages of negotiations through correspondence at both official and Ministerial level. So the new guidance makes clear Ministers should update Committees on common position texts and the prospects for second reading negotiations, and on adoption of the legislation at second reading. The aim is to ensure that the Committees are engaged at the earliest feasible point and then continuously through the later stages of the codecision process. So long as Departments do this effectively and promptly, we do not think first or second reading deals should pose difficulties in achieving effective Parliamentary scrutiny.
7. However, it can be difficult to keep Parliament as fully informed at Third Reading and conciliation stages as at earlier stages, because of the speed at which the process can move. Much depends on how the rotating Presidency of the Council and the European Parliament work. While the UK can express views on this, particularly in the Council, the Presidency does enjoy significant discretion in the way in which it operates, including the timetable it sets for negotiations, which has an effect on scrutiny. However, by this stage, the Government's negotiating position and red lines will normally be established and well known to the Committees, so we do not think these difficulties undermine the effectiveness of the scrutiny procedure. But we are open to suggestions.
8. Question 1(b) is also relevant here. Some documents, (for example internal Council documents which relate to ongoing negotiations in the Council and with the European Parliament) need to remain confidential while negotiations are ongoing, and this may have an impact on national parliamentary scrutiny. So, for example, the Government had originally given a commitment to make trilogue texts available. However, because these contain sensitive information about the state of play on negotiations, this has not been possible. It is difficult to see what can be done about this, as it reflects the fact that codecision requires first a negotiation among 27 Member States within the Council, and then negotiation with the European Parliament and the

Commission. We would of course be happy to discuss this issue with the Committee, and consider proposals on this point.

9. It may be helpful to outline the key points at which the Government supply information to the Committees, along with some comments on where the revised guidance seeks to improve the information flow:

- Step 1—Publication of the Commission proposal: Para 3.5.2i: We have strengthened the guidance to make clear there is a need to alert the Committees to the possibility of a first reading deal at an early stage. The passage also now includes a reference to Ministers writing to the Committees as soon as it is clear that progress is moving towards such an agreement.
- Step 2—EP First Reading: EP Opinion: Para 3.5.2:ii The new guidance makes clear that as soon as the Commission provides a response to the EP's proposals (usually orally at the EP plenary) that should be included in an updating letter from the Minister, rather than waiting for the formal amended proposal from the Commission. It advises that it will usually not be necessary to deposit the Commission's amended proposal (which may take months to arrive) if the Clerks are happy that the Committees have been updated adequately by letter.
- Step 3—Council First Reading; Common Position: Para 3.5.2iii: We have changed the requirement to require Departments to update the Committees by Ministerial letter when a Common Position is reached, normally with a copy of the text. The previous requirement had simply been for the common position text to be sent to the Committee clerk. Departments are reminded that the Minister should comment on the prospects for second reading. If there are occasions when the Committees would like us to go further and deposit the common position text with an EM, we would be happy to do that.
- Step 4—Commission response to the Common Position: Para 3.5.2iv: This reflects the production of a formal document from the Commission commenting on the Council's common position which isn't currently being used in the scrutiny process. The guidance proposes this be sent to the Clerks for information.
- Step 5—EP Second Reading: Adoption, Rejection or Amendment of the Common Position: Para 3.5.2v: The passage retains the requirement for the Clerks to be informed if the EP approves or rejects the Council's common position but the guidance now makes clearer how Ministers should report to the Committees after the EP has delivered its second reading opinion. The aim is that by this stage the Committees will have received all the information necessary to make a comparison between the views of Council, Parliament and Commission.
- Step 6—Council Second Reading: Para 3.5.2vi: This retains the role for letters at official level in reporting to the Clerks if the Council rejects the EP second reading from the previous guidance but proposes that Ministers report immediately to the Committee if the Council approves the amendments proposed by the EP. The new text notes the role of the Conciliation Committee in reconciling the positions of the Council and the EP (both the Council common position and the EP's second reading opinion will have already been sent to the Committees at steps 3 and 5 above).
- Step 7—Conciliation: Para 3.5.2: Reporting on the outcome of conciliation much as before.

10. In answer to question 3, the President of the Commission has given a commitment that Commission texts will be sent to national Parliaments at the same time that they are sent to the other Institutions, and he has encouraged national Parliaments to correspond with the Commission on legislative proposals.

11. With regards to question 4, we believe that what the UK Parliament produces is clearly valued in Brussels and would benefit from a wider audience. It is of course already open to Parliament to brief their European counterparts. The yellow/orange card system that the Lisbon Treaty (if it enters into force) would provide National Parliaments with a say in the legislative process during the first reading stage. National Parliaments would therefore need to ensure that coordination mechanisms were in place to share their positions.

12. I am copying this letter to the Minister for Europe; Ed Lock in your Brussels office; Michael Davidson, Departmental Scrutiny Co-ordinator; and Les Saunders at the Cabinet Office.

8 April 2009

PREVIOUS GUIDANCE

Provision of memoranda on proposals subject to the codecision procedure (Article 251)

3.5.1 The codecision procedure applies to most legislation under the EC Treaty involving the Council (see separate European Secretariat Guidance (99)2.3). There are three points in the codecision procedure where a positive vote in Council can lead to the adoption of the proposed act:

- i. at the first reading—if the EP makes no amendments to the Commission proposal and the Council adopts it as it stands; or if the EP makes amendments and the Council approves them without making further amendments of its own; or if the Council adopts a common position which is then approved by the EP (by default or by simple majority);
- ii. at the second reading—if the Council approves all the EP's amendments to its common position; and
- iii. after agreement between the EP and Council in the Conciliation Committee.

The Scrutiny Reserve Resolution (see paragraph 6.1.1) applies to these stages under the codecision procedure. A flow chart of the codecision procedure is at Annex M.

3.5.2 It is essential that Departments keep the Scrutiny Committees fully informed of the passage of a proposal through the various stages of codecision. Some of these steps require formal consideration by the Committee (i, ii, iv and vii) whilst other are to keep the Committees informed of progress (iii, v and vi). The following steps need to be taken:

- i. Commission proposal—a numbered EM should be submitted in the normal way. This should give advance warning where this may be known if it is likely that the proposal will be subject to a First Reading Deal between the institutions;
- ii. EP first reading amendments—the Scrutiny Committees should be informed of EP amendments by a letter from the responsible Minister to the Committee Chairmen. The letter should provide information about the Government's view on the amendments and the prospects of them being accepted by the Council. However, an inter-institutional agreement commits the institutions to co-operate as far as possible to reach agreement at First Reading (First Reading deal). This happens in a number of cases. If this is in prospect, Departments must write to the Committees as soon as this is known and update them as soon as it is clear that significant progress is being made towards such an agreement. The Commission, in response to the EP amendments, sometimes revises its proposal. If this happens, a further EM should usually be provided on the revised proposal. But you should consult the Committee Clerks on the precise handling as the Committees may agree that there is no value in depositing such a text if the Minister has written previously to update the Committees on developments;
- iii. Council common position, first reading—the Scrutiny Committee Clerks should be informed when a common position has been reached and a copy of the text of the Council's common position should be sent as soon as it is available. (Proforma letter at Annex L);
- iv. EP second reading amendments—Departments should keep the Committees informed of developments by way of Ministerial letter with a copy of a text available to the trilogue which sets out the proposed amendments to the text of the common position (in the form of a two-column text). Formal communications from the EP to the Council and Commission opinions on EP second reading amendments will not be deposited unless the Committees have not been updated fully in Ministerial correspondence. As with First Reading, the institutions will work to reach agreement on a package of amendments to avoid conciliation (Second Reading deal). It is therefore important as it is at the First Reading stage for Ministers to keep the Committees informed by letter of the prospect for such a deal;
- v. adoption or rejection by EP at second reading—if the EP approves the Council's common position (either by positive endorsement or by default), you should inform the Clerks of the Scrutiny Committees immediately in writing, copying the letter to the European Secretariat, Cabinet Office;
- vi. Council, second reading—if the Council does not approve the EP's second reading amendments, the matter is referred to the Conciliation Committee. The Clerks of the Scrutiny Committees should be informed immediately in writing. The letter should be copied as in v. above. The key to conciliation, which in practice can move speedily and involve the rapid swapping of texts between the institutions, is the provision of early information to the Committees. The first three-column text available to all the institutions (noting the Council's position, the EP's amendments, and the Council's formal reaction to the EP's amendments) should be made available to the Committees with the Minister's assessment of what are likely to be the main issues for negotiation;

- vii. If the Conciliation Committee approves a joint text, the Minister should write swiftly to update the Committees on the result of conciliation and the Government's view on the agreed text. This is because the approved Joint Text may not emerge in time for it to be deposited and commented on before the text is formally adopted by the Council. In practice, the key is to have kept the Committees informed of the issues at regular intervals in the process preceding conciliation so that the parameters of the final negotiation is clear to them. The letter should offer to deposit a copy of the Joint Text (with an EM) if the Committees would find it helpful to have this. If however the Conciliation Committee fails to approve a joint text, you should inform the Clerks of the Scrutiny Committees immediately in writing, copying the letter as in v. above.

3.5.3 Given the speed at which proposals can progress, particularly during the latter stages of codecision, you must stay in close touch with the Clerks of the Scrutiny Committees to ensure that the Committees are provided with the information they require. The handling of Presidency compromise texts requires particular care (see paragraph 3.3.2–3.3.4). If you have any doubts about what to do, you should contact the Cabinet Office European Secretariat.

REVISED GUIDANCE

Provision of memoranda on proposals subject to the codecision procedure (Article 251)

3.5.1 The codecision procedure applies to most legislation under the EC Treaty involving the Council (see separate European Secretariat which was updated in 2005).ⁱ There are three points in the codecision procedure where a positive vote in Council can lead to the adoption of the proposed act:

- i. at the first reading—if the EP makes no amendments to the Commission proposal and the Council adopts it as it stands; or if the EP makes amendments and the Council approves them without making further amendments of its own; or if the Council adopts a common position which is then approved by the EP (by default or by simple majority);
- ii. at the second reading—if the Council approves all the EP's amendments to its common position;
- iii. after agreement between the EP and Council in the Conciliation Committee.

The Scrutiny Reserve Resolution (see paragraph 6.1.1) applies to these stages under the codecision procedure and the discipline of ensuring completion of scrutiny before these stages applies. However, the Committees acknowledge that in practice it is not possible to apply the scrutiny reserve to the final Joint text stage. A flow chart of the codecision procedure is at Annex M.

3.5.2 It is essential that Departments keep the Scrutiny Committees fully informed of the passage of a proposal through the various stages of codecision. Some of these steps require formal consideration by the Committee (i, ii, iv and vii) whilst other are to keep the Committees informed of progress (iii, v and vi). The following steps need to be taken:

- i. Commission proposal—a numbered EM should be submitted in the normal way. An inter-institutional agreement commits the institutions to co-operate as far as possible to reach a deal at First Reading and this occurs in a number of cases. If there is a prospect of a First Reading deal, Departments must make this clear in the original EM, if possible, or separately in writing as soon as it appears there is a prospect of reaching such a deal. Departments must then update the Committees by Ministerial letter as soon as it is clear that significant progress is being made towards such an agreement.
- ii. EP first reading: EP Opinion—the Scrutiny Committees should be informed of the EP Opinion (setting out proposed amendments to the original proposal) by a letter from the responsible Minister to the Committee Chairmen. The letter should provide information about the Government's view on the amendments and the prospects of their being accepted by the Council. Where possible the letter should also set out the Commission's response to the EP Opinion. This is normally given orally by the responsible Commissioner at the appropriate EP plenary session. On occasion, the Commission may formally amend its original proposal as a result of the EP first reading (acting under Article 250(2) of the Treaty). This amended proposal would be designed to address some of the EP's concerns, as well as elements of the emerging Council view. If such a proposal is produced, it should be deposited and a new EM should be provided to the Committees unless the Clerks advise that previous correspondence with the Committees makes such a step unnecessary. Where departments can anticipate the emergence of this document before it is deposited they should contact the Clerks to avoid problems with deposited documents having to be withdrawn if the Clerks agree that no EM is necessary. The Cabinet office will, however, aim to consult departments before amended proposals are automatically deposited.

- iii. Council first reading: Common Position—The Scrutiny Committee should be informed when the Council adopts its Common Position by a letter from the responsible Minister to the Committee Chairmen. The letter should provide information about the Government's view on the Common Position and the prospects for second reading negotiations. It should also include the text of the Common Position as an annex.
- iv. Commission: response to the Common Position—Some time after the adoption of the Common Position by the Council, the Commission produces a document setting out its view. This document should be sent to the Committee Clerks for information.
- v. EP second reading: adoption, rejection or amendment of the Common Position—if the EP approves the Council's common position (either by positive endorsement or by default), Departments should inform the Clerks of the Scrutiny Committees immediately in writing, copying the letter to the European Secretariat, Cabinet Office. The same also applies if the EP rejects the Common Position and the legislation falls. If the EP adopts a second reading report proposing amendments to the Common Position, the EP report should be sent by Ministerial letter to the Committees as soon as it is published after the EP Plenary vote. (By this point, the Committees will have received documents permitting a full comparison between the views of the European institutions). The Minister's letter should examine prospects for agreement and explain whether Conciliation is likely and explain the main differences of substance between the Council and EP. Commission opinions on EP second reading amendments—delivered under Article 251(2) of the Treaty—will not normally be deposited unless the Committees have not been updated fully in Ministerial correspondence. You should consult the Clerks on handling. If it is agreed this document should not be deposited it should be sent to the Clerks for information. The key to effective scrutiny throughout codecision is for Departments to have kept the Committees informed of the issues at regular intervals in the process so that the parameters of the final negotiations are clear to them.
- vi. Council second reading—If the Council approves all the amendments proposed by the EP in its second reading report, the legislation is adopted and Departments should immediately inform the Committees by Ministerial letter, copying the letter to the European Secretariat, Cabinet Office. If Council does not approve the EP's second reading amendments, the matter is referred to the Conciliation Committee. The Clerks of the Scrutiny Committees should be informed of this immediately in writing, with the letter again copied to the European Secretariat. The Conciliation Committee's role is to reconcile the positions of the European Parliament and the Council, as set out in the Common Position and the EP second reading report. Both of these documents will have already been sent to the Committee in accordance with commitments in points (iii) and (v).
- vii. Conciliation: approval of a joint text or no agreement—if the Conciliation Committee approves a joint text, the Minister should write as quickly as possible to update the Committees on the agreement reached and to give the Government's reaction. The approved Joint Text is likely not to emerge before the text is formally adopted by the Council. The Minister's letter should offer to deposit a copy of the Joint Text (with an EM) if the Committees would find it helpful to have this. If however the Conciliation Committee fails to approve a joint text, you should inform the Clerks of the Scrutiny Committees immediately in writing, copying the letter to the Cabinet Office European Secretariat.

THE QUICK GUIDE TO CODECISION AND SCRUTINY

Codecision was introduced under the Maastricht treaty, and provides the European Parliament with a formal role in the agreement of legislative texts. The policy areas where the codecision procedure applies under the current EU treaties are:

- consumer protection;
- culture;
- customs co-operation;
- education;
- employment;
- equal opportunities and equal treatment;
- health;
- implementing decisions regarding the European Regional Development Fund;
- implementing decisions regarding the European Social Fund;
- non-discrimination on the basis of nationality;

- preventing and combating fraud;
- research;
- setting up a data protection advisory body;
- social security for migrant workers;
- statistics;
- the environment;
- the fight against social exclusion;
- the free movement of workers;
- the internal market;
- the right of establishment; and
- the right to move and reside, this including the Schengen rules.

The new Treaty of Lisbon, if it enters into force, will extend codecision to virtually all areas of EU policy.

LEGISLATIVE PROCESS

First reading

The Commission, using its right of initiative, submits its legislative proposal simultaneously to the Council and to the European Parliament.

Work is taken forward in both institutions in parallel. The Council will discuss the proposal at Working Group level.

The EP committee will make recommendations for amendments to the Commission proposal, and then the EP as a whole will vote on an opinion in plenary session.

The Council then either:

(a) Accepts the outcome of the European Parliament's first reading

In this case, where it has been possible to reach agreement during the parallel exercise at first reading, the Council adopts the legislative act.

(b) Does not accept the outcome of the European Parliament's first reading. In this case the Council adopts its common position. The text of the common position is sent to the European Parliament, together with the statement of the reasons behind it and The Commission position. This leads to a "second reading".

Second Reading

Upon receipt of the Council's common position begins a three month time limit (which may be extended by a further month) for the second European Parliament reading.

The EP committee examines the Council's common position and makes its recommendation. The plenary considers the matter on the basis of that recommendation and proceeds with a vote. This will result in:

SCRUTINY PROCESS

[Scrutiny]—the proposal is formally deposited to the Scrutiny committees, and an EM provided commenting on the prospects for First Reading agreement where possible]

[Scrutiny]—Council Secretariat Documents summing-up MS positions are limite, and are NOT public documents so are not shared with the Committees]

[Scrutiny]—the Government will communicate the opinion of the EP to the Scrutiny Committees, and write to offer its opinion of the EP proposals and prospects for acceptance by the Council]

[Scrutiny] —the Government will generally communicate the Council Common position to the Scrutiny Committee's, and write to offer its opinion of the EP proposals; discussion with the Clerks to determine if Commission opinion and any revised proposal text need to be deposited].

LEGISLATIVE PROCESS

SCRUTINY PROCESS

(a) Approval of the common position

In this case, the act is deemed to have been adopted in accordance with the common position.

(b) Rejection of the common position

Rejection of the common position, on the basis of an absolute majority of MEPs terminates the procedure. The proposed act is then deemed not to have been adopted. Examination of the dossier may be resumed only on the basis of a new proposal from the Commission.

(c) Proposal of amendments to the common position

Amendments to the common position are voted on the basis of an absolute majority of MEPs. This opinion is notified to the Council and the Commission, and the latter must issue an opinion on the amendments

[Scrutiny—the Government will generally communicate the opinion of the EP to the Scrutiny Committees, and write to offer its opinion of the EP proposals with comment on prospects for Second Reading agreement, or whether conciliation will be needed]

The Council then has three (possibly four) months to accept or reject the EP's proposed amendments:

(a) Amendments accepted (the Council acts by qualified majority or unanimously, depending on the subject matter, and always unanimously if the amendments were the subject of a negative opinion from the Commission)—act deemed to have been adopted.

[Scrutiny Committees informed]

(b) Not all amendments are accepted. Conciliation begins.

[Scrutiny Committees informed]

Conciliation ("third reading")

Preliminary meetings of the Conciliation Committee (trialogues) and technical meetings will occur prior to the first meeting of the full Conciliation Committee in an attempt to bring the conciliation to a conclusion during this first meeting.

In other cases, several meetings of the Conciliation Committee will be necessary before agreement can be reached. These trialogues will agree a joint working document of the European Parliament and Council delegation which sets out those elements of the compromise already agreed and the unresolved points with the respective negotiating positions.

[Scrutiny—Trialogue Documents are limited, and are NOT public documents so cannot be shared with the Committees]

The Conciliation Committee brings together delegations from Parliament and from the Council, each consisting of 15 members. It is chaired jointly by a Vice-President of the European Parliament and by a minister of the Member State holding the Presidency.

The Commission also takes part in proceedings with a view to reconciling the positions of the EP and the Council. Such initiatives may include, *inter alia*, draft compromise texts reflecting the positions of the Council and the European Parliament. The Commission has no influence, however, on the majority rules for the adoption of the joint text by the Conciliation Committee.

[Scrutiny—Trialogue Documents are limited, and are NOT public documents so cannot be shared with the Committees]

If the Committee fails to approve the joint text within the time limit set by the Treaty, the proposed act is deemed not to have been adopted.

[Scrutiny Committee informed]

If the Conciliation Committee approves a joint text, the European Parliament, acting by an absolute majority of the votes cast, and the Council, acting by a qualified majority each have a period of 6 (+ 2) weeks in which to adopt the act in question in accordance with the joint text. If either of the two institutions fails to approve the proposed act within that period, it is deemed not to have been adopted.

[Scrutiny Committees informed of outcome; Joint text deposited with new EM if required following consultation with the clerks]

LEGISLATIVE PROCESS

SCRUTINY PROCESS

TRENDS

The general trends in the codecision process are that files are more likely to be agreed at first reading now (63% cent of dossiers agreed at first reading between mid 2004 and end 2006) than in 2004 (29% of dossiers agreed at first reading between May 1999 and April 2004), but that the process takes longer (an increase of around four months on average).

The most immediate explanations for this are that the Commission has vastly improved its consultation process, and thus is drafting proposals that take into account the considerations of the European Parliament from the off. It could also be said that the Council and Parliament have improved their coordination at the first reading stage (where both institutions take forward work on a dossier in parallel). This more considered relationship and interaction may also account for the increase in time taken to complete a file, though it is also likely that the increase in Member States in the Council since 2004 would also have contributed to this.

Examination of Witnesses

Witnesses: RT HON CAROLINE FLINT, a Member of the House of Commons, Minister for Europe, Ms ALISON ROSE, Head of Communications, Institutions, Treaty and Iberia Group, Europe Directorate and MR ANANDA GUHA, Deputy Head, Europe Strategy Group, Foreign and Commonwealth Office on the March European Council, gave evidence.

Q1 Chairman: Minister, thank you very much for coming to answer questions. The session is on the record; it will be webcast. You will of course receive a transcript and have an opportunity to propose corrections. If there are any relevant interests, members will declare them. May I start by thanking your office for the helpful letter of 8 April 2009 which contains an explanation of the revised Cabinet Office Guidelines. I was particularly pleased to see that the evidence given puts sections of those Guidelines for departments in the public domain for the first time and that the explanation given seems to be a very helpful starting point for today. Is there anything you want to say by way of initial statement?

Caroline Flint: I would just like to introduce Ananda Guha who is the Head of our Europe Strategy Group and Alison Rose who is Head of our Communications, Institutions, Treaty and Iberia Group. They will be helping me this afternoon.

Q2 Chairman: The revised Guidelines which I mentioned make clear that a minister will write to update the Committee when “significant progress” is being made towards a deal and will also provide a supplementary Explanatory Memorandum in cases where it is clear and “as soon as it is clear that the proposal to be considered by the Council will differ substantially from the original text”. Those are value judgments; can you assist us as to whether there are any criteria which your department intends to apply to judge when progress is “significant” or whether a proposal differs “substantially”?

Caroline Flint: Firstly in relation to significant progress, our interpretation of that would be, for example, where there is a real chance of a first or second reading deal being reached on the proposal but also where there may be changes to reach that deal which would alter the text of the document but not actually substantially change the policy. Following on from that, I think substantial changes would be those changes that alter the proposal radically, therefore changing its policy implications. In that respect that is where there is a separation between writing to update the Committee as opposed to providing a supplementary Explanatory Memorandum which I think better reflects where there are substantial policy changes that are under discussion.

Q3 Chairman: Without wishing in any way to go over past history that may have led to some unhappiness, there have been one or two such occasions in the past. I have in mind in particular a case relating to the Returns Directive proposal which went to sleep for a long time from 2005/2006, was revived in 2008, was not the subject of any update from the Home Office and, when looked at by Sub-Committee F, led to that Sub-Committee concluding that the adopted text—adopted at the first reading—had differed substantially from what was originally proposed by the Commission. Indeed I think ultimately when the Department’s Explanatory Memorandum was received it too said that “the proposed directive has developed along lines different

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from those originally proposed". Can we have an assurance that this sort of situation should now be covered unequivocally by the revised Guidelines and will not reoccur?

Caroline Flint: I would hope so, Lord Mance. I would just make two points on that. First of all, I think in your report, if you were to recommend any criteria that you think might be helpful, then we are open to listening to those recommendations. Secondly, as Europe Minister, where committees either of the House of Lords or the House of Commons have indicated they would like more updates and more information, I have tried to facilitate that as well. I hope and I am sure that all ministers would be of the same point of view to keep colleagues informed. Again if there are some areas and specific examples where you feel it has not quite worked and may not work according to the revised guidance then I think it would be helpful to receive that in your report. I think colleagues have provided to the Committee a Department for Transport example of some of the processes involved in trying to keep parliamentary colleagues involved and informed of changes. I am not saying it always works a hundred per cent but we are trying to do our best.

Q4 Chairman: If we concluded from sources other than a Ministry that significant progress was being made, can we take it that you would respond to a request from us?

Caroline Flint: Yes. I would and I hope others would as well.

Q5 Lord Jopling: The Chairman asked a specific question in terms of the attitude of the Home Office. I happen to be the Chairman of Sub-Committee F which deals particularly with the Home Office. The case that he mentioned to you, in spite of repeated staff chivvying (our staff chivvying the Home Office) we were left out in the cold and we were extremely irritated when the Department's own Explanatory Memorandum shot its own fox. In terms of the relationship with the Home Office—I think you have been a minister there in the past—Sub-Committee F becomes frequently exasperated by the response and the attitude of the Home Office and, in particular, ministers. We had a case with Mr Byrne not long ago where it took him over a year, in spite of repeated requests by the staff, to get a response to Lord Grenfell's letter which was absolutely intolerable. I wonder, as we are moving into new ground in codecision, would you consider having a meeting, as the Minister for Europe, with the Home Office to—what I would call in north country terms—square them up a bit. Their attitude to this business of scrutiny is totally deplorable. I think we probably now have a minister who seems to be much more helpful than Mr Byrne who I believe has moved on

somewhere else. Would you consider having a meeting with the Home Office? We will give you plenty of background; we have all the background of their mistakes in the past and the way they failed to respond as they should. I think if you had a meeting with them to try to say that the Government as a whole will not tolerate this type of slovenliness it would be hugely helpful.

Caroline Flint: I am sorry to hear that you and your Committee feel so strongly about this and how you feel let down. What I can say is that it is difficult for me to comment at this stage but I am happy to share what you have expressed this afternoon with my colleagues at the Home Office. We also have a meeting of government ministers and the devolved administrations in relation to European matters and I am happy to put the issue of scrutiny on the agenda for that meeting. Given that you are raising a particular point about a particular Department I will follow that up. We obviously do not get it right all the time and sometimes the expectations on us are quite high too, but what we have done in a spirit of trying to be constructive is to have discussions about how you can better improve the scrutiny process. That is something I would like to share with my other Whitehall colleagues as well about what we can learn from this. Clearly in terms of justice and home affairs there are more issues around codecision down the road and they have to be on top of that.

Q6 Chairman: Would it help if we put the dates in writing so that you have a little bit more information and then perhaps you can respond?

Caroline Flint: Yes.

Q7 Lord Jopling: I have been working in this place for 45 years and Mr Byrne was the first minister I have ever known to be named. He was named because of his failures by the Leader of the House of Lords on the floor of the House some months back.

Caroline Flint: I will try not to find myself in the same position.

Q8 Lord Hannay of Chiswick: Just to round off this discussion, I welcome your willingness to look into all this, but after a lifetime spent in the interstices Civil Service one is naturally alert to adjectives and adverbs like "significant" and "substantially" which are clearly designed to provide wriggle room. Certainly one of them—"significant"—seems to me completely unnecessary and unhelpful. If there is progress towards a deal surely Parliament needs to know and there does not need to be an appreciation of "significant progress" or whatever it is? For "substantially" I can see the requirement is different, but if Lisbon is ratified there will be a considerable expansion in codecision, with the whole of the agricultural sector coming in as well as big chunks of

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Sub-Committee F's work. It therefore is important and perhaps you would look quite widely when you have this further look and see whether it is really necessary to keep all these weasel words in.

Caroline Flint: I have a feeling that part of it is to protect against where there are sometimes meetings and exchanges but it is actually going nowhere and therefore creating a flurry of correspondence that really cannot add anything to the last piece of correspondence. However, I take your point; progress should mean what it means: progress. In your report you might touch upon that. I think it is a way to deal with potentially having letters that cannot say anything. If there has been a meeting do we write to you and say that there has been a meeting but it has not done anything? I take on board your point.

Q9 *Chairman:* An alternative might be to add the word "any" before "significant".

Caroline Flint: Maybe.

Q10 *Lord Maclellan of Rogart:* This is really a development of the same point. Rather than leave it to the judgment of ministers and the Council as to whether or not a particular development is significant or not, would it not be preferable to have some agreed prior trigger point. This would be a procedural trigger point so that if there is a change we are notified of that change and the government can express its view on that change including whether or not it is a significant change. If you have a debate every time within the machine whether or not something is significant, that is hugely complicated for those who have to take the decision and might not match our views. If you did take that view—we may come on to this—what trigger points would be appropriate?

Ms Rose: We are covering such a wide range of subject matters here that it makes it quite complicated to give a common trigger point. The second thing is that, particularly when you are looking at first reading deals, a lot of negotiations are conversations that are going on between Parliament and the Council. It is not always clear at which point a first reading deal is on the cards. There is not a particular type of meeting at which that will happen. As the Minister has said, we can look at being clearer with Departments over what "significant" means. But a number of first reading deals appear to be likely and then fall away again. When you are looking at first reading deals it is quite a fluid situation. I think we would be very happy to look at making it more clear but I think we would be misleading you to imply that there are very, very definite and clear trigger points at which an update would always be useful.

Lord Maclellan of Rogart: Clearly in the dialogue or the trilogue or whatever exchanges you have there will be different degrees of fairness but decisions are

decisions and they are reflected in language. If a decision is taken and expressed in language it ought to be something which is automatically referred for scrutiny and the importance of the decision may or may not be considerable and the Government can give its view on that. It seems to me that if you are taking the view that the circumstances are so various that you cannot think about procedural answers in advance, that is ducking out of the issue.

Chairman: Let me just ask Lord Kerr to come in with question 1(d) because I think it bears on this.

Q11 *Lord Kerr of Kinlochard:* Could I say first that I learnt a great deal from Mr Rycroft's letter setting out the changes to the Guidance that you have made. Thank you very much for a very interesting piece of evidence. I am really on the same point as Lord Maclellan. I do understand that negotiations are fluid and that you never know precisely what is coming up. It seems to me that we have to consider whether we stick to what we do now, which is that we base our scrutiny on documents, not on the government's position. Reading our evidence one sees that some parliaments clearly do the latter. The Scandinavian and Dutch parliaments tend to cross-examine their governments early in the process over what the government's position will be. Then they remain calm, provided that the government's position in negotiations does not change. If the government wishes to change its position it has to go back to them. We have this different approach, which is textual, so we are a bit stuck if you do not give us a text, and you do not know at what stage to give us a text because the situation is fluid (as just explained to Lord Maclellan), and all that is pretty unsatisfactory for all of us, particularly for Parliament. It seems to me that one has to think of devising certain defined stages, like when a Presidency compromise text is presented, or when the Presidency reports that an informal agreement with Parliament in trilogue appears to have been reached, which will have to be ratified on the Council's side, and eventually in the Council at ministerial level. It seems to me that these are one or two natural points in the procedure where you could expand this excellent guidance a little further, to make clear that there would then be a requirement to update the committee.

Caroline Flint: I think that is partly what the letters are for which is to update the Committee and as far as possible keep everyone informed about how discussions are going. As I said before, where we think there is a substantial policy change then an Explanatory Memorandum would be provided. I am sure we are going to come onto matters around confidentiality and documents. In some parliaments they have a very different approach to the decision making. For both the Finns and the Danes there

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literally has to be a signing off from their parliament on decisions that might be taken and we have gone into this situation about these documents which, we are told, should be confidential but there is still sharing going on. If I take the Finnish example, my understanding is that those texts or drafts or other documents are shared in confidence with the committee and that is understood. We do not have this arrangement here but we have mentioned it to the clerks in the House of Commons. Is that what they are looking for, to have that conversation in confidence? That does require a huge amount of responsibility on all sides if that was to be a route we were to go down. My understanding is that the committee in the House of Commons has not been interested in having such a confidential conversation.

Q12 Lord Kerr of Kinlochard: I would be quite happy to see a revised Explanatory Memorandum. It would be very nice if it enclosed a document but I do not think it need do so. When the situation has changed, I would have thought the Government's explanation to Parliament should also change. If a stage had been reached, for example in trilogue, or a Common Position is emerging, and it is not precisely in line with the original Commission proposal, it would seem to me to be not difficult to revise the Explanatory Memorandum which by that stage is out of date. The question of whether you would enclose something, sending us a new document, is another question.

Ms Rose: I think that is a good point because if we have only a document based system you will only be getting things after the event because the Council only takes its decision on a first reading deal once it has agreed all the parliament's amendments. If you wait for that then I think you would find that very late. One of the reasons we have gone down this updating letter approach is to say, "Look, there will be stages before we can give you a piece of paper where you need to know something". Whether you prefer a more informal letter or whether you prefer the very structured EM approach I think we would be in your Lordships' hands on that. My preference, I think, is that a letter enables you to focus on what has actually changed whereas an EM goes through a lot of things again which may not be necessary. That would be my preference but the whole aim of the revision of this Guidance is to say to the Departments, notwithstanding the fact that we have a document based system, do not just stick to the documents, use your intelligence, is something changing? There will be some changes which are really very minor and do not affect the policy intent and some which are more major. Again the idea of telling you every single "a" or "the" or whatever has changed I would have a few doubts about. The aim is

to make sure that Departments really think, "Is something changing here? If so, we must update."

Q13 Lord Kerr of Kinlochard: I do not disagree with that. In particular I do strongly believe that you are right and that a letter would be better than a full Explanatory Memorandum. I entirely agree with that. Do you agree with me that to tie the requirement to particular events would be desirable and would perhaps require some further adjustment of the Guidance? I do think that the changes that Matthew Rycroft's letter describes are all very helpful, sensible changes. I am trying to encourage you to go just a little further. If, as seems to be the case, 70 per cent of legislation is now concluded at first reading, there will not be a second or third stage; there will be moments when it will be unclear to us and we will ask you to tell us more. You will know what is going on during the first reading stage and it seems to me that there is a need to recognise that you have a duty to tell us when what is going on is a significant move from the original Commission proposal, and therefore the proposition on which the Government, and Parliament, originally took a view.

Caroline Flint: I agree with that. In the letter that Matthew has provided for you he has tried to go through the different stages. If I am understanding what you are saying I would hope that we are trying to get the best Guidance we can. Whilst we recognise there are stages in the process there is clearly, as with anything, some common sense which has to come into play if things do not fall in line with the process. We do not want, necessarily, to wait for the process to tell you about something which we judge to be a significant change or a significant amount of progress. I hope we can find a way to ensure that there is a spirit of intention in the guidance as well as something which tries to give an outline so there is clarity as well. As I say, if there is something this Committee wants to put forward through its recommendations in the report then I am very open to that. Sometimes things do happen that are not tied to a formal procedure; events happen which shape how we might be thinking on any one issue from day to day. I can think of something happening today, for example. I think there is common sense as well in trying to give some structural clarity. So that people come back to that if they feel a Department is not abiding by what, at the very least, they should be doing to help scrutiny in both Houses.

Q14 Chairman: Can we move onto the problem of confidentiality? In paragraph eight of a helpful letter you point out that some documents relating to ongoing negotiations in Council need to remain confidential. It is difficult to see what can be done about that in the context of parliamentary scrutiny but I hope you would be happy to discuss the issue

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with us and consider the proposals. It is of course an issue which we have recently discussed with you, Minister, in Sub-Committee E. Leaving aside documents for the moment, do you see the confidentiality of Council discussions and negotiations as a problem which would in any way inhibit you from updating the Houses' committees in relation to substantive developments in the sort of way we have just been discussing, by letter or Explanatory Memorandum?

Caroline Flint: I think generally trying to keep committees updated through the letters or Explanatory Memoranda is something we seek to do. However, in some ways this came up at the last evidence session in terms of access to documents. It is also part of where negotiations are under way and they can go up to the wire, if you like, at these meetings. It is quite difficult to share that in a way that could not guarantee, for our purposes, the confidentiality that is needed.

Q15 Chairman: I was seeking to leave aside documents because you focused on documents in paragraph eight and we are going to ask you later about LIMITÉ documents. Is there any problem about giving an undertaking to update the Committees on substantive developments reached in negotiations rather than reflected in documents by letter or memorandum?

Caroline Flint: No.

Q16 Chairman: So the problem relates to documents. As I understand it, part of the problem is that documents are marked LIMITÉ by the Council and part of the problem is that the Government wish to keep any negotiating document confidential. There have, of course, been cases where the Government has taken a different view and committees have seen LIMITÉ documents, presumably because the Government has taken the view that they are perfectly innocuous.

Ms Rose: There are provisions where the Council itself can decide what LIMITÉ documents can be made available. We have given the clerk the actual definition of what LIMITÉ is. This is set out in a paper which is itself a LIMITÉ document until it was declassified.

Chairman: Yes, and somebody stamped "public" on it.

(The Committee suspended from 4.56pm to 5.03pm for a division in the House)

Q17 Chairman: Let us resume; I am sorry about the interruption. The information we have from replies is that in the various Nordic countries in particular—Finland, Sweden and Denmark—and also in the German Bundesrat, documents are received from

their administrations which are marked LIMITÉ and are used by the parliaments in the scrutiny process. Can you just help us as to whether there is anything preventing that from happening in a British context?
Caroline Flint: The situation in the Finnish Parliament is that their parliament has to sign off the details of individual negotiation positions before each Council. Therefore the Finnish Parliament is provided with information but in confidence. It is a confidential arrangement and the relevant information is not published. The Danish situation is rather similar although we are aware that our colleagues from Denmark are putting the documents on their website. We believe and understand that the rules that define those documents known as LIMITÉ documents are pretty clear. It is not actually up to staff of a national administration to decide for themselves what they think can or cannot be put in the public domain. I think you are right, it does raise some questions about why this is happening the way it is, but I think that is why I have said to colleagues in the House of Commons as well as to you that we will look into this. We have asked a question about publishing these documents on a website. I think the document we provided explaining the handling of LIMITÉ documents is reasonably clear.

Q18 Chairman: It is essentially a judgment by the Council that they are entitled to withhold public access in accordance with Regulation 1049/2001.

Caroline Flint: That is correct.

Q19 Chairman: They do not have power to make a binding judgment, it is simply their view.

Caroline Flint: I think it is their view and I think it is to try to create an environment in which discussions can take place and, as we have discussed in the past, sometimes negotiation decisions are made right up to the wire. I have been told that the Danish minister will often find himself on the phone back to the parliament during the Council proceedings. Again, we have had some discussions with clerks in the House of Commons about a way to share in confidence documentation. The initial response we have been given is that that sort of arrangement would not be wanted.

Q20 Lord Hannay of Chiswick: Minister, I wonder if I could pass on a little beyond that point because I imagine you have seen the Council document of 16 March 2006 which describes all this. It states very categorically that LIMITÉ is not a classification level; it is a distribution mark. It does not actually say who to distribute it to because it then goes on to say that some documents were given to a whole range of people. So I would like to ask you whether the Government would not be a bit bolder than it has been up to now and decide to try out on the two

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scrutiny committees a procedure by which they would be sent *LIMITÉ* documents. It is very possible, as you say, that one or other of the scrutiny committees would not be prepared to be bound by the obligation not to put it on their website. I do not think it would be this Committee, although I hasten not to take anyone else's name in vain. So could we encourage you to try on us what you think fits 1049/2001 which does allow *LIMITÉ* documents, under certain restrictions, to be made available to a parliamentary Committee? If we say to you, "Sorry, that's no good" then I agree, end of story. However, it might well be that we say, "Thank you very much" and I think that would be rather good for you and rather good for us because it would remove a source of irritation. I do not think it would damage negotiations at all. I do think it is not sufficient to hide behind the collective, faceless Brussels machine as the reason why you cannot provide the documents, because it is clear that other Governments have got round that point. These are not governments that are normally thought to be sloppy about their handling of community business.

Caroline Flint: I am happy to think about what you have suggested, Lord Hannay. I am trying to see ways in which we can improve the process and have more meaningful conversations. I am sure you appreciate that is a matter that I cannot decide on my own because I am governed by the way the Cabinet Office put together the Guidance, so it would be something I would have to think about as well in relation to my other colleagues. I am certainly prepared to think

about that and again, in terms of your report, coming back with a way forward. I am not suggesting that you are moving in this direction at all, but avoiding anything which would undermine our ability to negotiate and move forward obviously has to be my top priority. I do think there is a discussion to be had. **Chairman:** Bearing in mind the time, I think we probably ought to leave questions three and four unless there is a particularly urgent feeling they should be put.

Q21 Lord Maclellan of Rogart: I have a very quick question, if I may. If the Lisbon Treaty is implemented, there will be some implications for the volume of work which would have to be undertaken as part of this process. Are you giving some contingent thought to that possibility?

Caroline Flint: Yes, you are right. I think there are something like 40 areas that will move to codecision under the Lisbon Treaty. Two of the major areas are justice and home affairs and agriculture. In the case of agriculture Defra already have quite a lot of experience of decision making in the environment field. On justice and home affairs officials in both the Home Office and MoJ are, I understand, preparing officials for the change, but they will be expected to work to the same Cabinet Office guidance on scrutiny. Maybe I will take the opportunity following on from our earlier discussion with Lord Jopling to follow that up with my colleagues in the Home Office and MoJ as well.

Chairman: Thank you very much.

Supplementary memorandum by the Foreign and Commonwealth Office

EXAMPLE OF CO-DECISION AND SCRUTINY IN PRACTICE

DEPARTMENT FOR TRANSPORT

The following shows the progress and the correspondence/Government contact (highlighted in bold) with the Scrutiny Committees on the following regulation:

The Single European Sky II package—three EMs including two codecision proposals on the proposed "Single Sky II" Regulation (11323/08) and proposed "EASA" Regulation (11285/08)

<i>Date</i>	<i>Substance</i>
4 July 2008	Package deposited in Parliament. Deadline for submission of EMs given as 18 July 2008.
4–15 July 2008	EMs drafted and final drafts sent to Clerks. DfT officials and Committee Clerks discuss arrangements for EMs and timetable for consideration in both Committees ahead of Recess, likelihood of debate recommendation by Commons Committee, possible General Approach on "Single Sky II" Regulation at 9 October Council. Advance arrangements made for Commons debate.
15 July 2008	Initial EMs submitted on package. EMs note that Presidency aiming for General Approach at Transport Council on 9 October on proposed "Single Sky II" Regulation.

<i>Date</i>	<i>Substance</i>
15 July 2008	Chairman of Lords Committee sifts EMs to Sub-Committee B for consideration.
16 July 2008	First considered by Commons Committee. Debate recommended on package, debate motion tabled.
16–22 July 2008	Arrangements continue for Commons debate on 7 October, debate pack delivered to Commons Committee Office and dealt with by Committee Office staff.
17 July 2008	Arrangements made for DfT officials to give informal evidence to Lords Sub-Committee B .
21 July 2008	Lords Sub-Committee B considers EMs, taking informal evidence from DfT officials.
22 July 2008	Lords Chairman writes to Minister; Committee cleared scrutiny on the Communication and proposed “Single Sky” Regulation, and asked Minister to attend a Committee meeting to give a report on the proposals following the December Transport Council. The Committee holds proposed “EASA” Regulation under scrutiny pending developments in negotiations.
22 July 2008	House rose for recess.

[During recess negotiations took place in Working Group on the Single Sky II regulation; in the course of these it became clear that the Presidency’s wish to achieve a General Approach at the 9 October Transport Council was too ambitious.]

1 October 2008	Ministerial letter to Lords in reply to Chairman’s letter of 22 July.
6 October 2008	House returned from recess.
7 October 2008	Standing Committee debate on package in Commons, Jim Fitzpatrick represented the Government . Motion cleared.
20 November 2008	Ministerial letters sent to both Committees with update on package . General Approach on Single Sky II now expected at Transport Council on 9 December. Presidency intentions for EASA proposal unclear.
5 December 2008	Ministerial letter to Lords Committee on proposed EASA Regulation . Presidency now hope to reach “partial” General Approach at December Transport Council, but negotiations on aerodrome safety will continue in Czech Presidency.
8 December 2008	Lords Sub-Committee B consider Ministerial letter of 5 December, outcome relayed to Department by Committee Clerk in advance of Chairman’s letter of 10 December.
8 December 2008	Lead European Parliament Committee adopts its report on the proposals.
9 December 2008	Transport Council reaches consensus on Single Sky II and partial General Approach on EASA. Formal General Approach not possible on Single Sky as an issue regarding applicability of the new legislation to Gibraltar was raised just before the Council. UK and Spain undertook to resolve the issue bilaterally.
10 December 2008	Letter from Lords Chairman to Minister reports that on 8 December Sub-Committee B considered letter of 5 December and were content for partial General Approach to be reached ahead of full scrutiny clearance.
10 December 2008	Letter from Commons Chairman thanking Minister for update of 5 December.
18 December 2008	House rises.
6–12 January 2009	DfT officials and Lords Sub-Committee B Clerk discuss arrangements for Ministerial evidence session . Session scheduled for 2 February.
12 January 2008	House returns.

2 February 2009	Jim Fitzpatrick gives evidence to Lords Sub-Committee B meeting on outcome of December Transport Council discussion of Single Sky II.
9 March 2009	Ministerial letter sent to Lords giving an update on EASA. UK now broadly content. Presidency aims to work with European Parliament towards a first reading deal, issue of “accredited bodies” will need to be resolved with MEPs.
16 March 2009	Lords Sub-Committee B consider letter of 9 March.
17 March 2009	Letter from Lords Chairman. Scrutiny maintained on EASA pending further negotiations and EP position.
25 March 2009	Ministerial letter sent to both Committees ahead of 30 March Transport Council, reporting progress with both proposals, including European Parliament position and expectations of a first reading deal following intensive negotiations between EP and Presidency. Gibraltar issue on Single Sky II now resolved. “Accredited bodies” issue on EASA Regulation now resolved with European Parliament.
25 March 2009	European Parliament Plenary vote.
30 March 2009	Transport Council features progress report on the package.
1 April 2009	Letter from Commons Chairman thanking Minister for update of 25 March.
2 April 2009	House rose.
20 April 2009	House returned.

[Lords Sub-Committee B has not yet considered letter of 25 March due to Easter recess and the Committee's joint Evidence Session with Sub-Committee D at their first meeting after recess]

LIST OF THOSE AREAS MOVING TO CO-DECISION UNDER THE LISBON TREATY

1. Comitology (QMV & Co-decision) Article 2(236), new Article 249C TFEU
2. Citizens' Initiatives (QMV & Co-decision) Article 1(12), new Article 8B TEU
3. Specialised Courts (QMV & Co-decision) Article 2(211), new Article 225a TFEU
4. ECJ Statute (QMV & Co-decision) Article 2(226), new Article 245 TFEU
5. Principles of European Administration (QMV & Co-decision) Article 2(243), new Article 254a TFEU
6. Staff Regulations of Union Officials (Co-decision only) Article 2(282), new Article 283 TFEU
7. Financial Regulations (QMV & Co-decision) Article 2(273), new Article 279 TFEU
8. Services of General Economic Interest (SGEIs) (QMV & Co-decision) Article 2(41), new Article 22a TFEU
9. Freedom to provide services for established third country nationals (Co-decision only) Article 2(56), new Article 49 TFEU
10. Freedom to provide services (Co-decision only) Article 2(58), new Article 52 TFEU
11. Freezing of assets (Co-decision only) Article 2(64), new Article 61H TFEU
12. Distortion of competition (Co-decision only) Article 2(83), new Article 96 TFEU
13. Authorisation, co-ordination and supervision of intellectual property rights protection (QMV & Co-decision) Article 2(84), new Article 97a TFEU
14. Economic, financial and technical co-operation with third countries (Co-decision only) Article 2(166), new Article 188H TFEU
15. Humanitarian aid operations (QMV & Co-decision) Article 2(168), new Article 188J TFEU
16. Official and Government Employment (Co-decision only) Article 2(53) new Article 45 TFEU
17. Movement of capital to or from third countries (Co-decision only) Article 2(60), new Article 57 TFEU
18. Multilateral surveillance procedure (Co-decision only) Article 2(86), new Article 99 TFEU
19. Structural and cohesion funds (Co-decision only) Article 2(133) new Article 161 TFEU
20. Transport (QMV & Co-decision) Article 2(69), new Article 70 TFEU
21. European Research Area (QMV & Co-decision) Article 2(136), new Article 163 TFEU
22. Space (QMV & Co-decision) Article 2(142), new Article 172a TFEU
23. Energy (QMV & Co-decision) Article 2(147), new Article 176a TFEU

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24. Tourism (QMV & Co-decision) Article 2(148), new Article 176b TFEU
 25. Sport (QMV & Co-decision) Article 2(124), new Article 149 TFEU
 26. Civil protection (QMV & Co-decision) Article 2(149), new Article 176C TFEU
 27. Administrative co-operation (QMV & Co-decision) Article 2(150), new Article 176D
 28. Common Commercial policy (QMV & Co-decision) Article 2(158), new Article 188C TFEU
 29. Budgetary procedure (Co-decision only) Article 2(263), new Article 270b TFEU
 30. Agriculture and Fisheries (Co-decision only) Article 2(43) new Article 37 TFEU
 31. Border Checks (QMV & Co-decision) Article 2(65), new Article 62 TFEU
 32. Immigration and frontier controls (QMV & Co-decision) Article 2(67), new Article 69B TFEU
 33. Judicial co-operation in criminal matters (QMV & Co-decision) Article 2(67), new Article 69E TFEU
 34. Minimum rules for criminal offences and sanctions (QMV & Co-decision) Article 2(68), new Article 69F TFEU
 35. Crime prevention (QMV & Co-decision) Article 2(68), new Article 69G TFEU
 36. Eurojust (QMV & Co-decision) Article 2(67), new Article 69D TFEU
 37. Police co-operation (QMV & Co-decision) Article 2(68), new Article 69F TFEU
 38. Europol (QMV & Co-decision) Article 2(68), new Article 69G
 39. Amendments to certain parts of the Statute of the European System of Central Banks (QMV & Co-decision) Article 2(93), new Article 107 TFEU
 40. Use of the Euro (QMV & Co-decision) Article 2(96), new Article 111 TFEU
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COUNCIL OF
THE EUROPEAN UNION

Brussels, 16 March 2006

5847/06

LIMITE

CAB 11
CSC 13

INFORMATION NOTE

From: The General Secretariat
To: Delegations
Subject: Handling of documents marked LIMITE

1. As far as distribution and handling is concerned, Council documents fall into three categories:

- (i) Documents which bear no distribution or classification marking, and which are therefore automatically accessible to the public;
- (ii) Documents which are classified and bear one of the four classification markings set out in the Council Security Regulations (TRÈS SECRET UE/EU TOP SECRET, SECRET UE, CONFIDENTIEL UE or RESTREINT UE); and
- (iii) Documents whose distribution is internal to the Council, its members, the Commission and certain other EU institutions and bodies. Such official Council documents bear the distribution marking “LIMITE” on the front page, and in the footer of all subsequent pages. Note that “LIMITE” is a distribution marking, and not a classification level.

2. Documents marked LIMITE may be given to any member of a national administration of a Member State and the Commission. Certain LIMITE documents may be given to acceding States and to other EU institutions and bodies, depending on the “code matiere” on the front page of the document. LIMITE documents may not be given to any other person, the media or the general public without specific authorisation (see below).

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3. No technical protection measures need to be applied to protect documents marked LIMITE when handled or transmitted by IT systems or networks.¹
4. However, the following procedural rules apply to LIMITE documents:
- the content of LIMITE documents must not be published, either by read or by download access, in the Internet on a website that is accessible by any Internet user;
 - when sending LIMITE documents by e-mail, special care should be taken to ensure that e-mails are only sent to recipients entitled to receive them;
 - LIMITE documents do not require any specific physical protection measures, other than not distributing them to persons not entitled to receive them;
 - LIMITE documents may be disposed of without any requirement for physical destruction.
5. LIMITE documents may only be released to representatives of third States or international organisations by decision of the Council, or by persons duly authorised to release such documents under a Council decision.
6. LIMITE Council documents may only be made public by decision of the competent Council officials, or, where relevant, by decision of the Council, on the basis of criteria laid down in Regulation (EC) 1049/2001 and in the Council's rules of procedure. Staff of a national administration or the Commission may not themselves decide to make LIMITE documents public. The Secretariat is examining ways of marking the electronic version of all official documents automatically sent to each delegation to allow identification of the source of any leaks.
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¹ Other than the requirement set out in Section XI (2) of the Council Security Regulations for all systems to protect the integrity and availability of those systems and the information they contain.

TUESDAY 2 JUNE 2009

Present	Hannay of Chiswick, L MacLennan of Rogart, L Mance, L	Sewel, L (Chairman) Teverson, L Trimble, L
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Examination of Witnesses

Witnesses: MR ANDY LEBRECHT, UK Deputy Permanent Representative to the EU, and MR DAVID TRIPP, Private Secretary to Mr Lebrecht, examined.

Q22 Chairman: Thank you very much indeed for coming and helping us with our inquiry into codecision and national parliamentary scrutiny. The formal thing to begin with is that this is a formal evidence-taking session of the House of Lords EU Select Committee. There will be a transcript and that will be available to you, hopefully within a few days, and you can have a look through and remove any slips. We are at the relatively early stages in our inquiry. We have heard from our own Minister for Europe and have received a fair amount of written evidence, so we thought it would be appropriate to come over to Brussels and speak to people like you who have knowledge from the Brussels perspective of how codecision works. An important thing is what changes are likely to come in as a result if we get Lisbon, rather than looking back all the time, looking ahead to the future and how things may evolve. I suppose the tension we detect, and is it real or not, is between the increase in the number of first reading deals over recent years and the necessity for effective parliamentary scrutiny? Because decisions are being taken earlier in the process, how does that impact on effective parliamentary scrutiny? Do you have a view on that and what is your experience?

Mr Lebrecht: Perhaps I could first thank you for inviting me to give evidence. I am accompanied by David Tripp who, amongst other things, is our representative on the Mertens Committee which supports the deputy permanent representatives here in Brussels; he may be able to help me answer some of your questions. To look at your question, firstly, it will be quite interesting to see if in the next Parliament this increase in first reading agreements continues. Certainly we hear some mumblings in the Parliament that they would rather move back towards more second readings, and possibly conciliations, but that is just as an aside really. My own view on the process and how it links to parliamentary scrutiny is I am not sure if it makes it harder to conduct scrutiny, but I suspect that it changes the way that scrutiny has to be conducted in the sense that, whereas under the old system of consultation, the procedure that still applies for the moment in agriculture, for example, there was a much more formalised process and there were fixed

points. With first reading agreements and, indeed, second and conciliation agreements, the whole process is much more iterative. That is why I think the Government in its guidance has moved towards the concept of keeping the committees in the picture when there are significant moments in the process rather than the fixed points that characterised the situation previously. I think my answer to your question is it does not necessarily make it more difficult, but it does change the nature in which we need to involve the committees so that you can do your scrutiny as effectively as possible.

Q23 Chairman: Is there the chance that things move too quickly in order to be able to intervene effectively in a scrutinising way and we just have to be quicker and nimbler?

Mr Lebrecht: The straight answer to that is sometimes. One of the characteristics of codecision is that every negotiation is different. Sometimes a first reading agreement can be very predictable, it can even have fixed points, and it can be manageable. An example of that was the 2020 climate change package where we knew right from the outset what all the fixed points were, but you will get other situations where things move incredibly quickly, as you said. We have just done two very, very quick ones that I can give you as an example. One was the proposal to ban the import of seal products where, partly because we were facing the deadline of the end of the recent Parliament, it became clear that a first reading deal was on the cards, so the negotiation moved very fast. A second, even faster, one was on airport slots where the Commission made a proposal in April to apply in July to adjust the rules on airport slots in the context of the current economic recession. That moved very fast. That said, there are examples of negotiations moving very fast under the consultation procedure as well, so it can happen.

Q24 Lord Hannay of Chiswick: From what you say, presumably as negotiators on behalf of the Government you identified those very fast ones at a fairly early stage. Are there arrangements which would enable the Government to tell the committees of the Commons and Lords that they are faced with

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Mr Andy Lebrecht and Mr David Tripp

a very short timescale to get their views in? Are they doing that, do you know?

Mr Lebrecht: My understanding is that the rules require the initial Explanatory Memorandum to include a reference to the fact the department anticipates that there will be a first reading agreement. Sometimes it is very easy to anticipate a first reading agreement, and the airport slots is a case in point. That ought to happen. That said, there will be other cases where you do not anticipate a first reading agreement at the outset, but it will become clear in the negotiations that a first reading agreement may be on the cards. As soon as we know that, we will tell the lead department and my understanding is that the lead department needs to tell the committees that at that stage. Whether they do or not, I am not in a position to say.

Chairman: I think the answer to that is it is very patchy.

Q25 Lord Hannay of Chiswick: You are saying there is nothing that stops the Government doing that because you are actually tipping them off that your best estimate is that a first reading deal is in the offing?

Mr Lebrecht: Correct.

Q26 Chairman: It goes through the filter of the department before it gets to us?

Mr Lebrecht: Yes. The way we operate is any information we pick up here goes to the department and then from the department onwards.

Q27 Lord Trimble: Why do you not copy it to us when you send it to the department?

Mr Lebrecht: It is not as black and white as that. What will happen is there will be a particular meeting of the working group, or possibly COREPER, when, amongst the other information we get, there is a prospect of first reading agreement and we will send a report of that meeting as a whole and that will go to the department.

Q28 Chairman: Can we go on to informal trilogues, how important they are, how they work, who attends on behalf of each institution, what documents are available and how the meetings are conducted. First of all, how vital are they? I suspect they are very vital.

Mr Lebrecht: The trilogues are the central part of the process. They involve the Parliament, the Council and the Commission. The Council is represented by the Presidency of the day supported by the Council Secretariat and the Council Legal Services. This can vary, but the Parliament will normally be represented by the rapporteur and the shadow rapporteurs—that is, those from the other political parties—the chairman of the committee and perhaps some others. The Commission will normally be represented at a senior level, probably by the director-general

concerned, and some technical experts. Very occasionally, the Commissioner himself or herself may become involved if it is very political. That is the basic format of the trilogue. Essentially, the Presidency is acting on behalf of the Council, so in the main it is negotiating on a mandate which has been given to it by the Council, in effect by COREPER. That is the outline of how it works.

Q29 Chairman: What documents are available? What are they working from?

Mr Lebrecht: If it is a first reading agreement, the core documents are obviously the Commission's proposal and, if the committee of the Parliament has voted on its amendments, so not the plenary but if the committee has voted, that will be available. If there has been a General Approach in the Council, then that will be the Council's basic position. Sometimes you do get first reading agreements, and the airport slots is a good example, where, because of the time, the committee has not voted and there is not a general approach, so you are then working on the basis of evolving parliamentary and Council positions. The standard document that we get is usually a three- or four-column table which will show, for example, the Commission's proposal, the general approach or common position, if there is one, the Parliament's position, and then in the fourth column what will come to COREPER will be the Presidency's proposals for a mandate, in other words, the Council's negotiating position. That would come to COREPER and COREPER may well change that and what would then go to the Parliament would be that document, but as amended by COREPER.

Q30 Chairman: This is not just a matter of assembling the various positions, this is about real negotiation, is it not?

Mr Lebrecht: It is very much real negotiation. The documents may be quite long and detailed but on the key negotiating points it will describe the Parliament's position and the Council's proposed position. It is a negotiating document. As I say, the Presidency makes a proposal to COREPER and on the basis of that proposal, amending it as necessary, COREPER will give the Presidency a mandate to go and negotiate with the Parliament.

Q31 Lord Mance: I was just looking at the Inter-Institutional Agreement and that speaks about an iterative process, as you say, and exchange at the first reading stage and other stages of draft compromise texts and continuing contacts. The document you described, a three- or four-column table, sounds a rather formal summary document. Would it be right to understand that there would be other preceding, less formal documents that might have been

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exchanged before such a formal document was prepared?

Mr Lebrecht: The answer to your question is yes. If I can take a second reading agreement perhaps, it is slightly easier to describe. You have a common position and you have the Parliament's amendments to that common position and there could be quite a lot of distance between those two documents. The Presidency, Commission and Parliament, possibly at technical level, will go through a process of seeking to align the positions as closely as possible on what one might describe as technical amendments so as to reduce the number of issues outstanding that need to be discussed at political level. Are those done on the basis of documents? I am sure they are, but they are not necessarily circulated to the other Member States. They will be a preparatory process to the Presidency coming to the Council to say, "Look, we have sorted out A-T and they are here in our four-column document, but U-Z are still outstanding and here are our proposals". At that stage, which is the first stage where they are really coming to us for a mandate, it is open to the Member States entirely to say, "Well, actually on point M or whatever where you said we can accept the Parliament's amendment, actually we cannot and we want you to fight that". We have been through that informal process, but it is the four-column document that is effectively the Presidency's proposal to us which is a request for a mandate.

Q32 Lord Hannay of Chiswick: Presumably it is fair to assume that the Parliament has that four-column document as soon as you have it?

Mr Lebrecht: They are not meant to.

Q33 Lord Hannay of Chiswick: I know, but that is not the question I asked.

Mr Lebrecht: The documents are meant to be private to COREPER and the fact that COREPER then amends them means they sometimes only have a life of about 24 hours. This is very much an iterative process. We had a package on telecoms which has occupied much of the Czech Presidency, COREPER probably discussed it virtually every week from the end of January to the end of April, and we will have had a different four-column document for every one of those discussions. In a sense, whether or not the Parliament gets it, it is dead 24 hours later because what they will then get after COREPER will be what the Council's position actually is.

Q34 Chairman: Does the Presidency get into the position of meeting the Parliament without a mandate?

Mr Lebrecht: At an informal stage they do. Their task fundamentally is to find that compromise that is acceptable to the Parliament and to a qualified

majority of Member States. They know from the previous discussions where the sensitive points are and where the less sensitive points are. They almost certainly will try to resolve the less sensitive points, the technical points, without an explicit mandate, so informally with the Parliament, and then come back to COREPER and say, "This is where we think we have got to, can you agree to that?" As I say, if the Council says, "No, we cannot agree to every element of it", then they have to go back and negotiate something different. They do have that clearing away task beforehand, and it is only when you get to the difficult issues, the political issues, that they look for an explicit mandate from the Council.

Q35 Chairman: What about your ability to influence the process from a UK point of view? In particular, how much warning do you get of informal trilogues where you are not directly involved?

Mr Lebrecht: Formally, by definition, we do not. Informally we are talking to the Presidency all the time, we are talking to the Commission and we are talking to the Parliament in the sense of we may well be talking to the rapporteur, we will certainly be talking to other Members of the European Parliament, particularly British ones, on the committee, so we are both gathering information but also trying to influence all parties to this negotiation.

Q36 Chairman: That is an organic process, is it not?

Mr Lebrecht: Yes, effectively, in the sense that the two institutions start out with different positions and they are trying to come closer. Sometimes there will be some issues where there will be very clear red lines that everybody knows you cannot touch, but they tend to be relatively few, so there is scope for influencing throughout the negotiation.

Q37 Lord Hannay of Chiswick: Coming back to an earlier stage, that is to say, when the Commission's proposals first go to the Parliament and the rapporteurs and so on, how does UKREP monitor things at that very early stage about how the Parliament's view is shaping up? If you do that, do you report on that to London so that, if the Government wanted to, they could tell our Committee, our sub-committees who were looking at that particular piece of legislation, what they thought the European Parliament's broad views were likely to be?

Mr Lebrecht: We do monitor and we do seek to influence the EP committees, both by formal briefing and through informal discussions. It is not just UKREP, it is Government ministers as well, for example. We do keep a close watch. Of course, it is quite difficult in many circumstances to predict what the Parliament's view is until the committee has voted because it is only at that stage that the various ideas

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become concrete. Yes, we do keep London informed. It must be possible in theory that, if it became clear before the vote in the committee that a particular policy position was likely to be taken by the committee, I cannot see any reason objectively why the departments could not inform your committees. The only caveat I would make is that, until the EP committee votes, nothing is certain.

Q38 Lord Hannay of Chiswick: Two other things, perhaps slightly more speculative, which are concerning us, one backward-looking and one forward-looking. The backward-looking one is: could you just say a little bit about how this whole process of codecision has evolved following the very large enlargement of 2004 going from 15 to 27. Secondly, could you speculate a bit about the way you think Lisbon would have an impact on the codecision process, obviously with particular reference to the very large areas which have not been subject to codecision before—immigration, agriculture and fisheries and that sort of thing—because we are trying to feel our way towards how the British Parliament should insert itself into those matters too.

Mr Lebrecht: Just looking backward, obviously the Community enlarging to 27 has affected both the way the Council operates, but also the way Parliament operates. I think it is fair to say that the MEPs from the new Member States still have not fully made their mark yet and are probably still not as effective in pursuing their objectives within the Parliament as the old Member States. But perhaps that is to be expected and with the new Parliament that is shortly to be elected perhaps we will see as strong a performance from MEPs from the new Member States as we see from the old. It is still evolving. In terms of the Council, the enlargement has inevitably given more power to the Presidency and more power to the Commission in the sense that it is much more difficult now to put together a blocking minority than it used to be. For example, the UK, Germany and France together are not a blocking minority, so that changes the dynamics of the negotiation. I would also say it has given additional influence to Member States that are more fleet of foot over here and have the resources to be more fleet of foot because there are a large number of Member States who do not have the resources to do that. Looking ahead, as you say, JHA and agriculture and fisheries are very big areas. Personally, I am more familiar with agriculture and fisheries than I am with JHA, so forgive me if I give examples from there. The impact will be felt in a number of ways. Firstly, it will slow down legislation in the sense that, with the exceptions I identified earlier, the normal period for agreeing legislation by codecision can be 18 months to two years, whereas under the consultation procedure it was much

quicker. That will force policymakers in the Commission and Council no less than Parliament to be more reflective about the legislation they propose and we may see less of it, therefore. I think we will see the Parliament behaving differently. On agriculture, for example, until now the Agriculture Committee, and some of you are familiar with agriculture, has not had power and some might say it has not exercised much responsibility. Over time I think we will see a change in that. We will see a change in the way the Council has to behave as well. If there is one thing I have learnt, it is that you cannot take the Parliament for granted, you have to work with it, you have to influence it and, if it has views, you have to take them into account because they have a veto on the legislation. I think we will see a slowing down of the legislative process. We will see a need for more resources and behaviour change on the part of the Parliament and the Council.

Q39 Lord Hannay of Chiswick: You did not mention the effect in JHA of the change in the voting base, of course, which is pretty important I assume.

Mr Lebrecht: I think that is right. I have to confess, I am not an expert on JHA.

Q40 Lord Hannay of Chiswick: Secondly, you have not made any reference in your forward look to the new weighting of votes in the Council which presumably will redress to some extent the bias which you saw following the enlargement to 27 towards it being more difficult to make a blocking minority. It becomes slightly easier, I think, under Lisbon.

Mr Lebrecht: That is true, but I do not believe the new voting weights come into effect immediately.

Q41 Lord Hannay of Chiswick: No, that is right, they do not.

Mr Lebrecht: The voting weights under the Nice Treaty sit very oddly with the populations of the Member States, so Lisbon will redress that balance, as you say.

Q42 Lord Trimble: The question I want to ask you is with regard to Presidencies, how Presidencies make clear to the Council which dossiers they intend to complete in their term of office.

Mr Lebrecht: There are a number of ways they do that. Firstly and formally, at the beginning of their Presidencies they publish a written programme of work. For example, at the beginning of the French Presidency it was very, very clear that the climate change package was their top priority. They also publish draft Council agendas in advance of their Presidencies which will say what each Council is going to do. They are not entirely helpful for your purpose because a lot of the codecision is discussion in COREPER rather than the Council, but it is still

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important. Then at the beginning of the Presidency they make presentations certainly to the relevant working group and to the key Councils, certainly those which meet frequently. In addition to that, the normal practice is that the Presidency minister will appear before the relevant European Parliament committee at the beginning of its Presidency and give a presentation of its objectives. The totality of that information gives a picture of what their aims are.

Q43 Lord Trimble: Which ones of those do you then communicate to Parliament?

Mr Lebrecht: We will communicate all of them to the departments. We tend to work directly with the departments, so we would inform departments.

Q44 Lord Trimble: It is then left to the departments to decide whether or not to inform committees in Parliament?

Mr Lebrecht: Effectively, yes.

Q45 Lord Trimble: Is there any way that can be improved?

Mr Lebrecht: I would imagine there could be no difficulty in there being a formal—

Q46 Lord Trimble: Some of those are formal documents. The programmes of work and agendas would be formal documents, would they not? Would we have access to them?

Mr Lebrecht: I am sure they are not LIMITE documents, let us put it that way. Of course, the appearance before the European Parliament committees is publicly available. To answer your question, personally I would see no difficulty in Government ministers being asked to report on the same timescale as Presidencies.

Q47 Lord Trimble: If we have got documents such as the programme of work and the draft agenda which are not subject to any limitations on the publication of them, then surely they should be circulated to the committees.

Mr Lebrecht: I can see no reason why they should not be.

Q48 Lord Trimble: Those are all things that are happening at the beginning of the Presidency.

Mr Lebrecht: Yes.

Q49 Lord Trimble: During the Presidency, is there any way in which the Presidency will indicate that they have got some new ideas or they are no longer to pursue some ideas?

Mr Lebrecht: Firstly, events can happen in the middle of a Presidency and that can drive new developments. In terms of new ideas, a good Presidency has thought well in advance of how it is going to handle its six

months and, if it comes up with a bright idea in the middle of its Presidency, then something has gone wrong somewhere and it is not likely to get anywhere. What it should have done is worked with the Commission to make sure that the proposals are on the table or are going to come on the table, and then it is going to work them through and it will have told everybody. As regards stopping things, clearly if a Presidency runs into a blockage in terms of a strong blocking minority, for example, or the Parliament may throw out a proposal, and it does so occasionally, then it stops. Those are the sorts of developments that can happen mid-Presidency.

Q50 Lord Trimble: The reason why we are asking this question is with regard to codecision and particularly things happening at an early stage in the legislative procedure where the timescale could become quite short and, if we could get further upstream and are aware of the things that are going to come before they go into this process, then that gives an opportunity to keep in touch with things. This is why I am asking whether anything be done to improve this situation because, if it just goes back to departments, the departments may not be thinking in terms of which are the items which the committees in Parliament would be particularly interested in and which are the items which are going to be seen as significant politically in the overall scheme of things rather than in terms of the department's individual agenda. You might be in a better position to take that overview than the individual departments.

Mr Lebrecht: As I said earlier, I do not see any reason why this information should not be made available to the committees. Quite what the route is, whether it is from an agreement between yourselves and ministers or ministers ask us to send it direct to you, is a matter for yourselves really. There is no secrecy around this information.

Lord Trimble: I think what we would all really need is not just the formal documents to be circulated to us, but also to get a steer about which things are likely to be sensitive and important.

Q51 Chairman: I think that is right.

Mr Lebrecht: We would know at the beginning of a Presidency what is really going to matter to the Government. With the Czech Presidency, for example, we had a negotiation on working time, we had a negotiation on telecoms and a negotiation on the energy market. These were the dossiers we knew were going to matter to us the most. If what you are suggesting is that ministers might write, or whatever, and say, "This is the programme and these are the ones we care about", however you would want that expressed, I would not see that as being a difficulty.

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Lord Trimble: So if at the beginning of the Presidency we could get the minister at that stage to write to us drawing our attention to what are thought to be the significant items that are coming up.

Chairman: Then making sure that there are good lines of communication during the process, that is the important point. That is helpful.

Q52 Lord Mance: Can we move on one stage to the actual process by which first or early second reading deals may be reached. Forgive me if I am not completely au fait, but, as I understand it, the trilogue procedure can take place at any stage and is essentially an informal procedure where there is an attempt to negotiate a common position based on another column table, but of a slightly different nature from the one you have described because the one you were describing was designed to get authority for the Presidency. As I understand it, this is a table which sets out the position of the Council, the Parliament and then has a proposal which is intended to represent a possible compromise between those positions. Is that right? Would that be the basis on which trilogue discussions commonly take place?

Mr Lebrecht: Yes. Just to be absolutely clear, we are almost talking about the same thing. The document that will come to COREPER will have the previous positions of the Council and the Parliament and a proposal, the fourth column, will say, "This is what we want to put to Parliament". COREPER will discuss that, it may agree it or it may change it, but at the end of the COREPER that fourth column will be amended and it then becomes the Council's proposition to the Parliament, which is what you were describing.

Q53 Lord Mance: So the trilogue document will probably have Parliament's counterproposal and the aim will be to use that document to arrive at some sort of common compromise.

Mr Lebrecht: It gets a bit murky here. Just to be clear, the document that will come to COREPER we will see and we will agree what goes to the Parliament, but the Member States may never see that document that goes to the Parliament because it is a trilogue document.

Q54 Lord Mance: At the trilogue stage it leaves your sphere to some extent, this is happening without your being directly involved.

Mr Lebrecht: Yes, exactly. We are entrusting the Presidency as our negotiator, if you like, to take forward our position and negotiate with the Parliament. If it is helpful, I will tell you what happens next.

Q55 Lord Mance: Yes, that would be helpful.

Mr Lebrecht: After the trilogue the Presidency will come back to COREPER and they might say, "The Parliament has agreed everything you have asked for", or they might say they have agreed most of it but are not prepared to agree X and also they are insisting on Y, and we will have a new four-column document reflecting that. We will decide in COREPER whether and to what extent we want to revise the Presidency's mandate by responding to X and Y, then the Presidency will take that back to the Parliament and will negotiate that. At the end of all this process, if it has worked, and it does not always work, the Presidency will come back to COREPER with a new fourth column and they will say, "The Parliament are prepared to accept this. If COREPER can accept it, we have a deal." If a qualified majority in COREPER is prepared to accept that, then the Presidency will go back to the Parliament and say, "We have a deal" and the Parliament will take it forward and vote it through.

Q56 Lord Mance: So there should be no possibility of an agreement being reached between the institutions without COREPER having either beforehand authorised it or having the opportunity to see it afterwards and authorise it?

Mr Lebrecht: Correct.

Q57 Lord Mance: On that basis, if parliamentary scrutiny were appropriate in relation to the agreement, it should always be possible at one of those stages, given the information?

Mr Lebrecht: It should be possible. The only caveat I would give is there is often very little time between the various stages.

Q58 Lord Mance: Perhaps you can give an indication because that may be part of the problem. How quickly can the stages go?

Mr Lebrecht: It depends on the negotiation. Sometimes they can be spread out and sometimes they can be very concentrated. At worst, and we had this, for example, at the end of the French Presidency when we had a lot to get through in a very short time and we had it again in March and April of this year at the end of the Parliament, you might be talking about two or three days, a maximum of a week.

Q59 Lord MacLennan of Rogart: I wonder if you could help me by way of preliminary. You said that sometimes there is not time to give us much detail, but also you spoke of the normal period for codecision being 18 months to two years. Does the speed at which this process takes place, and you cited some examples of where there was speed for economic reasons like slots at airports, lay very much with the individual Presidency? Are there no

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conventions about lapse of time between different phases? Why is it that, despite this longish period of time, which you say is normal, there is suddenly a rush in some cases which makes reporting difficult?

Mr Lebrecht: A lot of the time is spent pre-first reading, that is the initial negotiation both of the Parliament's first opinion and the Council's common position, and only when you get to that stage does the clock start ticking. Why does it happen quickly? There are a number of reasons. One, and I guess the most common, is the cycle of Presidencies. As you know, with a six month cycle there is always pressure, the Presidency wants to complete as many negotiations as it can in its term.

Q60 Lord MacLennan of Rogart: That will change with Lisbon, will it not?

Mr Lebrecht: It will and it will not. Obviously with Lisbon you have the President of the European Council and a High Representative, but they only affect certain Council formations. They do not affect the majority of Council formations that deal with codecision, where you will still have the six-monthly Presidency. I think that will continue. There will be the usual pressure as you get towards November and December and May and June, there will be pressure from a Presidency to get completion. That is one reason. The second reason is I have certainly known examples where the Parliament quite deliberately has wanted to put pressure on the Council and has said, "We will have a plenary vote in, let us say, our April session. If you want to have a first reading agreement, you need to get your act together in order to meet that deadline". That is a second example. The third reason will be in second reading agreements clearly there are clocks ticking. As perhaps is often the case in any negotiations, the real pressure on a negotiator only arises towards the end of the process, so it tends to be in those last few weeks when you are nearing a deadline that the real movement happens. There are those reasons why it happens.

Q61 Lord MacLennan of Rogart: We have been shown the *Cabinet Office's Guidance to Departments* on keeping us informed and we were told that there was a provision which was intended to move this process more from a document-based process to a process where reports were made when there was significant progress. On the face of it, that seems to be a difficult and not wholly objective process. How do you decide whether something is "significant" or not?

Mr Lebrecht: I think the Government made that change in order to try to be helpful in a context in which it was quite difficult to identify fixed points in the negotiation.

Q62 Lord MacLennan of Rogart: I did want to come back to the point about fixed points.

Mr Lebrecht: Inevitably, defining what is "significant progress" or "substantial development", which I think was another expression, involves some subjective judgment. Clearly, if the system is going to work, then departments have to be sensible in terms of helping the committees and making sure you are kept informed. I can understand that there is a degree of feeling uncomfortable with that element of discretion, but it does come back to the point about fixed points, I accept that.

Q63 Lord Mance: Can I just intervene and ask why is the element of discretion necessary because, by definition, if an agreement has not been reached and there is a document which sets out differing positions and authority is given perhaps by COREPER to the Presidency to put forward another position, that seems to be a change by definition. Similarly, if something comes back which is outside the ambit of what has been authorised by COREPER, that seems to require recognising a change and one which requires further authorisation. In other words, why is the test of disclosure not simply whatever requires to be authorised by COREPER at any particular stage which is, by definition, something new?

Mr Lebrecht: There are two observations I would make on that. First of all, this is very much an iterative process, it is happening all the time. As I said on the telecoms package, for example, it was happening week by week, so, if the documents were to be made available, you would be swamped.

Q64 Lord Mance: There would be a lot, yes.

Mr Lebrecht: I promise you, you would be swamped. The second point I make to reflect upon is the significance of the changes. Certainly we could feel very comfortable in a negotiation—we the UK—if this iterative process of negotiation is happening around an area of the legislation about which we care nothing or is well within our negotiating mandate, for example. The question I would pose in that circumstance is: is every small change a significant development in the context of the work you are doing?

Q65 Lord Hannay of Chiswick: But you will understand that aficionados of bureaucratese regard the two adverbs "significantly" and "substantially" as taking away with the left hand most of what the right hand has given. If you look at the sentences without the adverbs, they do not actually mean an enormous amount different, but they do reduce the degree of subjectivity.

Mr Lebrecht: There is a dilemma. On the one hand, unlike in the previous world, there are not normally fixed points on which you can say, "Yes, this document matters and that one does not matter" and we know that objectively and in advance. On the

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other hand, if committees were to get every single document, you would be swamped and it would be meaningless, I suspect. It is a question of how we find a way of identifying those documents, or perhaps fewer documents, as those developments arise when there is something new and useful about which the committees need to be informed. It is a question of how you identify that.

Q66 Chairman: Also, it is who is identifying what. There is identification going on with you and then there is identification going on within the department.

Mr Lebrecht: There is, although I would hope that we and the departments are as one.

Chairman: I think that is the blocked filter problem, quite honestly.

Q67 Lord Maclellan of Rogart: May I just come back to this for a moment or two. You have mentioned the changes or the progress in terms of the mandate, but presumably in the course of negotiations issues arise which may not have been foreseen.

Mr Lebrecht: Yes.

Q68 Lord Maclellan of Rogart: In such circumstances, you have to go for a new mandate presumably. Where does the decision come as to what the reaction should be to the development? Is it lying with you or is it lying within the office?

Mr Lebrecht: Firstly, you are absolutely right, new elements do come along. We would obviously inform the department of that and our expectation would be that the departments would make the judgment that this development is such as to notify the committees. I have to say, we do not monitor that, we do not see that as part of our responsibility. What is our responsibility is to make sure the departments know what is going on, certainly know if it is significant and if it is new.

Q69 Lord Maclellan of Rogart: Going back to an earlier answer, you said that sometimes the Parliament might time the debate to put pressure on. Presumably the Council would also use timing as a means of trying to concentrate minds. You said the Presidency uses time sometimes to rush things through at the end. Is it utterly Utopian to look for a legislative system which has more conventional spaces in which these talks can take place if, as you put it earlier, you have 18 months to two years to get this sort of legislation with codecision?

Mr Lebrecht: I do not think it is Utopian, but it may be difficult. In the early stages of the negotiations on what was then the EU Constitution, the UK Government was pushing hard to get rid of the six-month Presidencies across the board because it is the

six-month Presidencies which are probably the biggest driver in terms of these deadlines. As we saw, the eventual compromise was, that for many of the Councils, the six-month Presidencies would be retained. If you translate your question to the question would a Presidency in May/June, for example, let matters drift into September/October for the sake of good order and good legislative practice, I think the answer is, if a blocking minority of Member States insist on it, yes, but, if they see an opportunity of getting a qualified majority and agreement, they will normally go for it. That is the dynamic of the six-month Presidency.

Chairman: We are under a bit of time pressure. We have three more questions to look at, but the most important one of those is the one dealing with the confidential nature of some documents and I will go straight to Lord Mance.

Q70 Lord Mance: We have got an understanding of the classification LIMITE which appears to be, or is described as being, a distribution classification rather than a security classification, but is sometimes treated as a reason for limiting disclosure to parliamentary scrutiny committees. What do you understand by the classification and what do you understand its significance to be in relation to disclosure to persons outside the Council and COREPER?

Mr Lebrecht: Our understanding is that those documents are available to administrations and to the institutions of the Community as appropriate, so the Commission and the Council and sometimes the Parliament. How do you define "administration" or could they go beyond that? As I read that document, the critical thing that the Council is concerned about is public access more generally, so the world at large.

Q71 Lord Mance: Yes.

Mr Lebrecht: I think the Government is largely guided by that. I know that, when you saw the Minister, she talked about the possibility of some kind of understanding around confidentiality and I suspect that is the key point of concern to the Council. There are two reasons why I think LIMITE documents are LIMITE, particularly in the case of the four-column documents, that they are negotiating documents and we would not always want our partner in a negotiation to see what our thinking is. There are other documents which have details of Member States' positions on them and it may well be that Member States would be uncomfortable in having that information put into the public domain.

Q72 Lord Mance: Can you just put the classification in the context of what is, I suppose, the relevant Regulation, which is 1949/2001 on access to documents. Does the classification have significance

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in terms of that Regulation which deals with documents drawn up for internal use or received by an institution and says that disclosure should be refused only if it would seriously undermine an institution's decision-making process, and then only if there is not some overriding public interest? Are we to take LIMITE as a conclusion in relation to every document so marked that disclosure would seriously undermine the decision-making process and there is no overriding public interest? Is that the significance which is being given, in which case it is a security classification one might add?

Mr Lebrecht: I think what the Council will say is that they would want decisions on publication of them to be on a case-by-case basis. It may be that the answer to your question depends on timing. Clearly a document that is sensitive vis-à-vis the Parliament we would not want to be on the website two days before a negotiation with the Parliament, that is clear. Whether it became available six months later is a more difficult line to defend. You may find the Council defending that line.

Q73 Lord Mance: I just wonder if I can ask whether if in fact there is any considered decision in relation to each and every document in accordance with the Regulation as to whether it should be so marked or whether this is not an almost automatic process of marking this type of document as LIMITE.

Mr Lebrecht: The Council will mark all four-column documents as LIMITE because they are negotiating documents. You will have an opportunity to check this this afternoon, but I think they interpret the process as being that the Council defines them as LIMITE. Whether or not they should be released will be dependent on a request. There would need to be a request from someone for publication and the onus would be that way round.

Q74 Lord Mance: In practice, it would not be regarded by you at any rate or, it would seem, by the Minister as an obstacle to their disclosure to Parliament if that disclosure were on the understanding that at any rate they would not be broadcast in the *Daily Mail*?

Mr Lebrecht: That is a decision for Ministers obviously.

Q75 Lord Hannay of Chiswick: On this point, I think it is common ground that a number of parliaments are currently receiving LIMITE documents: the Finnish Parliament, the Danish Parliament, the French Senate and so on. I do not think there is any doubt about that frankly. Have you any reason to believe the Finnish, Danish or French Governments ask for authority before giving their parliaments those documents? Have there ever been any protests

made by other Member States about the fact that these documents have been passed on to those Parliaments?

Mr Lebrecht: I am not aware of there ever having been problems.

Q76 Lord Hannay of Chiswick: Or that they have ever asked for authority?

Mr Lebrecht: I do not know the answer to that question, I am afraid.

Q77 Lord Hannay of Chiswick: Occasionally we kept the view in Whitehall that the British Government would be doing something improper if it gave these documents to its own Parliament. We doubt this because it seems to us a number of governments have decided to do that to their parliaments without asking anybody's authority because it is not a security classification, it is a distribution one, and because presumably they have satisfied themselves that there is not going to be publication of these things of a wholesale kind. I just ask you those questions to find out whether you were aware of anyone having asked for authority or being taken up on doing it without authority.

Mr Lebrecht: As I said, I do not know the answer to that question. I am sure, when you see the representative of the Council this afternoon, he will be in a position to answer that question.

Q78 Chairman: Would it be significant if the representative of the Council this afternoon said they were quite content with the process that is going on in these other parliaments?

Mr Lebrecht: Forgive me, but I think that is a question for ministers as well. When the Minister for Europe spoke to you, she was relatively open.

Q79 Lord Teverson: Given that the Council is a legislative assembly, I find it strange that formal documents are not publicly available in that way. From that point of view, does that not seem very strange that they are not available or public?

Mr Lebrecht: They are not formal documents in a sense, they are negotiating documents. The formal documents are what goes to Council to vote upon. Perhaps that was a slightly trite answer. The dilemma we face is the two institutions are negotiating and neither the Parliament nor the Council can afford to negotiate entirely in public, it does not help the negotiating process, so there needs to be a certain amount of negotiating space. That is one side of the argument. The other side of the argument is precisely the one that you put, that both the Council and the Parliament are legislative bodies and there should be openness.

Chairman: We have gone over our time. Thank you very much and thank you in anticipation of lunch.

TUESDAY 2 JUNE 2009

Present	Hannay of Chiswick, L MacLennan of Rogart, L Mance, L	Sewel, L (Chairman) Teverson, L Trimble, L
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Examination of Witness

Witness: MR PHILIPPE LÉGLISE-COSTA, French Deputy Permanent Representative to the EU, examined.

Q80 Chairman: Good morning. This is an evidence-taking session of the House of Lords European Union Select Committee. There will be a transcript produced of the evidence which you will receive a copy of to read over and make minor corrections if there have been any little slips. Thank you very much for coming and helping with our inquiry. We are at a relatively early stage. We have spoken to our own Minister for our Government's view on codecision and how that relates to scrutiny by national parliaments. We have received quite a lot of evidence and we thought now was the time to come across and speak to people like yourself who have a close and immediate experience of how the process works. We look forward to learning. Can I start by raising the subject of the informal trilogues. Could you tell us how they work and how the process pans out.

Mr Léglise-Costa: Thank you very much for this opportunity. I am sorry about my English. In principle, I am not allowed to speak in English!

Q81 Chairman: We have come across that before!

Mr Léglise-Costa: The trilogues are the key process for achieving an agreement with the Parliament in the codecision procedure. In fact, whatever the steps in the procedure, first reading, second reading, third reading with conciliation, the real negotiation takes place in the trilogue. The other steps are more formal: votes in the Council, in the parliamentary committee, in the plenary. They are very important politically, but they are not aimed at negotiating an agreement between the Parliament and the Council, the negotiations take place in the trilogue. The trilogue meetings are composed of the President of COREPER, assisted by staff of its own representation with the Secretariat of the Council and the Legal Service of the Council. So maybe ten people altogether. The Commission participates in a similar fashion there is usually the Director-General assisted by staff of the Commission, and they are many because the Commission's contribution is mainly expertise, and their Legal Service. In front you have the Parliament. In general the meeting is chaired on the Parliament's side by the chairman or chairwoman of the lead committee—Environment Committee, Employment Committee, et cetera—the negotiator is the rapporteur. The shadow rapporteurs of the other political parties are present and officials of the

Parliament, the Legal Service, et cetera. For more complicated negotiations where several committees of the Parliament are involved, there is the lead committee and associated committees and you might have other Members of the Parliament, rapporteur, then shadow rapporteurs of the other committees. In some cases, when the negotiation becomes more political or there are challenges for the Parliament among political parties, you might have the political coordinators of the committees. The chairman or chairwoman is always there, but the political coordinators of political parties in general do not participate in the trilogue although they might if it becomes important. A trilogue is a bit formal and informal, a bit public and not public. It is informal because there is no status in the Treaty or legal text, but it is formal because for the Parliament and the Council what is agreed represents a commitment on the Parliament and the Council to proceed on the basis of intermediary agreements that are reached in the trilogue. It is half informal and half formal, it is half public and half not public. It is not public because it is restricted, the press are not allowed in the room.

Q82 Chairman: How many people would actually be in the room?

Mr Léglise-Costa: It depends if it is technical and not so significant, or if it is the climate change negotiation. On the Council's side there will be ten, three or four from the Presidency and three or four from the Secretariat and two from the Legal Service, from the Commission ten to 12 and from the Parliament maybe 20, so you have an average of 40 people. That is why it is not so 'unpublic' because nothing is secret with 40 people in the room and one has to be aware that everything will be known, there will be leaks. I am not saying they are coming necessarily from the Parliament's side, it can be from the Commission or even the Secretariat, but we should hope never from the Presidency! You have 40 people more or less. It is not public because it is an informal negotiation among negotiators but, of course, it is more open than that. That is why a lot of preparation is required in order for the choreography to proceed well. The first element in the process, which is extremely important, is that the basis on which the trilogue proceeds is a document that is

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prepared by the Council, the so-called four-column document where you have in each column for each article or recital the initial proposal of the Commission, the position of the Parliament, the position of the Council and then the draft compromises. The trilogue consists of reading and analysing whether the draft compromises are acceptable or not and negotiating texts. The Council prepares that mainly in COREPER where the role of the Presidency is to submit to COREPER, to the Member States, this draft four column document and to assess and confirm whether there is enough support. When one says "enough support", this is the assessment of the Presidency. If it is unanimous, consensual, there is no ambiguity, but, if there is some opposition, some Member States oppose, it is up to the Presidency to assess whether it is something that would block the negotiation eventually or something that could be overcome. It is up to the Presidency, after negotiation in COREPER, to amend its draft compromises in the fourth column and to go to the Parliament with that text. During the French Presidency we had to go forward and the qualified majority was not always obvious, but our judgement was that eventually, because of the political pressure and other steps in the negotiations, those Member States which were not convinced would rally the consensus in the framework of an overall assessment of the final agreement. In order to identify the draft compromises, not only does the Presidency have to consult with Member States and the Commission but also, informally, with the Parliament.

Q83 Chairman: That is the critical part.

Mr L glise-Costa: There are a lot of technical and political contacts at the level of the President of COREPER and the rapporteur in order to prepare the trilogues. When it is very complicated, it might involve other Members of the Parliament beyond the rapporteur—shadow rapporteurs, some key people in the committee, some key people in the political parties—in order to ensure that what the Presidency will bring to the trilogue will form a good basis for the negotiation. You might have some prepared choreography with a rapporteur or other Members of the Parliament in order to overcome blockages there. They might suspend the meeting, meet and come back with a potential revised position, et cetera. The Presidency spends a lot of time preparing these four-column documents. There is a lot of expertise and we have to assess what is and what is not possible. There are many contacts with Member States and the Commission in order to prepare the COREPER mandate for the next trilogue, and also contacts with the Parliament in order to assess whether there is a possibility to converge on that. In order to allow that to be successful there is a lot of preparation before the actual negotiation in order to assess with the

Parliament what is the right schedule according to their own constraints or the Council's constraints: what is the right block of issues to identify, what is the right way to proceed, what issues should be taken first or taken later in order for that to be compatible with the decision-making process in the Council and the Parliament. Before the negotiation starts, or at key moments of the negotiation, there is a need for intense preparation with the Parliament in order to assess the technical and political aspects of the negotiation and to deduce from that the sequence of how to proceed. For the Presidency, and it is not necessarily the case for the Parliament, the pressure of the six months is very strong because the Presidency has to deliver. A Presidency has some priorities, and the Parliament might play with that. The scheduling of the negotiation is one of the early aspects that has to be discussed with the Parliament and even before the six-months Presidency. When we move from first reading to second reading, there are some binding delays in the codecision procedure and the pressure is both on the Parliament and the Council. Ahead of the Presidency, the Presidency has to identify for each text what is the right schedule, when to transmit a document, when to organise the trilogues, how to organise the agenda of COREPER in order to go to possible convergence before the end of the Presidency or enough convergence to say there is an agreement. That is the main picture.

Q84 Chairman: I think that is an absolutely fascinating and masterful presentation. It explains it to me very well and has the ring of authenticity about it. To sum up, what you are saying is that, although the informal trilogue is the important meeting, that is a meeting of 40 people and a meeting of 40 people is a strange negotiation in any case, so before that takes place and surrounding it there has been a series of other more informal negotiations on an ad hoc basis to prepare the ground, which is almost then endorsed at the informal trilogue. Is that right?

Mr L glise-Costa: Endorsed, or at least prepared. I will give you an example that is more concrete of the French Presidency because that is the one I know best. Let us take the quite sensitive regulation that we negotiated on CO₂ emissions from cars and how to limit those emissions. That was extremely complicated because in the Council there was a division between those in favour of protecting the car-makers and those in favour of the environment, limiting the emissions. Among the car-makers there were the big car-makers, the smaller car-makers, the niche car-makers. In the Parliament we had the same kind of things. There were some key people defending these aspects, plus the general context of the energy and climate change package with tactical games on this text in relation to the wider package. We had one trilogue per week and each was important because a

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failure to progress would have been dangerous for the whole text and the package. I spent a lot of time during the week and weekends with the rapporteur, who was a very experienced Italian Member of the Parliament called Guido Sacconi. He was rapporteur for the REACH legislation which is a very important legislation on chemical products. We spent a lot of time assessing the position in the Council and the Parliament, explaining why we could not do certain things and other things we could do. We spent a lot of time with the people in the Parliament. There was the Environment Committee, which was the lead committee, but also the Industry Committee chaired by a German woman called Mrs Niebler, who was also very influential. I spent a lot of time with nationals of the Parliament, either Germans, French or Belgians and Dutch, because they were concerned with the environment, and of course with the Member States and the Commission, in order to prepare the steps for the week, what to propose to COREPER, what to say, how to transmit a document to the Parliament a bit ahead of the trilogue, how to organise the trilogue, what the rapporteur would say, and what other members from the other parties would understand from that and how to conclude at the end of the trilogue. A trilogue can be short or long, of course, but the average duration is two hours. Some energy and climate change trilogues lasted six or seven hours into the night, but the normal trilogue is two hours in general. To answer your question, it can happen. Of course, other trilogues are easier, they are more technical and you do not need such careful preparation.

Q85 Lord MacLennan of Rogart: Arising from your interesting statement, can you give any indication in your experience as to how often the schedule which is announced by the Presidency for the process of codecision is broadly adhered to? Is it exceptional for it to be adhered to broadly or is it more often honoured in the breach than in the observance?

Mr L glise-Costa: It depends on the level of scheduling. With the broad scheduling our aim was to reach such a step in December. This kind of scheduling is often adhered to, honoured, because there is enough pressure. There might be accidents, of course, the Parliament is not in a position to engage in the negotiation because it is too early or there is a blockage in the Council, but in general the Presidency anticipates this kind of thing. If the Presidency's schedule is done well, then the objectives are more or less met. But the Presidency has to have enough flexibility to adapt to what can change which is the exact scheduling of the trilogues. There is a first sketch but in negotiation the Parliament could suddenly say, "We need another meeting. There was a problem in our shadow rapporteur meetings, sorry, but what was scheduled for Tuesday has to be

postponed to next week", or the same thing in the Council. There is a bit of flexibility in the exact process, but the global schedule is more or less kept.

Q86 Lord MacLennan of Rogart: Is more or less kept?
Mr L glise-Costa: More or less. There may be accidents, of course.

Q87 Lord MacLennan of Rogart: Would it be possible to predict at the beginning of the process roughly what stages you would have to go through?
Mr L glise-Costa: Yes.

Q88 Lord MacLennan of Rogart: It is?
Mr L glise-Costa: Yes, we did that before the French Presidency.

Q89 Lord MacLennan of Rogart: That is publicly known, is it?

Mr L glise-Costa: More or less. There are some documents which are publicly known and officially transmitted. Seven months before the Presidency you have the main programme with the Council meetings, et cetera, six weeks before the Presidency a detailed programme and one week before the Presidency the agenda of each Council's meeting. These are public and transmitted. There are some more internal documents that the Presidency shares with the Council Secretariat, maybe the Commission in some respects, which detail what we envisage for the trilogues, for the agenda of COREPER, the agenda of the technical working groups, the transmission of the documents. All of that does not need to be public and it might be counterproductive to be completely public. For us in the French system, it is scheduled with Paris obviously.

Q90 Lord MacLennan of Rogart: Would you say that the scheduling depends upon the Presidency?
Mr L glise-Costa: Yes, completely.

Q91 Lord MacLennan of Rogart: So it varies from one six-month period to another very considerably, does it?

Mr L glise-Costa: It is always a mix. The Presidencies are only for six months, which is a short time, so they inherit some things and transmit others. The Council Secretariat is there to inform and keep the continuity and consistency. The second aspect is the Presidencies are more or less hands-on. Some Presidencies just take what comes from the Secretariat, adapt to some of the political constraints and then try to deliver. Other Presidencies have more influence of their own.

Q92 Lord MacLennan of Rogart: There are not conventions which indicate what is a reasonable time to allocate to the particular steps?

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Mr L glise-Costa: Yes. One has to assess the maturity of the file when it comes from the previous Presidency, the political difficulties to expect, the complexity of the text because there is a difference between a three-page text and a 200-page text. The priorities of the Presidency have also to be taken into account. Of course, what the Presidency does is very important. For example, during the French Presidency on the energy and climate change package the normal assessment, according to observers, for this kind of legislation would have been an 18-24-month negotiation with a second reading, a lot of committees involved in the Parliament and a lot of complex discussions in the Council. It was done in 11 months because of political pressure but also because of the end of the legislative term and the Copenhagen deadline. There is a standard duration that can be deduced from the text and complexity and then political push. For a normal text, if an agreement is reached in the first reading, one needs maybe six to nine months or something like that, second reading one should add four to six months and, if it goes to conciliation, it is again four to six months. That is the kind of duration.

Chairman: Having dealt with that comprehensively, we get to the difficult bit of the meeting which is how to secure adequate parliamentary scrutiny of the process you have described.

Q93 Lord Hannay of Chiswick: I wonder, firstly, whether you could just give us a broad idea of how you, the French Permanent Representation here, keep the two Houses of the French Parliament informed of all these pieces of legislation. That is over and above what is being done officially by the administration in Paris. It would be very helpful for us to know roughly how the *S nat* and *Assembl e* are informed about this and able to carry out their scrutiny procedures.

Mr L glise-Costa: There is no distinction to be made between what the Permanent Representation does and the Government; we are just an arm of the Government. Since 1994 all documents have to be submitted to the Parliament so proposals of the Commission, the positions of the Council and positions of the Parliament, are transmitted for information. Since last July, when we had a revision of our Constitution which led to an improvement in the way the French Parliament is involved in EU affairs, we transmit all Acts coming from EU institutions and the *Assembl e Nationale* or the Senate can adopt resolutions. These resolutions are not binding but, of course, they put weight on the Government. Obviously in the process of negotiation the main documents that the French Parliament can analyse are the proposals of the Commission, but they are not the only ones. Other texts that are important in the various steps of the codecision

procedure, the votes in the parliamentary committee, the votes of the Council, the votes of the Parliament, but they cannot lead to resolutions from Chambers of the French Parliament. During the negotiations relations between the Government and Parliament are organised through questions of the Parliament, meaning of the *S nat* and the *Assembl e nationale*, to the Government, oral or written, and every month there is a session of the *Assembl e nationale* which is dedicated to questions to the Government on EU affairs. These are hearings of the Ministers, the Minister of Foreign and European Affairs and the Minister of European Affairs, or specialised Ministers, hearings of officials for instance, the Director of European Affairs of the Ministry of Foreign Affairs, the adviser to the Prime Minister, who is the head of our coordinating body for European affairs (SGAE). The third element which is also in practice now is a presentation of the objectives and positions of the Government before each European Council. That is before the *Assembl e nationale* and the *S nat*. There is also a debriefing after each European Council. We do not transmit to the Parliament document prepared for the trilogues because they are only working documents. Obviously, if there is a key element that appears in the negotiation that was not present initially in the Commission's proposal and that is relevant in the political debate in France, then there might be exchanges between the members of the Parliament and the Government. There is no formal transmission during the negotiating phases of the codecision process.

Q94 Lord Hannay of Chiswick: That is very helpful. On one point of detail, you say you send all documents to the two Houses of Parliament. Does that include documents that are marked "LIMITE"? *Mr L glise-Costa:* Yes. LIMITE is an indication, not a classification, it is not confidential or secret, et cetera.

Q95 Lord Hannay of Chiswick: And they respect the confidentiality?

Mr L glise-Costa: Yes. There are arrangements that ensure that confidentiality is protected as it is in the administration. When it goes to the staff of the administration, as it is foreseen in the EU documents, then there is a commitment by our Government not to send that to lobbies or industry or the press. When we say "national administration", that can extend to the Parliament.

Q96 Lord Hannay of Chiswick: One last question on that point. Do you ask the Council whether you can do that or do you just take a decision yourselves that the interpretation of the rules enables you to do that?

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Mr Léglise-Costa: We take a decision.

Q97 Chairman: Has anybody ever told you that you have been naughty and got it wrong?

Mr Léglise-Costa: Not at this stage.

Q98 Lord Mance: Can I just press you a little as to precisely when a LIMITE document might get disclosed. The impression I have at the moment is that some fairly basic documents which would be public anyway, I think, the proposal, the common position, the parliamentary amendments are sent, you do not continue the process of transmission of documents during the codecision process so documents preparatory to a trilogue meeting, the four-column document, would not be sent?

Mr Léglise-Costa: No.

Q99 Lord Mance: Furthermore, perhaps consistently with this, the actual scrutiny sessions—this may be wrong, help me—appear to be rather infrequent, once a month, so it would not be feasible on that basis for, at any rate, the *Assemblée nationale* to keep in touch closely with a quick-moving situation. Is that a fair understanding?

Mr Léglise-Costa: Formally, yes. In our Constitution the Government is in charge of conducting international negotiations and formally EU negotiations are international negotiations. It is up to the Government to assess when it consults the Parliament and by what procedures. Of course, the approval of the Parliament might be required and it is the responsibility of the Government to ensure that. There is no obligation to consult the Parliament at every step of the negotiation. In addition, if we had to transmit to the French Parliament the four-column documents, it would require huge capacity for absorbing these documents because there are hundreds of pages of hundreds of documents.

Q100 Lord Mance: We understand that and this is one of the problems we are grappling with. Can I just ask how it reconciles with the information which we have got from the French *Sénat*. We asked the question, “Does the confidential nature of some negotiating documents hinder national parliamentary scrutiny of codecision legislation?” and the answer we received was: “*Le Sénat est bien informé grâce à la transmission des télégrammes diplomatiques. Si des informations complémentaires sont jugées nécessaires, elles peuvent être obtenues par l’antenne administrative du Sénat à Bruxelles . . .*” That suggested, on the face of it, a rather close involvement on an almost day-to-day basis by the *Sénat* and we know that in some other countries there is that, but can you comment on what the position is in that respect?

Mr Léglise-Costa: Yes. The *Sénat* is right obviously. I mentioned the transmission of documents and the formal obligation of the Government and there are two other aspects that are mentioned there. The first one is that reports of the permanent representation are in principle transmitted to the *Sénat* and the *Assemblée nationale*.

Q101 Lord Mance: And so too the *Assemblée nationale*?

Mr Léglise-Costa: Yes There are some exceptions and rules on confidentiality. The mainstream reports are transmitted. That means the *Sénat* and the *Assemblée nationale* might get from the reports a quicker understanding of what is at stake in a negotiation than if they were to read long four-column documents which only experts understand. The reports are a synthesis of the negotiations of Member States’ positions or European Parliament’s position. They can review easily whether there is a new element to a negotiation or something has appeared that they should react to. Then they can ask questions. The second element is that we host in the Representation two persons, one from the *Assemblée nationale* and the other one from the *Sénat*. These people do not formally belong to the Representation because the Representation is a branch of the Government, but we host them and their task is to organise the liaison between each of the chambers and EU institutions.

Q102 Lord Mance: They are actually in your premises, are they?

Mr Léglise-Costa: Yes, they are in our premises, although they also have an office in the European Parliament. Each of these two colleagues has an office in the French Representation for practical purposes.

Q103 Lord Mance: Do they have full access to internal documents there or not?

Mr Léglise-Costa: In principle, they can request documents from us. I do not see any mainstream document that we would not show in the normal process of negotiation. It is one person for each chamber and they cannot follow 20 parallel negotiations with hundreds of pages. They spend a lot of time in organising the visits and in transmitting the documents that they get, mainly documents that come from the European Parliament or positions of the Council rather than the four-column documents.

Q104 Lord MacLennan of Rogart: But they would have access to the four-column documents, would they?

Mr Léglise-Costa: They would on an informal basis. They are working documents so they would not react formally to working documents which reflect the state of play at a certain stage.

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Q105 Chairman: Can I just check, is the line of communication directly from the French Representation in Brussels to the *S nat* and the *Assembl e nationale*?

Mr L glise-Costa: No.

Q106 Chairman: Or does it go through from the French Representation to Paris, to government departments in Paris, and then to the *Assembl e nationale* and the *S nat*? Which is the route?

Mr L glise-Costa: The transmission is initiated by our coordinating body for European Affairs called the SGAE, the *Secr tariat G n ral pour les Affaires europ ennes*, which is a body of more or less 200 staff. The head of this secretariat is also the adviser to the Prime Minister on European affairs. He has two hats. They are in charge of initiating the transmission, except for CFSP documents which the Ministry of Foreign Affairs deals with because the CFSP documents are not within the competence of the SGAE.

Q107 Chairman: So, if I am a member of the appropriate committee in the French *S nat* and we are looking at, say, a proposal on agriculture, where am I getting my information on what is happening in Brussels? Where is that coming from?

Mr L glise-Costa: From the SGAE.

Q108 Lord Mance: The next question is, I suppose: is everything automatically passed on or is there a filter in the SGAE?

Mr L glise-Costa: They do not have to request documents which are considered as Acts according to our constitution, these are transmitted automatically from the SGAE. The *Assembl e nationale* and the *S nat* can adopt resolutions on these documents. What is not transmitted are the working documents in the course of a negotiation because that is not required by the Constitution and is in general not relevant in practice.

Q109 Lord Maclean of Rogart: Would a Presidency compromise proposal be regarded as an act?

Mr L glise-Costa: No.

Q110 Lord Teverson: My Lord Chairman, if I can go back to something you raised, with the 40 people who are there, how many of those are active within the meeting in terms of contributing? The other area I am interested in is that we all look at this conciliation process as an institutional process, but everybody in that room has a national label and a political label and I want to understand how that plays out in practice. Particularly, for instance, when one of the major Member States is in the Presidency, say France, it is quite likely that one of the rapporteurs

will be a French national, maybe of the same political view as the Government. Does that in any way affect the way the negotiations work or does everybody keep to their institutional point of view? I find it difficult to believe that is completely the case, but I would be interested to understand that.

Mr L glise-Costa: During the trilogues there are mainly three persons who speak: the Presidency, the rapporteur and the Commission when requested. The Commission can have a more or less active role depending on the involvement of the Presidency, the technicalities and personality of the director-general. During the process you might have other people coming in either because they are experts, for example, the Presidency can request the Legal Service of the Council to confirm an interpretation of a legal nature, and the same thing for the two other institutions, but more politically you might have shadow rapporteurs coming in with the authorisation of the main rapporteur or the chairperson of the committee if they want to say something they consider relevant on a specific issue. There are 40 people, but in practice only three of them speak, plus a few others if necessary or when politically relevant. The others are important, they can bring expertise or ensure, if an agreement on the text is reached, that there is enough involvement of the other political parties because in the end the agreement which is reached in the trilogue is supposed to be transposed in the Council and Parliament. In practice it is very rare that it does not happen. It happened recently with the telecoms package when the Parliament did not respect the vote. It is the responsibility of the Parliament's team and the rapporteur to ensure ownership.

Q111 Lord Teverson: So the reason they are all there is not to speak but to get consensus so that both sides can deliver the deal at the end?

Mr L glise-Costa: I do not want to speak on behalf of the Parliament but, of course, there might be political complexities in the Parliament and trilogues meetings can eventually be more complicated for the Parliament than for the Presidency. For the Presidency the complication is mainly before or after the trilogue. As a President of the Coreper you are in charge you are alone and you take your responsibility. It can be sometimes more complicated for the negotiator of the Parliament, who is surrounded by other political parties. If necessary, for instance if there are political tensions, they can stop, meet and assess the situation among Members of the Parliament, and then come back. It is also a political negotiation within the Parliament that the rapporteur is conducting, not only a negotiation with the Council. Then there is the mix of an institutional, political and national elements. During the French Presidency, we negotiated 43 texts, mainly at night, in

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the second half of the semester and only one with a French rapporteur. It was a very important text but not at the core of the political attention in the context of the French Presidency. It was Erasmus Mundus Students, a programme for attracting foreign students. The rapporteur was Marielle de Sarnez. The fact that she was French, was not important in the negotiations. The other rapporteurs were Germans, British, Italian, Irish or nationals of other Member States. The national dimension within the Parliament is a question relevant for the Parliament, whether negotiating with the Council or in its own internal negotiations and votes. It is always a mix. When there is a very strong national interest in a negotiation, as on cars or particular industries or budgetary measures, then there are always Members of the European Parliament who come in with positions close to those of their governments and they defend those. There is also an institutional dimension and in general, the Parliament is very well-equipped to define its institutional position *vis- -vis* the other Institutions: better than the Council in general because they do not have the six-month rotation and they have often an agenda of extending their influence. When it comes to the institutional position of the Parliament in general, that is a good matter for consensus among Member of Parliament. There is a difference in the psychology in the Parliament between the first reading and the second reading because in the second reading, when they vote at the end of the process of negotiation with the Council, they have to reach absolute majority, 393 votes, and that requires larger consensus among the main political parties which is more complicated than first reading when they can have more politicised views. They need to reach that quite large consensus and it creates a pressure on the Parliament because, if they fail to reach these 393 votes on the compromise, then it is the position of the Council that is adopted. The logic is a bit different then and that has to be taken into account from the Council's point of view.

Chairman: We have not got much time left. Lord MacLennan will ask a short question, then Lord Trimble on Presidency planning and I want to finish up asking you about Lisbon and the impact of Lisbon. We have got those three topics, if we can take those quite quickly.

Q112 Lord MacLennan of Rogart: My short question is we have focused largely on the inter-institutional negotiations, but there are negotiations within the Council and I am wondering if you can give us any indication as to when the documentation for those discussions is made available much in advance to what degree are those made public, for example, to the French *S nat* and *Assembl e nationale*?

Mr L glise-Costa: As I said, we do not transmit the working documents, the documents for negotiation.

Q113 Lord MacLennan of Rogart: If the French had a national position, would you be transmitting then?
Mr L glise-Costa: During the negotiation the Commission submits its proposal and that is transmitted and the Government defends its position. Of course, the responsibility of the Government is to understand what the Parliament thinks, but when the negotiation starts there is no formal transmission. Obviously the negotiations position of the Council when preparing the trilogues is a delicate matter. Firstly, the Presidency has to gather enough support in the Council through a lot of contacts, the working group and COREPER. Secondly, the Presidency has to ensure maximum transparency. When the Presidency speaks to a Member of the Parliament, most Member States are informed anyway. Finally each Member State requires enough time to study the documents. If everything goes well and the Presidency is not under time pressure, one week is a good time frame between the transmission of the document and its discussion in COREPER or the working group. That is standard. Some Member States, Denmark, for example, where they have a parliament which looks at every document, ask for this delay. When the negotiation time is coming to an end and things are accelerating, it is less possible to ensure the transmission one week before the meeting. During the French Presidency when we finalised the energy and climate change package, it was from the night before to the following day. We had the trilogue and then we had to debrief on the trilogue, the day after, prepare the next document in the evening, transmit the document the day after, discuss it in the COREPER, prepare the compromise and transmit it to the Parliament and then go to the trilogue. That was the rule of the game but it was an exceptional situation. Transparency is extremely important also in that regard and that is why we tried to be transparent on the timetables, the way we would proceed and the objectives from the beginning of the Presidency on and at each step so, even when the negotiations would accelerate each Member State could prepare itself and say, "On this one we have one day so we have to be quick".

Q114 Lord Trimble: When you were preparing for the Presidency, were there any dossiers on which at that point agreement had not been reached which you wanted to revive with a view to achieving agreement?
Mr L glise-Costa: Yes. There were this kind of files for two reasons. The first reason is that some of these dossiers were part of the French Presidency's priorities. The second reason is that it was almost the end of the legislative term and there was a lot of pressure to finalise some negotiations with the Parliament. I will give you the example of the maritime package. There were two texts, one about

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the liability of ship owners, the other one on the responsibility of Flag State, which were considered almost dead. We revived those, not only because we thought they were important but because it was a way to rescue the whole maritime package. We put a lot of political pressure on in July, August and September and revised them quite substantially in order to have an agreement in October and then to deliver the package.

Q115 Lord Trimble: When you revived and revised them, were there any formal steps you took with regard to communicating these to Member States or were fresh documents produced?

Mr L glise-Costa: To the French Parliament?

Q116 Lord Trimble: Yes.

Mr L glise-Costa: No. I understand that the Minister for Transport was in close contact with some key members of the French Parliament to inform them. It was anyway quite consensual in France and in addition we had to run the Presidency. In the case of a single Member State with strong views and specific difficulties on the maritime package faced with a text that was considered dead and then was revived by the Presidency, it is imaginable that the government would come back to the Parliament and say, "Something is happening". In France it would be of an informal nature. It would be a political decision of the Government to do that and not a requirement of the Constitution or the regular arrangements between the Parliament and the Government.

Q117 Lord Mance: Apart from the personal contacts, just to make sure I have understood the position correctly, would all diplomatic communications automatically be passed and available to the *Assemblée nationale* or the *S nat*?

Mr L glise-Costa: Do you mean the reports of the Representation?—

Q118 Lord Mance: Yes, the reports, so there would not be any filter process there?

Mr L glise-Costa: It goes through the Ministry of Foreign Affairs but there is an automatic transmission. The addressee (*Assemblée nationale*, *S nat*) is indicated on top of the report. There are very few exceptions, for instance due to confidentiality. It does not happen so much in the case of the reports on Community affairs from the Permanent Representation.

Chairman: Can I finish by asking you about Lisbon on the assumption that we will get Lisbon. You have given us a wonderful insight into how the process works now. Do you see changes taking place as a result of Lisbon?

Q119 Lord Hannay of Chiswick: In the codecision.

Mr L glise-Costa: Yes. There are two changes which are important. Firstly, there are more competences and it extends the field of codecision to JLS, agriculture and fisheries in particular. Another aspect which is for experts but which will have a huge impact on the codecision process is for now the Parliament votes in its second reading on the basis of the Council's position, so on the amendment voted by the Council in its common position. With the new Treaties codecision procedure, it will vote directly on the basis of Commission's proposals. That means that we start from scratch and not from the Council's position. It puts the two co-legislators on exactly the same footing at each stage. That will change the way the codecision will be organised.

Q120 Chairman: The emphasis you have given is that you have got a formal structure in which you are operating and the real business is done away from the formal structure. It meshes with the formal structure, but there is a lot going on beyond that.

Mr L glise-Costa: It is based on the formal vote structure.

Q121 Chairman: As a result of Lisbon do you see any differences, any movement there?

Mr L glise-Costa: Not in that regard. I would not like to give the impression that what is formal is not relevant and what is informal is key. In order to reach an agreement between two complex institutions, if there were not these trilogues, we would never reach agreement, it would be impossible. It works in practice. My experience of the Parliament and the Council, an enlarged Council and enlarged Parliament, is that these trilogues, where there is sometimes complex negotiation, are very efficient. It is very rare that we do not reach an agreement in negotiation. It is extremely rare. It happened recently with the Working Time Directive, but it happens maybe once every term. That means that, despite the complexity of the process and the need to reconcile a lot of interests, institutional, national and technical, these trilogues are a very efficient process.

Q122 Chairman: Thank you very much. Now we will get on to the reform of the Common Agricultural Policy! That was really fascinating. Thank you very much.

TUESDAY 2 JUNE 2009

Present	Hannay of Chiswick, L MacLennan of Rogart, L Mance, L	Sewel, L (Chairman) Teverson, L Trimble, L
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Examination of Witnesses

Witnesses: MR ANTHONY TEASDALE, Head of Strategy, Office of President, European Parliament, Ms ELS VANDENBOSCH, Director for Legislative Coordination, DG IPOL, MR KLAUS BAIER, Head of Conciliation and Codecision Unit, DG IPOL, MR ANDREAS HUBER, Head of Secretariat, Environment Committee, and MR NIALL O'NEILL, Directorate for Relations with National Parliaments, European Parliament, examined.

Q123 Chairman: First of all, can I thank you for finding the time to come and talk to us on our inquiry into codecision and scrutiny by national parliaments. The only formal thing I have to say for the record is this is a formal evidence gathering session of the House of Lords EU Select Committee, so a transcript will be taken and made available so that any small corrections can be made at that stage. Other than that, we are here to enjoy ourselves. Perhaps you could introduce yourself and your people.

Mr Teasdale: Thank you very much indeed, my Lord Chairman, for the opportunity to give evidence. First of all, I would like to apologise on behalf of Klaus Welle, the Secretary General of the European Parliament, who originally you hoped to talk with, but who unfortunately cannot be with us this afternoon. He asked me to gather a small group of colleagues closely involved in the codecision process so that we could share our thinking with you on this issue. Thank you once again for that opportunity. Let me introduce the colleagues who are with me. On my left is Els Vandebosch, Director for Legislative Coordination in DG IPOL, that is the Directorate-General here in the European Parliament for internal policies. On my right is Klaus Baier, Head of the Conciliation and Codecision Unit in the Directorate that Els heads. Further along the table is Andreas Huber, Head of the Secretariat of the Environment Committee in the European Parliament. The Environment Committee is one of those committees most actively involved in the codecision process and we thought it might be valuable for you to have a perspective from the coalface, as it were, on the operation of first and early second reading agreements. There are a number of other colleagues who I will not introduce for the moment. Down at the end, we have Niall O'Neill, who you probably already know, from our Directorate for National Parliaments who is an expert in the national parliamentary scrutiny process. That is the team for this afternoon. I do not know whether you want us to make a very short opening statement or you would like to go straight into questions.

opening statement. We have got 25 minutes and four areas to cover. On euro time that is five minutes for each question, which will take 25 minutes.

Mr Teasdale: Okay. Maybe the best thing then is to go straight into questions.

Q125 Chairman: Is there a paradox between the move towards more first reading agreements (and is that likely to continue?) and the equal stress on scrutiny by national parliaments?

Mr Teasdale: Maybe Klaus Baier would like to answer that question by giving a perspective on the recent increase in the number of first reading agreements and how in practice this is impacting on national parliamentary scrutiny.

Mr Baier: Thank you very much. I will start with a few figures on how important the trend actually is. We are currently doing calculations for the 2004-09 legislature, which is almost finished, and we see that so far almost 400 codecision files have been adopted. Of these 400, 69 per cent—were concluded at first reading, 25 per cent at second reading, and six per cent in conciliation. Of the 25 per cent at second reading, 12 per cent were agreed at “early” second reading, and 13 per cent at “normal” second reading. This is a trend which we have seen during the last few years and which started towards the end of the last legislature (1999–2004). At the time everybody said the reason was EU Enlargement—that there was a kind of unspoken consensus to conclude difficult files before Enlargement because, it might be even more difficult afterwards. Following the last European elections, we saw a very big increase in early agreements and most of the people expected that this trend would go down, but, instead, the trend has increased during this legislature, with all kinds of consequences, including very different practice among the various parliamentary committees. One reaction by the Parliament has been, quite recently, to establish a code of conduct on how such negotiations should be conducted in the future, to increase both internal transparency and transparency towards national parliaments and the outside world.

Mr Teasdale: Els, would you like to add anything from your perspective?

Q124 Chairman: I would be very happy to have an

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Ms Vandebosch: Being responsible for legislative coordination, we have an overview of what is happening in the various parliamentary committees. The tendency either to conclude the procedures at first reading or to try to achieve an agreement at the second reading—or indeed to go to conciliation in order to obtain what may be the best possible result—varies a great deal between committees. In some committees, such as the Committee on Economic and Monetary Affairs, the Committee on Civil Liberties, the Committee on Industry and Energy, there is a tendency to achieve almost all—I will not say all but a very big part of the dossiers at first reading. In other committees, we see instead a tendency to try to achieve agreement at second reading—as in the Environment, Transport, and Internal Market Committees. It depends on the preferences within each parliamentary committee whether they conclude as many dossiers as possible at the first reading or whether they consider the second reading and conciliation as a real option. The Transport, Environment, Employment and Legal Affairs Committees tend to go to the conciliation phase. So there is a considerable variety among parliamentary committees.

Mr Teasdale: The paradox that you talk about in your question, of course, is one that not only affects national parliaments, it bears on, the openness of the decision-making process generally, and it is not without comment, and indeed in some cases criticism, here within the European Parliament itself. Clearly the more often you reach first reading or early second reading agreements, the more difficult it is for there to be an open expression of views at a later stage in what was previously a more extended legislative process. This is an inevitable consequence of such a development. The issue of trying to ensure that the committees operate within some kind of established framework—that there be guidelines and a broad understanding of what is expected of them, that the rapporteur should receive a mandate from the committee and report back on what he or she is negotiating—has been an important question. It came up prominently in a recent exercise here in the Parliament on internal reform. As you may know, over the last two years, a German Social Democrat Member, Dagmar Roth-Behrendt, chaired a Working Party of all the political groups on parliamentary reform. It came forward with a series of important proposals many of which have already been implemented. One was the introduction of a specific code of conduct for committees, which is now embodied in the rules of procedure of the Parliament. I wonder if it would be useful to add a perspective specifically from the Environment Committee on this.

Mr Huber: Yes, thank you. The Environment Committee is a very busy committee. We have dealt with 114 codecision files in the course of this past

term. Out of those 114, 97 were concluded. The ratio is more or less along the average of the House: 60 per cent were concluded at first reading, 30 per cent at second reading stage and some ten per cent at third reading and conciliation. You have to differentiate here and look into the various case groups. On the one hand you have legislative procedures, carried over from the previous term and, on the other, those which will be carried over to the next term. Out of those which were concluded within the past term we have to distinguish between files where the proposal was made at the latest halfway through the term, that is just before the term or during the first half of the legislative term, and here we have a higher chance of going to second reading. A slightly larger proportion of those files were concluded at second reading than at first reading and those second readings were typically the more political files. At the halfway point through the term, if the Commission made proposals, say, at the end of 2006, or at the beginning of 2007, all the way through 2008 and 2009 the sense of urgency was such that most of the files, with the agreement of the MEPs, were concluded at first reading stage. That is perhaps an interesting detail to note.

Q126 Chairman: Is this not the nub of the problem? The statistics that you have quoted are very powerful, there is no doubt about that, but how can you give assurances or suggest improvements that can counter the argument that the growth of first reading agreements inevitably means that the opportunity for effective scrutiny by national parliaments decreases?

Mr Baier: I think part of the answer is in the code of conduct which Anthony Teasdale referred to, and which you can find in the dossiers that we have distributed to you. The code of conduct was proposed by the Working Party on Parliamentary Reform, then agreed by the Parliament's Conference of Presidents (of political group leaders), and since the last plenary (in May) it has been incorporated in the Parliament's rules of procedure. The code of conduct was established in order to increase the House's internal transparency, as well as transparency towards the other players in the legislative field. The philosophy of the discussion in the reform working party on the code of conduct was that, at first and second reading, the parliamentary body in the Parliament which should have the control of the negotiations—about how far the negotiations go, whether they get a conclusion or not—should be the committees. If the committees are the ones that control the negotiations and get proper feedback, given that they meet in public, the transparency both internally and for other players, is increased. The code of conduct foresees that a single rapporteur cannot decide to go ahead and negotiate a first reading agreement on his or her own, but rather that

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there should be a decision in the committee whether on to negotiate or not, a decision on who goes and negotiates, whether it is the rapporteur or both the rapporteur and the shadow rapporteurs. It would guarantee that there is proper feedback to the committee members—and since the discussions are in public the public would know whether these negotiations lead to something substantial—and any draft agreement which is reached with the Presidency would be evaluated by the committee before it goes to plenary. With this link, that will bind the rapporteur closer to the committee, the working party on reform tried to increase the transparency of these negotiations.

Q127 Chairman: How does that enhance scrutiny by national parliaments rather than by the European Parliament?

Mr Baier: The link the working party made was that, as all the discussions, all the deliberations in the committee, are held in public, and are featured on the committee's website,—the information is there, even this is not fully implemented yet—they were hoping that transparency vis-à-vis national parliaments, the scrutiny exercise for the national parliaments, would be facilitated. There were one or two other changes that have been introduced, like a “cooling off period” which means that a draft agreement reached with the Council Presidency does not go to the plenary for adoption just a few days later, but that instead there is a certain period of time, namely four weeks, in between when the committee agrees a text and the plenary adopts it, so giving external actors access to the content of the agreement.

Q128 Lord Mance: Can I ask a follow-up question in relation to the code of conduct and the decision on whether to enter into negotiations for an early reading deal. The code of conduct says: “The decision to seek such an agreement shall be a case-by-case decision, shall be politically justified in terms of, for example, political priorities, the uncontroversial and technical nature of the proposal, an urgent situation and/or the attitude of a given Presidency to a specific file”. It seems to me that in likelihood that could lead to it always being justified. Indeed, the Inter-Institutional Agreement, which you also kindly provided us with, suggests that institutions should always co-operate with a view to an early agreement. In reality is this decision taken seriously on a case-by-case basis or is it very easy to justify a move towards an early reading agreement?

Ms Vandebosch: That remains to be seen. We will soon be putting the code of conduct into practice. There is increasing awareness within the committees that the option of going for a first reading agreement should be taken on a duly justified basis and should

not be an automatic decision, that there should be reflection about what is in the interest of the European Parliament, what is in the interest of the European Union and what is in the interest of having the best possible legislation. There is awareness, in other words, that the decision will need to be taken on a case-by-case basis.

Q129 Lord Mance: It does seem to run in a different direction from the 2007 Inter-Institutional Agreement.

Ms Vandebosch: The code of conduct is much more recent. The code of conduct was only adopted a few weeks ago and will enter into force during the new legislative term.

Q130 Lord Mance: Even though it runs in a different direction nonetheless it has rather flexible criteria.

Mr Teasdale: There has been a change of mood on this. I do not think anybody really expected that first reading and early second reading agreements would take off quite so rapidly and become, in effect, the norm in law-making within the European Union. As people have been slightly startled by the speed and intensity of that process, obviously there has been an attempt to look at this issue again and assess whether or not it is in the interests, not only of the legislative process as a whole, but also of the individual institutions. For example, it might characteristically be in the interests of a particular Council Presidency to try to get legislative proposals adopted as quickly as possible, but it does not follow that this is necessarily always consistent with the principles of better law-making.

Q131 Lord Mance: That is very reassuring for my part. It is what happens on the ground that matters.

Mr Teasdale: There is a process of reappraisal. It might be useful to know a little bit about how in one committee the decision tends to be taken about whether to go for an early agreement or to let the legislative process play out.

Mr Huber: In all the parliamentary committees you have what is called a rapporteur and the shadow rapporteurs. These persons are appointed by their respective groups and play the most important role in the legislative process. In addition to committee meetings, where all members can take the floor on various points, regular meetings (so-called shadows' meetings) of these persons are held and they prepare the vote in the committee in the first place and thereafter define the strategy vis-à-vis the Council in the negotiations. These decisions are taken on a case-by-case basis. Some files which are technical and straightforward may require only a very small

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number of these shadows' meetings and others which are highly technical and politically sensitive will require many rounds. This has to be seen against the following background. In the Environment Committee at present we have 68 full members and another 68 substitute members. It is a high number but it is justifiable because between a fifth and a quarter of all codecision legislation goes through the Environment Committee. Look at the sheer quantities: 114 files pending, you have five years and seven groups involved. At the very least for each file that means a rapporteur, plus shadow rapporteurs, that is seven persons, and the specialised group staff working with them. If you multiply a number of files, say 100, by the number of rapporteurs and shadow rapporteurs—seven—you get 700 people (who on some occasions may be identical) involved in that process. Legislation requires a high degree of specialisation. This is the first practical point I wanted to bring to your attention. The second, coming back to the issue of transparency, which is for us the main issue, was raised in one of your questions and that is that documents should be submitted to the European Parliament as to the Council at the same time. In my view, this is still a problem because you have official documents with official reference numbers which are forwarded to all the institutions and, on the other hand, you have what are called non-papers and in view of their nature it is not even certain whether the European Parliament will systemically be among the recipients. Our problem in terms of transparency is mainly that we suspect the Commission to be conniving with the Council on many occasions and to play more on the side of the Council in submitting such papers and giving the Council and its working parties privileged information which the Parliament has difficulties in obtaining.

Q132 Chairman: Of course, there would be no argument, would there, that a document that goes to the European Parliament should also go to Member State parliaments?

Mr Huber: That is a political question. That is something which my political masters would have to decide.

Q133 Lord Mance: Is that what happens though? Looking at your code of conduct it says: "Negotiations in trilogues shall be based on one joint document", and we have heard about that this morning, but I am quite sure that we do not get sent that joint document at the moment. That is the document which sets out the original proposal and any parliamentary position formally taken, but then it sets out compromise proposals or possibly two

compromise proposals, one from each side. We do not see that.

Mr Huber: Again, there is a quantitative issue here. I hope I am not giving the wrong number, but we have some 40 national chambers of 27 Member States, where some Parliaments have two chambers, like in the UK, so we have 40 chambers in the European Union. Assuming that on average there are 200 members in each of those 40 chambers you reach a considerable number of people who would be involved. You see it from the perspective of one House, the House of Lords, but if you take the sheer quantity of members of national parliaments who would have to be involved in this transparency exercise, it is quite considerable. This is why when I was asked previously should the documents which the Parliament receives informally, like non-papers, be circulated to all the national parliaments I said it was a decision which would have to be taken by our political masters.

Chairman: It would only be 40 copies, would it not?

Q134 Lord Mance: Do you put on your website the joint documents which are the bases of trilogue discussions, what you refer to as this code of conduct?

Mr Baier: The joint documents are joint Parliament and Council documents, therefore we need the agreement of the Council. I do not think I am telling any secrets if I say that the Council is very restrictive on these issues. Our Parliament's vice-presidents, who are responsible for conciliation, had several discussions with the Council on the question of at what stage we can put these documents on the website, and the agreement, after very lengthy and difficult discussions was that we can put them up once the procedure is concluded politically, that is, not when the plenary and the Council had adopted them, but once draft agreements were reached at a political level in the trilogues. Again, a joint document, as the name says, is joint. There has been a long tradition of discussions, negotiations and indeed pressure sometimes, to get this process to be more open. Step-by-step, we are getting there, but in rather small steps.

Ms Vandebosch: The documents are prepared by the Council, and the Parliament often asks to get those documents as soon as possible, in view of the preparation of the next trilogue meeting. Often the Parliament finds that it gets the documents rather late for preparation of the next trilogue meeting. In most of the cases, it is Council documents which then become "joint" during a trilogue.

Mr O'Neill: One small point in relation to the Chairman's question on the effect of the changes on national parliament scrutiny. One effect is your timeframe for effective scrutiny is being shortened because as we move towards first reading it is reducing the whole process by several months.

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Arguably, you can only regain that timeframe if you begin scrutiny further upstream. If you have a situation where the start of scrutiny is the presentation of the Commission's formal proposal, or even when a national government lays that before a national parliament with an Explanatory Memorandum, then the timeframe is significantly curtailed. One impact of the changes in the process is that it could require national parliaments to scrutinise more closely Commission Green Papers, White Papers, Annual Policy Statements and a range of other items so that they would hit the ground running more quickly when the actual proposal appears. There would also seem to be a question of to whom do you target your comments once you have undertaken the scrutiny. If national governments are the primary focus, which is the case with many national parliaments, even the changes we are making in terms of our codecision procedure do not appear to be a primary focus for national parliaments. If, on the other hand, they were to take the view that having scrutinised it and wishing to get across their views then they may have to consider engaging in a pre-legislative dialogue with the European Parliament, the nature of that dialogue has not yet been determined on our side but it is mentioned more and more. A dialogue between our rapporteur and members in interested committees in national parliaments, however one might choose to define that may be the way we are going. If the timeframe is being reduced but national parliaments have a point they wish to make, do they consider continuing to make that point vis-à-vis their own government who will impart it to Council or do they consider engaging in a pre-legislative dialogue with a parliamentary committee to try and make their views known. How would our Parliament take part in that? And how that might evolve? Arguably we are still very much at the commencement phase. There are those in the House who are speaking about it.

Chairman: I think that is one of the most interesting contributions we have received all day and it is something that some of us have had formulating in the backs of our minds for some time, that there needs to be that sort of dialogue between national parliaments and the European Parliament somehow. I think we will return to this in our deliberations.

Q135 Lord Teverson: This is a brief point coming back to the question of why there are more first readings. One of the impressions we got from a past Presidency that we spoke to this morning, and it is something I have heard in the past in my own experience, is that the European Parliament is far more effective at negotiations in terms of third reading and conciliation than the Council ever is. I am trying to understand, is this really going to a first

reading partly because a Presidency is in a rush to complete before the end of the six months but at the same time the Parliament is getting pretty well everything it wants because of its proficiency on negotiation, which the Council effectively has to compromise probably further than it wants to in order to get its own timetable? Is that a scenario that works or not?

Mr Teasdale: I think you will probably find within each institution that there is a rather different perspective on this question. It could be fascinating for you, during the course of your own inquiry to identify the different view-points in each of the three main institutions. Here in the European Parliament, there has traditionally been a view that we were quite effective in the "codecision 1" mode where the timetable tended to be more extended and one more often saw things decided at the final, conciliation stage. There are lots of statistics, and you can find them in official documents and many textbooks, about how many parliamentary amendments were finally adopted. One of the consequences of the move towards first reading agreements in particular is that the paper trail disappears. It may well be that, from the point of view of some people both in the Council and the Commission, it is quite convenient for there to be less visible evidence of parliamentary influence on the content of legislation. That does not necessarily mean that the Parliament is less influential, but it is more difficult to immediately trace that influence. It would be fascinating to try to trace exactly the comparisons between these two decision-making systems, if you like. I do not think we are yet in a position to be sure about that. There is no doubt, however, that it has been an observable development over time that Council Presidencies have become keener and keener to bolster their legislative scorecard during their six-month term of office. I think this was a process that started with the Single Market programme before 1992 and it has continued ever since. The prospect that the Lisbon Treaty might soon end the role of the prime minister and foreign minister of the Presidency country in chairing the European Council and the Foreign Affairs Council also means that there is currently an even greater desire to make the sectoral councils as productive as possible and to have a clearly visible legislative output, as the hallmark of each of the successive Presidencies. Equally, here in the European Parliament, some rapporteurs have taken the view that sometimes—not always—it is easier for them to get their way if an item is fully wrapped up by the time it goes to the full plenary—where there might otherwise be a slightly different majority—or additional pressures—to that in the committee. One of the changes that was proposed by the Reform Working Party, and this again has now been picked

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up in changes made to the rules of procedure of the Parliament, is to ensure a more consistent application of the principle of proportionality between political groups in the committees, so that the membership of each committee reflects the overall balance of political forces in the plenary as a whole as accurately as practically possible to ensure that factor cannot become politically highly significant. There is a very interesting interface here and I do not think anybody yet really knows how and why there was this sudden surge towards the growth in first reading agreements, but it may be—

Q136 Lord Teverson: What you are saying is the first reading trend gives more power to the committees in effect because they can bypass the plenary?

Mr Teasdale: It can do sometimes. I am not saying it does in all cases, but it can do.

Q137 Lord Teverson: So it is the committee chairmen who are pretty powerful people. That improves their scorecards, does it not?

Mr Teasdale: One of the reasons for the introduction of the cooling-off period, which has already been referred to—this one-month minimum period between agreement of a first reading position in committee and its adoption in plenary, which has not been applied absolutely religiously but is now the norm whereas previously it was not, was to ensure that the political groups and the plenary as a whole have an adequate opportunity to reflect upon whether the balance struck in the negotiation is one that they can in fact endorse. Sometimes the balance struck in that negotiation will be rejected by the plenary: that is in effect what happened on the telecoms package in the last session before the European elections, in early May.

Q138 Lord Trimble: On the code of conduct, paragraph six, the final sentence: “There shall be sufficient time between the end of a negotiation to vote in plenary”, the “sufficient time” is usually one month?

Ms Vandenberg: Yes, this is the cooling-off period.

Q139 Lord Trimble: That is the cooling-off period. It is just “sufficient time” as defined, it is not defined as one month?

Mr Teasdale: No, but the Conference of Presidents of the European Parliament, which is responsible proposing to the plenary its timetable—which is then formally adopted at the beginning of each session—has, as a working principle, bound itself to the view that there should be a minimum one month delay wherever possible. This is not applied in every single case, but it is increasingly becoming the norm.

Q140 Lord Trimble: My marginal note reads, “usually one month”.

Mr Teasdale: Yes, indeed.

Q141 Chairman: They always have “usually” or “normally” in everything.

Ms Vandenberg: The fact that there is a high number of first reading agreements is partially due to the fact that there have been many technical files during this legislative term. For a purely technical file, there is a tendency to close at first reading and not go for second reading.

Mr Baier: Another possible answer to Lord Teverson’s question as to why there are so many first readings is that, during this legislature, on technical files, we have seen very many ‘codifications’. Equally, we have seen 50 files which only have to do with ‘comitology alignment’, following the introduction of the new Regulatory Procedure with Scrutiny: this is a purely technical exercise and, therefore, can naturally be dealt with in a single reading. More generally there is also the positive aspect that the institutions now know each other much better than in the past, and so they start speaking to each other from the very early stages of the codecision procedure. When I began to work in the Parliament 12 years ago, there was no real contact at first reading, but now one starts speaking very early. Many Council people say that the Parliament sometimes gets better results at third reading. Equally, if one analyses who really profits from first reading agreements, then it is not necessarily the Council as such, but the Presidency. Not only the Presidency because of the scorecard, because for the Presidency it counts with the concluded files, but also because of the level of negotiation. At first reading everything is negotiated by the permanent representatives, whereas in the conciliation committee, Ministers are involved. In a first reading agreement, there is never a Minister involved: he or she will see the file as an “A” point in the Council, to say “yes” to it. In fact, the negotiations are done very often not even at an ambassadorial level, but at working group level. For the Council Presidency, it is much handier to negotiate at first reading, because the work is distributed on different shoulders at lower levels, and sometimes our Members complain about this. Another factor which plays a big role in the Council as to why there are now so many first reading agreements has to do with Enlargement; as we observe it from the outside, with 27 member states, it became much more difficult to find consensus within the Council. For a Presidency, particularly at first reading, it is actually very helpful to have the Parliament there which can say, “I am sorry, we cannot do this” or “we cannot agree this”, because there is always a threat that the negotiations are in

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peril. In conclusion, I think one can say that who really profits from a first reading agreement is the Presidency.

Q142 Lord MacLennan of Rogart: In the context of the possibility of the Lisbon Treaty going through and an increase in the responsibilities for this, is the European Parliament giving thought to the procedural consequences of scrutiny for yourselves and, if so, in what committees and what is the prospect of timing of conclusions on that?

Mr Teasdale: As I am sure you know, the main areas in which the Lisbon Treaty would extend codecision are the Common Agricultural Policy the Common Fisheries Policy, and the Common Commercial Policy—that is external trade policy—as well as Justice and Home Affairs, in the latter case by “communitarising” the remaining parts of the JHA pillar which are still intergovernmental, but where the UK will enjoy a fairly comprehensive opt-out. This development will directly affect the work of the Agriculture Committee, the Fisheries Committee, the International Trade Committee, and the Civil Liberties Committee, here in the Parliament. Each of these committees will face a much bigger burden of codecision files. Fortunately, because we have the experience of codecision in many of the other committees, a measure of best practice has evolved which can be shared. Until the Irish “no” vote on the Lisbon Treaty last June, there was quite a lot of preparatory work being done in the Parliament at a technical level on Lisbon implementation, but it was decided politically to put that more or less into abeyance until such time as it was clear whether or not Lisbon would actually proceed. That work will be resumed if and when Lisbon ratification is completed.

Q143 Lord MacLennan of Rogart: In the light of what you said, even before Lisbon, does the European Parliament see any merit or virtue from a scrutiny point of view in having much clearer conventions, if not rules, on the scheduling of deliberation?

Mr Teasdale: Do you mean inter-institutionally—in concert with the other institutions?

Q144 Lord MacLennan of Rogart: Yes.

Mr Teasdale: We do. As a Parliament, we have long been in favour of a higher degree of inter-institutional coordination of legislative planning with the Commission and Council. If you go back to the negotiations on the Inter-Institutional Agreement on Better Law-Making, agreed in 2003, we pushed quite hard to get the other institutions to come in behind that concept. The Council has traditionally been the

least enthusiastic, of the institutions in this area. The characteristic attitude here in the Parliament would be strongly in favour of such a development, especially if the Council were prepared to play ball.

Q145 Lord MacLennan of Rogart: Is there an agreement within the Parliament for taking this forward? Is there a particular committee?

Mr Teasdale: At an operational level, it would be the responsibility of the Conference of Presidents to authorise and sanction this process. In the reports which were drafted by the Roth-Behrendt Working Party on Parliamentary Reform, this whole issue of legislative planning was addressed in some detail. On the basis of their recommendations, we have already taken the occasion to timetable debates in the Parliament plenary when the Annual Policy Strategy is delivered by the Commission, and both before and after the Annual Legislative and Work Programme is put forward by the Commission. Previously we used to have just one post-hoc debate after the Legislative and Work Programme had been proposed and, therefore, in effect the Parliament was coming in too late in the process. In parallel there was—and still is—an elaborate process of taking the temperature of opinion in the committees on legislative priorities and communicating their thinking to the Commission, between the APS and the Legislative and Work Programme. Now that exercise is wrapped into a broader process. So overall, I would say that we have in fact tried quite hard to raise the political profile of legislative planning and to improve the Parliament’s strategic input into the evolving agenda of the Commission, but we have not yet had very much success in trying to engage in a dialogue with the Council.

Mr O'Neill: If Lisbon were to come into effect in terms of the scrutiny of national parliaments, the enhanced role for national parliaments is within a pre-defined time limit which primarily affects national parliaments. It does, however, have one knock-on effect on our work in that neither Parliament nor Council are meant to consider the proposal until such time as it has been presented to national parliaments. There is a question of how do we interpret that. Can we go so far as to appoint a rapporteur on a proposal? What can the rapporteur do until such time as the Commission has sent the final language version to a national parliament? If national parliaments can react within that eight week period how does that impact on how we react in turn. As far as I understand it, our rules of procedure post-Lisbon are not yet finalised. The mechanism for how we would react, the eventual yellow card mechanism, for example, is not yet defined as such, although there is some consideration as to what procedures we put in place, which committees would be delegated to

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formulate Parliament's response, how we would respond and if we move to a vote, how we would do all that. All of that has not yet been determined.

Chairman: Thank you very much. We have more than gone over our time, which reminds me of Fisheries Councils! Thank you very much indeed for your help.

TUESDAY 2 JUNE 2009

Present	MacIennan of Rogart, L	Teverson, L
	Mance, L	Trimble, L
	Sewel, L (Chairman)	

Examination of Witnesses

Witnesses: Ms UNA O'DWYER, Acting Director for Relations with the Council, including Codecision, Commission Secretariat General, and MR NIALL O'NEILL, Directorate for National Parliaments, European Parliament, examined.

Q146 Chairman: Thank you very much for coming and helping us. This is a formal evidence-taking session of the House of Lords European Union Select Committee. A transcript will be taken and you will receive a copy and you can make any small changes. What we have done so far in our inquiry into codecision and national parliamentary scrutiny is receive a lot of written evidence, a wide range of correspondence, and we have had evidence from our Minister for Europe, Caroline Flint, and have spent today talking to a mix of the Council and the Parliament. How long have we got?

Ms O'Dwyer: I have got to leave at twenty to four.

Q147 Chairman: We have had lots of statistics and I am not saying we do not need any more but we can afford to be light on statistics. We will try and be as snappy as we can. The upfront question is: is there a real tension between the move to first and early second reading agreements on issues, which is quite understandable and has taken off dramatically, and the opportunity to have proper scrutiny by national parliaments?

Ms O'Dwyer: First, may I start by saying it is obviously a great pleasure for me to be interviewed by you all and to be subject to your scrutiny. This is very much in line with President Barroso's and, indeed, Vice-President Wallström's approach to the way legislation should be open, democratic, transparent and involving everyone with ownership for Member States and the democratic representatives of the Member States. It was in that spirit that President Barroso launched the initiative in 2006 to give national parliaments the proposals that came out of the Commission at the same time as the co-legislators received them. With or without the Lisbon Treaty we have been very much aware of the importance of the role of national parliaments and we want to involve you as much as possible. That is the spirit that inspires us here. As regards your first question, whether there is a tension between early deals and the whole process of democratic scrutiny, I think, from what I have experienced, there is always a bit of tension between efficiency and democracy. It is not just between the decision-making procedures, as

exercised by the co-legislators with the help of the Commission, and the outside world, in particular the national parliaments: the tension has also become apparent within the system. I have heard complaints from the representatives of Member States and Parliament, political groups and so on, saying that this way of doing business can lack transparency. On the other hand, we all want the best and most efficient deals possible and, therefore, I would say it is not really a question of having fewer first reading deals but perhaps trying to devise a system whereby first reading deals are as open as possible. The Council has certainly moved some way in that direction because for a large number of files, especially the more important legislative files, they do not move straight to a position, the Member States adopt what they call "a general approach". This general approach, while not a legislative act in itself, is a formal agenda item and it prepares the Council's negotiating mandate for first reading negotiations in a very formal way and, indeed, the preparations for the discussion on the general approach are as open as any other discussion within the Council. As regards the Parliament, I note that the Parliament has been looking into a code of conduct for its own internal organisation, so at least for the work in the committees, the rapporteurs who do the negotiations with the Council have to report to their committees and get a proper mandate from them before they engage in the conduct of negotiations in a general way. If all these things are taken into account it could be possible to make first reading deals more open. Nevertheless, it is true that these kinds of negotiations are very hard for everyone to follow, because first reading deals are made on the basis of the original Commission proposal only. There is no formal position adopted by the plenary of Parliament to define its position, nor is there any formal position of the Council on a common position. The negotiators themselves are in a certain difficulty as to what are they negotiating on, because they are negotiating between each other without having actually defined their own positions. It is very hard for the Commission to follow all of this I can tell you, never mind the national parliaments. It is a little bit unclear up to a certain point what is going on.

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However, as I said, the way of doing this kind of business has evolved and if you look at the way the climate change and energy package was discussed as a first reading deal, a very major and important first reading deal towards the end of last year, it had to be done in first reading. Otherwise it would not have got done before the end of the legislature and that would have delayed everything for years, and we have the Copenhagen Conference at the end of this year so it was absolutely essential the European Union had its own rules in place in order to prepare for this. There were many discussions in COREPER to prepare the different negotiating trilogues and there was intense work inside the Parliament to prepare the next stage of each step in each negotiation on each file in the package. It is true that there were two committees of Parliament involved, the ITRE Committee and the Environment Committee, the ITRE on the Energy part of the package, and the ENVI Committee on the Environment part. ITRE would have preferred second reading discussions rather than a first reading deal. In some ways, in my own heart I tend to have a feeling that second reading negotiations do give everybody within and outside the institutions a better handle on the negotiations, a better chance to prepare for the way they are going to take place, however that is not the practice and it is not necessarily in the interests of being quick conclusion of priority legislation. The next best thing is to try to ensure that, on the one hand, where the Parliament is concerned, that their new code of conduct works well to ensure that at least at the committee stage there is a clear debate, and committees are always open and can be followed by everybody, and in the Council equally these items are brought to the attention of ministers in one way or another through, as I said, the adoption of a "general approach" for example. Even in regard to the climate change package it also went to the European Council, to the Heads of State and Government. There was a rather good interlinkage there between the formal and informal phases. It can be done but we have to work at it. That would be my view essentially.

Q148 Lord Teverson: Leading on from that in many ways, what exactly is the role of the Commission in negotiations leading to a first or early second reading deal? At times are there informal negotiators between the rapporteur in Parliament and the Presidency cutting you out as the Commission?

Ms O'Dwyer: Not if I can stop it.

Q149 Lord Teverson: Heaven forbid!

Ms O'Dwyer: The key role of the Commission in all this is to get an initial proposal on the table and in preparing that initial proposal to have consulted as widely as possible, which is very much the philosophy of the present Commission. I noticed in the

Commission meeting of last week they were discussing the Communication on the Stockholm programme, the programme on justice and home affairs which is being prepared for agreement in the European Council at the end of the year, which will lead to legislative proposals but not yet. This Communication is coming out on 10 June, next week, and in that they emphasised in their conclusions the importance of the involvement of national parliaments. That means that even before there are any proposals, even just talking about them in a Communication, we would very much appreciate that input. The earliest possible stage is the time to do that as far as the Commission is concerned.

Q150 Chairman: How is that done?

Ms O'Dwyer: You receive the Communications and I presume your own internal procedures would allow you to produce an opinion and send it to the Commission through the usual channels in the same way as you produce an opinion on a piece of legislation that is already on the table.

Q151 Lord Teverson: What would you expect the usual channels to be on that? You said through the usual channels. Do you mean the national parliament communicating directly with the Commission about a legislative proposal?

Ms O'Dwyer: Formally you would write an opinion to the President or the Vice-President . . .

Mr O'Neill: It is actually a bit simpler. You email it back to the Commission. There is a Commission email address. You send the opinion there and—

Q152 Lord Teverson: I will just put it into my iPhone.

Mr O'Neill: —Mrs Wallström sends you a formal reply within a period of three or four months.

Ms O'Dwyer: That is exactly the case.

Q153 Chairman: That is our scrutiny process.

Mr O'Neill: This covers literally any item that is sent to the Commission. What is now happening is a number of houses send it simultaneously to the European Parliament and we forward it to our parliamentary committee simply for information. Various assemblies respond. It is a simplified emailed text to the Commission.

Ms O'Dwyer: Niall very kindly completed my intervention for me on this point. I was saying that formally you send it to the President and the Vice-President responsible but, in fact, as he said, there is a service in the Commission and there are email addresses. You never wait for the formal letter, you just send it through the usual email address channels. As regards our role in negotiations in general throughout codecision, but in particular at the first reading stage, the Commission has a multiple role.

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We produce an initial proposal but even though we tend to step back and let the co-legislators get on with the job at that stage we still have a number of important roles. One is we are never not guardian of the Treaties, we are always guardian of the Treaties. If we found the co-legislators going off and doing something they should not do, we will tell them so and we will stop them from doing so. Secondly, we are promoting the general European interest, that is our job and that is what our proposal is meant to be about. When the negotiations are ongoing we try to ensure that the outcome, even if it is different from our original proposal, which it often is, is still within the framework of what we deem to be the general European interest. Thirdly, we have a mediating role that we play at all stages. We have the technical expertise and we have a sense of the political constraints in both Parliament and Council as to what can be achieved. We sit in COREPER and the working groups of Council so we know what the problems of the Member States are. We also sit in the committees and the plenaries of Parliament so we know what the problems of the political groups and MEPs are and of the citizens through them. We are trying to be helpful, constructive, and at the same time put the brake on if something is going too far or not far enough. We certainly provide a mediating role and are prepared to draft in a legally correct way the amendments that the Parliament or the Council might want. We pop up with compromise proposals when it is important and useful. As regards the bilateral meetings you were talking about, they take place all the time not only between the Parliament and the Council, but also between the Parliament and us and between the Council and us, but they are not formal or even informal negotiating fora, they are just regular contacts. Preparing discussions in the Council and COREPER, we meet the Presidency in particular all the time, and we regularly seek meetings with rapporteurs and so on, committee chairs, to discuss with them how far we should go and that would be without a third party present, and they do the same, but we usually keep each other informed.

Q154 Lord Trimble: In negotiations leading to a first or second reading deal are there any key milestones of which we should be aware?

Ms O'Dwyer: As I said, the pre-legislative phase from the Commission's point of view and from influencing the Commission is the more important phase. The milestones in the legislative process are more for influencing the Council and the Parliament, ie the co-legislators. The rapporteur presents his report to the committee, and when we see that report we immediately start thinking about what our response will be and which of the rapporteur's amendments we are going to oppose, which ones we are going to support and which ones we are going to suggest they

are okay but with some amendment. It is a question of firstly when you see the report and then after the vote in committee, which is the next step after that from the Parliament's point of view. In the Council I would say when the file is discussed in COREPER is a key time to look at it. When they are discussing the preparation of a trilogue, not the first trilogue because the first trilogue is always the locking of horns between the co-legislators, certainly by the time you come to the second trilogue things are becoming more concrete and you can get a better feeling from the way things are going. As you move forward in the negotiations in first reading, more so in second reading and even more so in conciliation, the margin of manoeuvre is limited, getting narrower and narrower because people are fixing positions, compromises on certain aspects of the file are being concluded and put to one side and you concentrate on the more difficult issues. I would say there is almost a two-step approach necessary, which is first of all to try to get in early your overall approach to a particular file and afterwards, if you have something you are particularly attached to, to follow it through in the discussions and make sure either it is maintained or changed depending on what it is that you wish. For us, as well as anyone else following it, it is a moving target and you have to follow it if you have a key point to defend.

Q155 Lord MacLennan of Rogart: This is a slightly wider question but it flows from what you said. While recognising that some legislation has to be pursued in a hurry because of external factors, and you mentioned climate change and energy, we have also been told that 18 months to two years is the norm, or as near as it can be, but we are also learning at the same time that there is a squeezing of the serious give and take of negotiation so there is a long preliminary period. Would it be within the competence of the Commission to suggest better scheduling of legislation so that there can be more discussion and more scrutiny earlier in the process? You also gave an indication in an earlier answer of your sympathy with it being in the interests of the Barroso Commission that national parliaments should play a part. We do hear about the difficulties because of the process of decision-making being squeezed and the tendency to first reading deals is clearly part of that, but it is not the only issue. If I may enlarge a little. When and if we get additional matter as being subject to codecision as a result of Lisbon that tendency could become considerably worse it seems to me on the face of it. Can the Commission come forward with proposals as to how to make the legislative process more orderly, shall we say, and more transparent? I know that we could not alter the rules of any of the other institutions but you could make proposals.

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Ms O'Dwyer: I am not sure that the successive Presidencies of the Council would take very kindly to being told how to order their priorities by the Commission. They have a certain ownership of that. As you probably know, there are now the three ("Troika") Presidencies—the outgoing, the incoming and future Presidency—and they adopt a programme together of things they want to do, get done and see. They are putting pressure on the Commission to produce proposals in these areas. We have the Parliament, which is putting pressure on the Commission to produce proposals, and we have our own five-year term, so that there is a lot at the end of a legislature that had to be concluded, and there will be a new Commission coming up at the end of the year with a new programme, so things tend to get bunched at the end of the five-year cycle.

Q156 Lord Maclellan of Rogart: I was not trying to suggest that the Commission should indicate what its priorities were as opposed to the Council or, indeed, how long it would take for a particular piece of legislation. I was wondering if the framework and the conventions about how quickly matters should be considered and what necessities there were for deliberation and consultation could not be a little more explicit and open so that there can be a kind of iterative dialogue with all the institutions that are involved and something more than just the appearance of scrutiny. Obviously there would be occasions when you would have to step back from the norm but there could perhaps be a norm.

Ms O'Dwyer: I do not know if you put that question to the Parliament, but I hope you certainly do to the Council because from the Council's point of view in the management of the timing for consideration of legislation on the table, apart from always finding fault with the Commission because our proposals never come through as quickly as they would like them to do or, indeed, as we normally plan them to do, it is the Council Presidency and the Council in particular which pushes the timetable more than anything. We can certainly think about your suggestion but I am not sure how welcome it would be. I would be very interested to hear the reply from the Council's side to that.

Q157 Lord Mance: Will this not change with the Treaty of Lisbon when you have got a permanent President and we will presumably lose this pressure for activity and achievement within the six-month period? Lord Maclellan's point then might be resolved to some extent because *de facto* there will be an ability to look at things over a longer period.

Ms O'Dwyer: Certainly I think it will be a formal requirement to take account of opinions of national parliaments and a necessity to give time for that and that will have an impact on the way legislation is

programmed through the other institutions, through the Council and the Parliament. On the whole, one has to be selective about this. There is a lot of routine and fairly technical legislation that I presume would not be involved with that kind of necessity for delay because some of it might be not very important but rather urgent because of a deadline coming up. Certainly there is some scope for considering how to ensure that the system works better. I will ask my authorities and if it is deemed appropriate we can make suggestions, but, as I said, I have a horrible feeling that the Council would not welcome it. Please ask them.

Q158 Lord Teverson: In terms of the move to first readings and stopping the process at that point, does that reduce the role of the Commission significantly? Obviously you are there right at the initiation of the legislation, but if the deal is done at first reading does that really cut the Commission out in comparison with particularly a second or third reading?

Ms O'Dwyer: There is the academic line which seems to think that it does. Actually, the academic line tends to think that the conciliation phase cuts us out more than anything else rather than the first and second reading phases because, after all, at first and second reading we can still define whether or not unanimity or qualified majority is possible in the Council. The role of the Commission could be reduced if we were not involved, as we are, so intimately in the discussions in the trilogues and if we are presented with an agreed decision between Council and Parliament it is very hard to block that. We are involved very closely in the trilogue meetings, where we are the ones very often who are mediators or helping to steer the discussions or advising how they go. As I said, we are also involved in the discussions on these matters very intimately in COREPER and closely involved, but in a less directive role, in the parliamentary committees. The Commission's role has not really been reduced in any way would be my sense. It is based more on influence and knowledge of the files and reliability as a partner in the discussions as opposed to any formal Treaty role.

Q159 Lord Teverson: Could I just take up that different aspect which you raised which was the different role of the Commission in legislation which is as guardian of the Treaties.

Ms O'Dwyer: Yes.

Q160 Lord Teverson: How many times at first reading stage has the Commission put up a red card and said, "Sorry, those amendments are *ultra vires*, out of the scope of this"? Is the Commission's view on this normally agreed and is the next step the ECJ? Is there active intervention often in that area?

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Ms O'Dwyer: It does not happen in the first reading because what happens is first of all it is very difficult to get unanimity in the Council against the Commission. It is possible, but it is very rare if we flag up something in first reading, or even in second reading. In first reading it has never happened that we have flagged up a difficulty which then was maintained. It does happen, but very rarely. I checked the figures before coming here and it has only happened about ten times in the last 20 or so years that the Commission has forced unanimity in the Council at the common position stage.

Q161 Lord Teverson: What I really meant was not so much that you disagree with it from a policy or political point of view, which is the next question, but you disagree with it in terms of it not being an amendment that is valid under the Treaties.

Ms O'Dwyer: That is the same thing essentially.

Q162 Lord Teverson: They are exactly the same thing?

Ms O'Dwyer: If our proposals are weakened or whatever and we do not really like the amendment but it does not hurt from an institutional point of view, we are not going to do that. There is one case that I remember in conciliation where there was no unanimity in the Council, and as you know in conciliation the Commission cannot force unanimity in the Council, and that is the key as to why we do not have the problem in first and second reading. It was on one of the LIFE programmes where the Parliament and the Council agreed comitology procedures against the Commission's views of how they should be. This was an institutional issue to do with the Commission's rights and we said, "We are going to the Court", and we did. We had a partial victory. That is extremely rare, but it can and does happen.

Q163 Lord Teverson: Please forgive my ignorance here. You are saying the only time the Commission would go to a position of not agreeing was if the amendment was not correct, but surely it could not be passed anyway if it was not correct? I do not understand.

Ms O'Dwyer: There are different interpretations. In first reading if we really do not like what the Parliament and the Council are doing we can withdraw our proposal, full stop.

Q164 Lord Teverson: So it is a nuclear option?

Ms O'Dwyer: It is a nuclear option. It is enough just to threaten to do it to stop this from happening and to stop unanimity in the Council.

Q165 Lord Teverson: Has that happened?

Ms O'Dwyer: Very rarely. The threat is enough.

Q166 Lord Teverson: That is an important area of how the Commission actually influences what happens at that first reading stage.

Ms O'Dwyer: Yes.

Q167 Lord Teverson: That is pretty important to remember.

Ms O'Dwyer: It is in the back of people's minds but it is never actually said.

Q168 Lord Teverson: So if you do not like it you just take the ball away.

Ms O'Dwyer: Yes.

Q169 Chairman: On these informal trilogues we were told today by the representative from the French Representation that there are 40 people who attend these meetings.

Ms O'Dwyer: There can be.

Q170 Chairman: It does seem to me that that is hardly an intimate negotiating environment. It would seem to suggest that negotiation takes place outside that meeting.

Ms O'Dwyer: There are always discussions outside every negotiation, but they were exaggerating a little bit because they were talking about the climate and energy change package where there were four files and that meant four rapporteurs and all the political groups, all the assistants of the rapporteurs. If it is on one file only a trilogue is smaller, there are not 40 present. There might be between 15 and 20 but certainly not 40, except where you have these enormous package deals and these are mega-meetings. They have happened a lot in the last year because that is the way the proposals have been presented by the Commission. Also, under the pressure of time they had to be negotiated altogether, and not separately and brought together at the end. That was the other option, that one could have negotiated the four files in the package individually and then brought them together but it was preferred to do them as a package. In those cases the trilogues were very heavy and long but, on the other hand, when you are negotiating one file at a time most of the people around the table stay quiet and the real discussion is only between the key actors, which is the Presidency, the rapporteur and the Commission.

Mr O'Neill: With the trilogue on climate change, at one stage if you just popped out of the room you would see first of all the French ministerial delegation come out, which was 12 people, but of whom perhaps only one or two were speaking in the room. Our rapporteurs came out surrounded by four or five officials. There would have been the Committee

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Secretariat and a Commission delegation. There was quite a big difference between the numbers of people in the room compared with the number actually speaking. You might have had a third of those or even less who would have had a speaking role and a lot of others observing as such.

Q171 Chairman: I would hate to negotiate with a lot of observers behind me, I can tell you.

Ms O'Dwyer: It is our form of parliamentary scrutiny.

Q172 Lord Mance: You have explained the integral part that the Commission plays in trilogues, and no doubt you will see all the preliminary documentation and we have heard of the four-column document which is prepared, so you see the individual Member States' positions.

Ms O'Dwyer: Yes.

Q173 Lord Mance: Presumably you do not see any documents which have been exchanged between Council members in the process of achieving whatever position is being taken by the Council?

Ms O'Dwyer: Oh, yes we do.

Q174 Lord Mance: You see literally everything?

Ms O'Dwyer: We are sitting in COREPER and discussing it. Talking about informal discussions, in COREPER we would see ourselves as the partner of the Presidency. When the Presidency has a difficulty with different Member States we are in the margins of the meeting, in the corridors, meeting that Member State, trying to understand their problems and help the Presidency find something. We mediate between Council and Parliament, but before we ever get to mediate between Council and Parliament we are actually mediating with the Presidency inside the Council, in COREPER, so we know intimately what is going on.

Q175 Lord Mance: I think you said you also meet Parliament without the other parties being there.

Ms O'Dwyer: Yes.

Q176 Lord Mance: You are the one common feature at almost any stage in the process.

Ms O'Dwyer: That is correct, yes.

Q177 Lord Mance: One aspect which has interested us from the point of view of national scrutiny is the extent to which it would be helpful for national parliamentary scrutiny to have greater access to documents which are exchanged internally, non-papers and so on, positions which are taken at various stages in the negotiations and are not published, like the four-column document. Have you got a view on that? Would it undermine the operation of the European legislature if that sort of access were

available to national parliaments as part of their scrutiny?

Ms O'Dwyer: It is very hard to say. As you know yourselves, the process of negotiation is very delicate and the manoeuvring that goes on in any negotiation where you have the positions of each institution laid out and their compromise suggestions and so on in the different columns is obviously interesting if you want to know what is going on. But if the document were made widely available it might change the nature of the negotiation so that people would be less inclined to put their positions on paper and just talk about them in the corridors or exchange little manuscript pieces.

Q178 Lord Mance: We heard that suggestion from the Minister for Europe in London. May I ask about a possible contrary argument which is that, as we understand it, a number of national parliaments do receive exactly these papers, Denmark and Finland are the examples that come to mind, and I think in theory the German Parliament is entitled to under the arrangements, and whether it does I am not so sure, but certainly the French Parliament, we hear, receives diplomatic reports. If that is the position it does not seem to be causing any problem.

Ms O'Dwyer: From the Commission's point of view there would not be a major problem. I am just trying to put myself in the shoes of the negotiators and I think this is a question to be put to the Council more than anybody.

Q179 Lord Mance: It would not be a problem from the Commission's point of view?

Ms O'Dwyer: I do not think so, no.

Q180 Lord Mance: We were in the slightly odd position in the Committee I chair that we were reviewing a proposal on access to documents, which is quite controversial at Member State level, and we heard exactly what you have represented from the Minister for Europe but we were able to point out that, in fact, the very four-column document was published on the web with an academic commentary by Professor Steve Peers. It seemed a little incongruous that it was not made available to the British Parliament.

Ms O'Dwyer: That would certainly be true. It is just a question of judgment as to at what stage it is wise to make available wider access to what are internal negotiating documents between a very small group of people. It is a question of checks and balance as to when it is appropriate and what is to be done with those texts as well. If you can prove that they are genuinely useful to you in the exercise of parliamentary scrutiny I think there would be no difficulty. If there is a risk of lobbyists getting their hands on texts and upsetting the whole balance of the

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negotiations, playing one Member State off against another or one political group against another in order to undermine the discussions then we are in deep trouble. It is a question of political judgment.

Q181 Chairman: If these documents are on the web of some Member State they are there, are they not, they are published and out, anybody can grab them?
Ms O'Dwyer: If they are, then they are.

Mr O'Neill: The Finns have this element of parliamentary control over the negotiators from the Council side taking part so the Council feed back the documents to the Finnish Parliament, but the counterbalancing act is the Finns have opted entirely out of giving their comments to the Commission independently of the Finnish Government. They do not take part in the consultation process offered to them by the Commission, so the so-called "Barroso Initiative" is ignored by the Finns and they simply say, "We are happy with our scrutiny system which we have determined with our national government and we will work through that process, but we will do nothing publicly that would undermine the role of our government in negotiations".

Q182 Lord Trimble: That is because their government involves them wholly in the negotiations.

Mr O'Neill: Exactly. The counter element is that they do not see parliament acting independently of government and that is not a factor they take into account.

Lord Trimble: They do not need to because they are fully involved in the governmental decisions.

Q183 Chairman: What do the Danes do?

Mr O'Neill: The Danes are broadly in a similar position. Whether they go so far as to publish documents on the net, I do not think they go that far. In order to preserve the possibility of receiving from their government and Council representatives the documents they want, the counter element is effectively they are not negotiating in the public domain with the Commission and Council negotiations, they are happy to input via their Council operation. There are others who do not pursue that approach.

Q184 Chairman: Are you aware of trilogue meetings taking place where either the Council Presidency or the Parliament's rapporteur arrives without a mandate agreed by their institution?

Ms O'Dwyer: Yes, for two reasons. Sometimes the trilogues are not intended as real negotiating fora. Trilogues can be a meeting to decide on procedure, on which issues to discuss first, which priorities, or to explore what the margins are that are possible for progress. You can have technical trilogues for

drafting purposes. When the Council arrives in what I would call a negotiating trilogue without a mandate they are in deep trouble with the Parliament, I have noticed that on occasion. Parliament gets very fed up when they do not have anything. On the other hand, I am not entirely convinced that the rapporteur always has the full mandate either when they come to discuss. This is the trouble, at second readings and conciliation essentially every institution has its mandate voted by its different institution and the only thing you are looking for there is a mandate to change your position, to adapt it to meet the other side, and it is always the Parliament saying to the Council, "Why haven't you got a mandate to change your position to meet us and agree our amendments, or negotiate a compromise on the amendments?" The Council may have difficulty in agreeing any further modification to what they have already agreed and they just want to hear explanations as to why the Parliament wants something. This does happen in trilogues to do with explanations, exchanges of information. Yes and no. The most productive trilogues are those with mandates but they are not always like that. They are not always productive either.

Q185 Chairman: How would you advise us to improve scrutiny by our national Parliament?

Ms O'Dwyer: I probably hinted it at the very beginning, which is to come in as early and as quickly as possible. A late opinion is late, you have passed the position. In the preliminary stage, the pre-legislative stage, the stage where the Commission is preparing its proposal, if you have already notified and flagged up a particular concern at that stage then it is much easier to follow it through in the subsequent legislative stages because your interlocutors will be aware that you have a concern in this regard, and you can say, "It is referring back to what we said about the Commission Green Paper, so why are you not doing this, that or the other now?"

Q186 Chairman: In a way we deal with the Council through our member Government and we deal with ministers, we deal with the Commission directly, but how do we deal with the Parliament?

Ms O'Dwyer: I am not sure.

Q187 Lord Mance: Going back one stage, will a Green Paper have received consideration at the same level as a proposal which follows from it? In other words, you are encouraging us to submit responses to Green Papers and that sort of consultation document. Will those responses simply be reviewed by the same people who have prepared the Green Paper or does it go to a different level?

Ms O'Dwyer: It will feed into the process of the legislative phase. It will feed in at a deeper level.

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Q188 Lord Mance: Effectively it is the same people who reconsider the matter, is it?

Ms O'Dwyer: That is the difference between a Green Paper and a legislative proposal. A legislative proposal is already out there and we do not want to change our proposal, but if we are at the Green Paper stage we are very open to changing what we have suggested in the Green Paper. That is true for any

interlocutor really. I believe in national parliaments being involved and I really think that if you have a point of view and get it in early it is much easier to take account of it and it will be taken account of.

Lord Mance: We shall do so.

Chairman: Thank you very much. That has been very useful and helpful. A good insight into how things work. Thank you.

TUESDAY 2 JUNE 2009

Present	MacIennan of Rogart, L Mance, L Sewel, L (Chairman)	Teverson, L Trimble, L
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Examination of Witnesses

Witnesses: MR HUBERT LEGAL, Director (Codecision) Legal Service, Council General Secretariat, and MR JONATHAN DANCOURT-CAVANAGH, Senior Desk Officer, Codecision Unit, Council General Secretariat, examined.

Q189 Chairman: Thank you very much for coming. This is a meeting of the House of Lords European Union Committee. This is an evidence taking session and a note will be taken of the evidence. You will receive a transcript soon and will be able to correct it. We are fairly early in our process of collecting evidence but late in the day today, so we have kept the best until last. We have already met our Minister for Europe in London, Caroline Flint, who has given us the views of our Government. We have received a vast amount of written evidence covering a wide range of correspondence. We have had an exceedingly useful day today getting evidence from representatives of the various institutions. I wonder if I could start off by identifying what we see as a potential tension. That is on the one hand the move towards more first reading deals with informal trilogues and at the same time the emphasis on increased and improved scrutiny by Member State parliaments. Your views on that possible tension would be very helpful.

Mr Legal: The first preoccupation of the Secretariat General of the Council is the smooth conduct of the codecision process. In this respect the evolution towards more first reading or early second reading agreements is welcome because it saves time and avoids lengthy negotiations between the two institutions which are co-legislators. In addition the views of the Member States are generally not better taken into account in second readings or in conciliation than they are in the first reading. The Joint Declaration of the three institutions on Practical Arrangements for the Codecision Procedure, adopted in 2007, states that acts should be adopted at first reading “whenever possible” (point 11). So we try to operate in that way. On the other hand the involvement of national parliaments is a Treaty obligation and it will be a strengthened Treaty obligation under the Lisbon Treaty, in particular under its Article 12. My assessment in this regard is that a first reading agreement is not necessarily something more detrimental to the effective taking into account of the national parliaments’ positions than would be an agreement in second reading or in conciliation. In particular, one has to bear in mind that there is no time limit for first reading agreements

in Article 251 of the Treaty. The average duration of such procedures is 14 months at this time. That leaves ample time for national delegations to take into account the concerns of their respective parliaments and to give them the possibility to intervene fully during this period. I do not think first reading agreements are necessarily detrimental to a satisfactory input from the national parliaments in the codecision process. The second aspect of your question deals with the way codecision is organised and the way discussions are organised with Parliament. Well this organisation (procedures and methods) is in keeping with the objective that I mentioned of reaching an agreement with the European Parliament as soon as possible. There is no standard format for trilogues. You mentioned that you have discussed trilogues with other institutions during the course of the day and you must have realised that formalities are kept to a minimum. The idea is that there must be as many contacts as necessary and at the appropriate levels between the institutions, the Commission being present, in order to reach an agreement as early as possible. If I were to remain general in my answer, (you could ask more specific questions about organisational aspects of the codecision procedure later). I would say I do not necessarily feel that an agreement in second reading or in conciliation makes it easier for a national delegation to incorporate the views of their national parliaments in the process.

Q190 Chairman: It is just moving quickly, moving nimbly and moving early, is it not?

Mr Legal: Not necessarily quickly because you have second reading agreements which are reached in a relatively short time and first reading agreements which can take two years. Recently we have had experience of relatively short codecision procedures, leading to first reading agreements, (for instance on the climate change package), but such a short period of time is an exception.

Lord Teverson: What is the Council’s procedure for conducting informal trilogues? Who attends those meetings on behalf of the Council? When in the process do these meetings begin? Do they begin

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before the Council has agreed a mandate? How are the discussions reported back to the Council?

Q191 Chairman: Everything you know about trilogues!

Mr Legal: It is a simple structure but there are some rules. As I said in my introductory remark, it is not a process that is very formalised in the form of texts: it is a practice—but a codified practice. I already mentioned the Joint Declaration on Practical Arrangements for the Codecision Procedure which has been agreed by the three institutions. It is a public document, which attempts to clarify the practice established during the ten or so years of codecision which had elapsed when it was agreed. Who sits in the trilogues? There are by definition three partners the Council, the Parliament and the Commission. Trilogues are generally called “informal trilogues” which means there are no binding rules about the way they are composed. Who sits for the Council? It depends on what type of trilogue it is, but there are always two parties attending on Council side the Presidency and the Secretariat General of the Council, including the Legal Service. Near the end of a Presidency term the incoming Presidency also attends negotiations which are to continue under the next term in order to be aware of the background to negotiations when they take over. It is for about the last month of a Presidency that we have this type of arrangement. Who sits for the Presidency? It depends at what stage of the process we are and at what level. The arrangements foresee the possibility of two levels on the Council side: the working party level and the COREPER level. We do not hold trilogues at the Council of Ministers level except in conciliation. It is the only case when the Council is led by a minister for trilogues. During the first reading it is either working group level or COREPER level. If it is working group level it is normally the chairman of the working party and on the Parliament side there will be the rapporteur. That can be nuanced, but that is the general picture. When it is COREPER level, it is the President of COREPER on the Council side and opposite him is the chairman of the parliamentary committee responsible for the file, with the rapporteur, of course, and the Chairs of other interested parliamentary committees. The Commission is there also and they may come in great numbers when it is an interesting problem. In a room which is usually larger than this one, we have up to 20 people from Parliament and 20 people from the Commission side, plus experts from the Presidency and from the General Secretariat on the Council side. Do other members of the Council attend? No. Only the Presidency is there. As for the mandate, there is no legal obligation for the Presidency to obtain a formal mandate to go to an informal meeting. There is a de facto obligation to have a mandate before a

trilogue where an agreement is to be made with Parliament but you can have as many informal talks with Parliament as is deemed necessary. You can also have meetings which are not trilogues, by the way: you can have bilateral meetings for instance between the Presidency and the Parliament. As such a trilogue does not always imply an obligation to have a mandate. You can have very early informal discussions about the agenda, for instance. When a new Presidency begins they meet with the Chairs of all parliamentary committees to review the files, to arrange the calendar and those types of things, and to have an overview of what is the likely prospect of success on this or that dossier. Although this is the general idea, however when it comes to an informal trilogue at the level of COREPER, the Presidency will always have consulted COREPER beforehand. The Presidency might have a general mandate, not necessarily a mandate on a text but a general mandate on where to go. The only time when it is an absolute legal necessity for the Presidency to have a mandate from COREPER is when they sign the letter to Parliament at the end of the first reading saying, “If you were to vote amendments along those lines the Council would be ready to approve them”. That must be formally approved by COREPER. This is a step where there is a legal necessity to have the approval of COREPER, for the President of COREPER to sign this type of letter. Before that stage it is a matter left to the political decision of the Presidency. It must make its assessment of what will be acceptable or not to COREPER and it might decide to stay at working group level or to move the file up to COREPER and to use the COREPER level type of informal trilogue depending on the needs and particularities of each individual case.

Q192 Lord Mance: Could you just explain in practical terms what that means, the difference between a working group trilogue and a COREPER trilogue. You have just said at different levels but what does it mean, a different level of representation on the part of the Member States or what?

Mr Legal: If you have a trilogue at the level of the working group it usually means that the case has never been discussed at COREPER level in Council.

Mr Dancourt-Cavanagh: The Presidency would be represented by the chairman of the working group as well.

Mr Legal: That is right.

Q193 Lord Mance: But without having got authority from COREPER?

Mr Legal: There is a possibility that they have. When we receive a proposal from the Commission it is normally studied first at working group level to sort out the technical difficulties and to know what are the initial positions of the various delegations regarding

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the text before coming to the main negotiations on the principal issues.

Q194 Lord Mance: This is a working group on which all Member States would be represented?

Mr Legal: Exactly. It is a subsidiary of the Council, which has two preparatory levels. You have, on top, the committees, namely COREPER, and COREPER has under it a number of working groups which are specialised, for instance on road transport, energy, environment, all types of technical issues. There are experts sitting in these groups. To be clearer, working group level means expert level. At expert level there might be trilogues and in that case the file normally has not been studied by COREPER before because it normally moves to COREPER only when the experts have sorted out the main technical difficulties of the text. When the Permanent Representatives have said what they had to say or given political orientations, the file might go back to expert level because there are things to sort out, so there is the possibility of returning to the working party. What I want to say is that there is a choice for the Presidency to take the discussion within the Council and in trilogues at expert level or at the political level. It is a question of the assessment of the chance of success in each particular case. The ball is passed back and forth between the Council and the Parliament. There is always precise feedback to the delegations by the Presidency of how the negotiations have been conducted. On the other side, however, the Presidency does not normally give to the Parliament the details of the position that has been individually taken by this or that delegation, for obvious reasons. It gives the position of the Council in general terms. However, although the Presidency or the Council Secretariat do not give details, the Parliament seems to be usually fully informed about national positions expressed in Council.

Lord Mance: How is Parliament fully informed? Where does it get the information?

Q195 Chairman: Leaks!

Mr Legal: From anywhere. From people attending COREPER meetings or reading reports about them, I suppose. National sources, outside sources, institutional sources . . . It is hardly for me to say. We have had some recent cases in which there were delicate problems concerning one or more delegations in Council in important legislative packages where, as soon as something was said in COREPER, even indicating that discretion was required, Parliament was immediately informed.

Q196 Chairman: How surprising!

Mr Legal: That is certainly no surprise for anybody but that can be a problem.

Q197 Lord Trimble: Where there are negotiations leading to a first reading deal are there any key milestones of which we could be aware? Are relevant documents distributed to Member States in advance of those milestones?

Mr Legal: As I said, there is one certain milestone which is the decision to send a letter to the Chair of the relevant Parliament Committee indicating that the Council would be ready to support certain amendments if they were to be voted by the Parliament in plenary. There are milestones before that, but I do not think it is possible to have a model that would be applicable to all cases. We could say that before the first trilogue with the Parliament at COREPER level, at ambassador level, there is normally a mandate, following a first discussion of the case in COREPER, and that is a milestone in a way—but when that takes place depends very much on the Presidency's assessment of the political situation for one file or another, so it cannot be organised in a systematic way. Concerning documents, they are always available to inform delegations before any meeting of COREPER. Sometimes however they are only ready a few days or a few hours before the meeting, when we are under time constraints. The Presidency will prepare documents, with the help of the Secretariat about their last trilogues with the Parliament which are sent to the delegations but these might be issued as late as the day before COREPER meets about this subject. It can be a week before, but a week before is the optimal situation at present where we have almost 50 per cent of our agreements made in first reading. It is true that there is a problem with lack of time for delegations to react. As far as the Secretariat is concerned, we encourage the Presidency to do its very best to send documents at least two days before any COREPER meeting. But the time scale can be very tight..

Q198 Lord Trimble: You are talking there mainly in terms of what happens in COREPER. With regard to the parliamentary side you have made reference to the Joint Declaration, but earlier this afternoon we were given a code of conduct for the parliamentary side of codecision which was adopted by Parliament last month which obviously is not yet in operation. I am curious as to how much formality is going to attach to this code of conduct because it does seem to be trying to put a degree of formality into first reading deals.

Mr Legal: It is an internal document of the Parliament. Collectively, we are working on the basis of the Joint Declaration, which is a relatively recent document, which formalises our common practice. There is no doubt in the Lisbon structure, if we get to that stage, we will have to discuss again with Parliament the way we operate together, essentially at

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their request, I suppose, although the legislative procedure of the Lisbon Treaty is not that different from the current codecision procedure.

Q199 Lord Trimble: I have only had a glance at the Joint Declaration. I do not think there is any conflict between the Joint Declaration and the code of conduct. What the code of conduct is doing is adding a greater degree of formality to decision-making in Parliament and the parliamentary committees. You seem sceptical of that.

Mr Dancourt-Cavanagh: There should not be any conflict between the two. I would be very surprised if there were.

Q200 Lord Trimble: The initial rule talks about “the committee before entering into negotiations to take a decision by majority and adopt a mandate”, and looking at paragraph four of the code of conduct it seems as though they are trying to discourage first reading agreements without there having been a vote in committee. That gives a degree of formality and if things are happening in the committee presumably that is happening publicly and is going to be publicly available and maybe that gives some stage in the proceedings that other people can focus on.

Mr Legal: On our side we try to tell the Presidency to stick to certain rules, although they are not formal rules, because it helps having some consistency in the conduct of business on the Council’s side. However, I hope that we shall not get into an overly bureaucratic procedure on the handling of these types of things because it might cause unnecessary difficulties. These two institutions have to work together on a daily basis. From the Council’s side, work with the Parliament for any Presidency is more than 50 per cent of the workload. The Presidencies spend more time with the Parliament than with their colleagues in the Council or in COREPER. We must find ways which are efficient and productive.

Q201 Lord Trimble: If you are a legislature and the Parliament, together with the Council and Commission’s involvement, is involved in the legislative process, a legislative process ought to have a degree of formality to it, especially if people outside the legislature hope to be informed of and make representations about the content of that legislation.

Mr Legal: Sure.

Q202 Lord Trimble: So you need a decent set of Standing Orders.

Mr Legal: We do have those, I think.

Mr Dancourt-Cavanagh: If I could just interject to say that obviously the code of conduct is an internal document within the Parliament and that really questions on how the Parliament goes about its own business are not for us in the Council Secretariat to

comment on. I would say that in my personal experience of over 100 codecision negotiations it is very rare for the Parliament to seriously commence a negotiation before the committee has voted in first reading. It is usually when the committee votes that the rapporteur feels he has knowledge of what his fellow MEPs are thinking. Until then contacts tend to be more about identifying the key factors which are of interest to the rapporteur. In particular, if the rapporteur is from one of the smaller parties he is less qualified, in less of a position to be able to determine what the rest of the Parliament thinks. If I understood what you quoted just then, I think that is probably a formalisation of what is already the case. I would also say that occasionally you get rapporteurs who are very keen to try and get a deal even before the committee votes, but that very rarely works. It does happen but it is over-ambitious usually.

Q203 Chairman: You mentioned Lisbon and, assuming we are going to get the Lisbon Treaty, do you see that making any difference in the way codecision works, apart from the obvious extension of the scope?

Mr Legal: Apart from that I would say not essentially. It makes the process more equal in formal terms. In the current structure of Article 251 there are some drafting remnants from a period when the Council and the Parliament were not equal in the codecision process. For instance, the Parliament first proposes amendments and then the Council approves, or not, amendments by the Parliament and adopts the act in first reading. In practice, the balance is very even now between the two co-legislators and I do not think that will change very much in the future. There are some nuances, of course, and that will probably lead to further clarification between the institutions on the way to make the process more transparent and more effective, but I do not expect it will have a very fundamental impact. Codecision is still a relatively new process.

Q204 Lord Teverson: Post-Lisbon, if it happens, a lot of the JHA areas will become part of codecision, yet particularly on the parliamentary side what is going to happen in terms of, say, Britain and the huge level of opt-outs in that area? Does that affect the chemistry of how codecision is going to work where you have, I do not know, a British rapporteur or a British Presidency?

Mr Legal: The question of the opt-ins or opt-outs is a special issue on which you have published interesting things. However, I do not think this is really central to the organisation of the codecision process as it exists now. There are already JHA codecision procedures; Lisbon only entails an extension as far as JHA is concerned, albeit an important one. Agriculture and fisheries will be part of the picture as well. Codecision

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matters were almost exclusively a matter for COREPER I and now will be a matter also for COREPER II, but that is very insubstantial and unimportant in political terms.

Q205 Lord Mance: I want to ask some questions which are relevant to national parliamentary scrutiny particularly with regard to the documents which are integral to the process but which are not available on a day-to-day basis to us in the UK Parliament. Take the four column document which is an integral element of any trilogue and of codecision generally referred to in the guide and in the code of conduct. Those documents are not made public by the Council or regarded as documents which could be made public by any of the institutions. That is the position, is it not?

Mr Legal: The position is that when a document is marked "LIMITE", which is normally the case for a four column document, it is available to the institutions and to governments. It is not made available immediately to the public.

Q206 Lord Mance: Where do you see a national parliament in that dichotomy?

Mr Legal: That is an internal matter for Member States.

Q207 Chairman: That is for the Member States to decide?

Mr Legal: Speaking for the Legal Service, I would say that this is covered by the principle of the procedural autonomy of Member States. What they regard as government is an internal matter. In all Member States parliament is part of the legislative process, but what is covered by the terms "government" or "national administration" depends on the laws and traditions of Member States and I do not think it is for the Council to have specific views on that.

Q208 Lord Mance: As far as the Council is concerned you see no problem in what we understand, in fact, to be the practice with some Member States, that their national parliaments are given automatic access to this sort of document?

Mr Legal: We see no problem with that so long as it remains LIMITE. That is the purpose of having "LIMITE" on documents (which is not a formal classification as you know) that they are not made available to the public immediately. If the consequence of a document being given to a parliament is that it becomes immediately and automatically accessible to the general public then it is no longer LIMITE. It is also the way we proceed internally in the Secretariat. We do not make reference, for example, to LIMITE documents in documents which are made available to the public. I can give some explanation for that based on

Regulation 1049/2001 regarding public access to documents of the institutions. There are two main exceptions to public access. There are others, but those which are relevant are the exceptions in Article 4(2) and Article 4(3). Article 4(3) of the Regulation on access to documents covers ongoing procedures. During ongoing legislative procedures there is not a general right for the public to access documents if the fact of giving access would undermine the institutional decision-making process. That is the protection of ongoing procedures, which means that once the procedure is completed the document is no longer limited in access. The special exception in Article 4(2) concerns in particular legal opinions. One of the reasons for having a document marked LIMITE is when it contains references to an opinion of the Legal Service or when it is an opinion of the Legal Service. The other reason is when there are references to the views expressed by one Member State or another, or when there are drafting proposals made at one stage by one or more, delegations, or by the Presidency, which may not necessarily reflect the official position of the Council because they are preparatory and provisional in nature. They appear in working documents which are official documents marked "LIMITE". The consequence of that is that these documents are not immediately made accessible to the public. Of course, any member of the public may make a request to be given access to these documents and then there will be a decision made on this by the Court of Justice. This is an efficient control as you have seen in the case of Mr Turco, the plaintiff in a very recent case in which the Court of Justice underlined the role of transparency in the Community legislative process and the fact that information for the public in this legislative process was an important element of democracy and stressed that the principle was the right of access and that a denial of the right of access was an exception, which could never be automatic. When a document is published it is distributed to delegations, to institutions, but it is not immediately put on the Council's website accessible to the public. The logic of that is to retain some degree of flexibility in the negotiating process on the Council's side.

Q209 Lord Mance: Firstly, assuming that access to such documents was made available to a national parliament you have made clear there would be no problem as long as they did not infringe the LIMITE provision themselves and, therefore, presumably you accept it would be open to them to conduct their scrutiny and publish the results of their scrutiny and give a view as long as it does not disclose the substance of the contents of the LIMITE documents.

Mr Legal: That is difficult to answer because we are in a grey zone. It would depend on how direct was the reference made to the position of the Member State.

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For instance, there might be general remarks or remarks which do not reveal the contents of the LIMITE document.

Q210 Lord Mance: Scrutiny is not designed to disclose individual positions; scrutiny is designed to express a view for the national government to guide it, and one can do that, it seems to me, without disclosing the position which any particular government has taken, all you are disclosing is your own position. You simply say, "In our view, this is the way the negotiations should go". Would that be acceptable?

Mr Legal: I would say, with the proviso I just mentioned that I would not necessarily consider that there is a problem on the Council's side with this type of approach.

Q211 Lord Mance: Could I now go back to slightly more basic issues which you touched on a moment ago. LIMITE is said expressly to be a distribution marking, not a classification level, but I was not clear from what you said whether or not when you mark a document "LIMITE" you regard yourselves as making a classification judgment under the Regulation on access to documents, under Regulation EC 1049/2001. As I understood it, at one point you were suggesting that you are making such a judgement, but then you said that anyone can make a request and if that is refused it goes to the European Court. This suggests that you are not. Are you or are you not making a judgment in terms of that Regulation when you mark a document "LIMITE"? *Mr Legal:* Yes.

Q212 Lord Mance: So it is a classification.

Mr Legal: It is not a classification in the sense that it means the document is restricted, secret or confidential. I think it is clearly an assessment based on article 4(3) of the Regulation, concerning the exception of ongoing procedures. We are not saying there is anything necessarily secret in the document or even anything that is confidential, but we are saying it is something which, to ensure the good conduct of ongoing procedures, should not be made immediately accessible to the public.

Q213 Lord Mance: In reality you take that view of every single negotiating document because they are always marked "LIMITE"?

Mr Legal: Not always. These documents are marked "LIMITE" in three cases: when they contain a reference to a legal opinion; when they contain the specific views expressed by Member States; or when they contain drafting proposals which are of a provisional nature: which are seeking compromise, evolving and not final. That is at least how I understand it. I would characterise those as the three

main cases in which a LIMITE mark is given by the competent directorate-general in the Council. I hope this is done in a consistent way, but perfection is impossible; there might be slight inconsistencies here or there. Sometimes LIMITE documents are quoted or mentioned in a public document. That happens, it is inevitable. Certainly when we mark "LIMITE" it means we do not give immediate access to the public. When we do that we are making a determination under the Regulation on access to documents. If a document is not immediately made public we must justify that. I am telling you that, in my own view, the only justification for that is that we consider that disclosure of these documents would seriously undermine the Council's decision-making process. Otherwise we should not use this marking.

Q214 Lord Mance: If I may say so, it does sound as if it is an automatic blanket categorisation of every document which falls within one of the three categories you have mentioned: it either refers to a legal opinion or contains specific views expressed by a Member State or some proposals for redrafting. If that is right it does seem to me very interesting to ask how that reconciles with the European Court's decision in the case you mentioned of *Sweden v Turco* which said that you have to look at documents on an individual basis and consider very carefully, document-by-document, whether there really is such confidentiality to outweigh the strong interest in transparency.

Mr Legal: I do not know if my explanation was interesting, but your remark is very interesting. We have not heard the views of the Court as yet on this exception granted under Article 4(3). We have heard the views of the Court on the exception in Article 4(2) and certainly the Court holds that we must make a specific consideration in every case. I understand that what the directorate-general does when they put "LIMITE" on a document is make a specific examination of the case at hand. For instance, when I mentioned the specific drafting amendment, in some cases that does not require LIMITE; there is no general rule. There might be a proposal which represents a concession or a possible compromise and that is not necessarily LIMITE. There is a need to evaluate the situation before making the determination and it is taken case-by-case. For legal opinions it is not automatic because there are legal opinions which are very well known and which cannot be justifiably withheld from the public. In some cases there were references made in public documents to opinions from the Legal Service, for instance on the cross-border enforcement of road traffic penalties. A reference was made to that in public documents because it was central to the debate. It is a balancing act between transparency, which is a key element of the legislative process, as the

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Court indicated, and the need to retain some flexibility. What would be the consequences if we did not have this LIMITE marking, but only the protection of restricted, secret or confidential documents? It would mean that all negotiating documents would be meeting room documents without any number, without being on the files. We would have “non-papers” all round the place, as is the case in other fora, documents which do not exist if you ask for them, they have no classification, no reference number, nothing. The existing situation is a much better one. We do have many documents at every meeting which are there with a classification number and there is a limit on access, but they exist and if there is a request by somebody to have them we must consider this request on a case-by-case basis, which we do in the Legal Service. Every request for access to documents is duly taken into account.

Q215 Lord Mance: The logic of your position is that you have already considered it when marking it “LIMITE” and have determined that it should remain confidential under Article 4(3), so to consider it again ought to lead to precisely the same result.

Mr Legal: LIMITE is not confidential, it is not immediately accessible to the general public.

Q216 Lord Mance: As you rightly pointed out a moment ago, documents do get published on the net, sometimes through national parliaments even.

Mr Legal: There is nothing we can do about it.

Q217 Lord Mance: Has there ever been any objection to that? Have you ever done anything about it?

Mr Legal: No.

Q218 Chairman: Are you likely to do anything about it?

Mr Legal: When we happen to find documents on the Internet which are not meant to be there, it usually appears that they are there by mistake. There are cases of publication which are deliberate but also cases, for instance, of one Presidency explaining the results they have achieved in this or that area and then publishing a whole list of documents they had not checked or read through and which contain very specific references to legal opinions for instance, which should not have been there. That happens purely by mistake. Those sorts of things inevitably happen. In that case we would probably send a letter to the authority of the Member State concerned indicating that this should not be on the Internet. That is all we can do.

Q219 Lord Mance: Can you think of a case when you have done that?

Mr Legal: No.

Q220 Lord MacLennan of Rogart: There are more ways than one of restricting accessibility of documentation to national parliaments and one of them is often a constraint of time. Sometimes time may be of the essence because there is some urgency, but how would the Council view a normative scheduling of the legislative process that ensured before acts occurred that there was a procedure to enable proper scrutiny and comment?

Mr Legal: Of course, in terms of legal basis we have the protocol on the role of parliaments which mentions a minimum time lapse which should be respected to allow national parliaments to intervene before certain decisions can be adopted.

Q221 Lord MacLennan of Rogart: The reference, please, as we are being legal?

Mr Legal: It is the Protocol on the role of national parliaments in the European Union, 1997, Protocol No.9.

Q222 Lord MacLennan of Rogart: That does not seem to have an effect, does it?

Mr Legal: The situation can certainly be improved and article 12 of the Lisbon Treaty should facilitate that. It is clear that we already receive many parliamentary reserves from certain delegations. We have had many in the past year because negotiations have been conducted in certain files before a formal position was taken by COREPER. There was a very short period of time to study documents and we had parliamentary reserves placed by delegations which they maintained until the day of the Council in some cases. There are very few examples of delegations expressing on the day of the Council that they are not in a position to lift their parliamentary reserve because they have had no time to consider the issue. The risk that parliaments would only be in a position to express their views once the game is practically finished, because the deal has been reached before with the Parliament, has to be taken very seriously. The advice we give to the Presidencies is to bear in mind the need to allow for a sufficient period of time—otherwise we get into difficult situations when you have delegations indicating they do not know which way they want to go. You put on the delegation the burden of saying whether they have a positive or a negative parliamentary reserve, but what does that mean? It puts on the delegation, on the ambassador, the obligation to assess what are going to be the views of their parliament, an issue which it is not their job to do normally. That is indeed a difficulty that we have in mind. A compromise is necessary between this and the need to decide rapidly. We have difficult negotiations in which it is clear that closing the deal can sometimes be achieved only by leaving little time

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to the delegations—and I am being very frank with you: it happens. If you have a very complex file with strong national positions one way or the other, and if you put one Member State in such a position that if they vote against they will be the one to make the lives of all the others impossible, that certainly limits that Member State's margin of manoeuvre. Sometimes handling such situations implies leaving little time to the Member State concerned, particularly when we are at the European Council and there are important and difficult negotiations. That is something to be taken into account because it is true that in absolute terms, in broad and abstract terms, not all the things we are discussing are as extremely urgent as they are said to be. There is an element of political pressure in this time factor. Real urgency is something else. For instance, we are currently discussing important things like the European patent which has been under discussion for 15 years. Climate change is a very urgent matter particularly in view of the conference we are going to have in Copenhagen at the end of the year. But things like the statute for a private European company or the European patent are not as urgent and could be prepared in a quiet and organised way. But we must take into account the fact that each Presidency is in a hurry because they want to conclude things before the end of their six months and to show a good record.

Q223 Lord Maclean of Rogart: I understand that, but is that really a sensible way to legislate?

Mr Legal: In matters for the Council, the Presidency is the master of the agenda, under the control of the Council, not under the control of the Secretariat General.

Q224 Chairman: We are coming to the end of our session but I wonder if I could pick up on something you said. You mentioned the amount of time that is taken up in working with the Parliament to get agreement. In a way when we are doing our job, scrutiny, obviously we are interested in the three legs

and we can access the Council in a way through our Government, through the Member State and we can write and meet directly with the Commission. What is your advice on how to deal with the Parliament?

Mr Legal: The advice for national parliaments on how to deal with the European Parliament?

Q225 Chairman: Yes.

Mr Legal: I do not think I would give any advice on that!

Q226 Chairman: Come on, give us a chance!

Mr Legal: You think national parliaments have no contact with the European Parliament on legislative issues?

Q227 Chairman: Very little.

Mr Legal: If national parliaments have no contact with the European Parliament on legislative issues, they are in a very different position from the Commission which has many contacts and from the national delegations which also have contacts. Discussion with Parliament is a second chance. If the Commission does not meet with full success in their discussions with Council on a proposal, certainly a discussion with Parliament is a way to reach a more favourable compromise in the view of the Commission. Also, when national delegations are in a minority situation in Council they have got people they can talk to in Parliament. Whether national parliaments should have regular contacts with the European Parliament on issues in codecision, I suppose it is in their interest, but I thought that was the case.

Q228 Lord Mance: That is the case, is it not, with some countries and they arrange regular meetings?

Mr Legal: Possibly, but I cannot really speak about that because it is very much outside my knowledge and my competence.

Chairman: Okay, I think that is it. Thank you very much for your frankness and openness. Thank you.

TUESDAY 9 JUNE 2009

Present	Cohen of Pimlico, B Dykes, L Hannay of Chiswick, L Howarth of Breckland, B Jopling, L MacLennan of Rogart, L Mance, L Plumb, L	Richard, L Sewel, L (Chairman) Symons of Vernham Dean, B Teverson, L Trimble, L <hr style="width: 20%; margin: 5px auto;"/> Haskins, L
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Memorandum by Richard Corbett MEP, European Parliament

I shall limit my submission to those aspects of questions 1–4 on which I feel qualified to submit some thoughts.

The codecision procedure itself

Question 1

1. It is sometimes suggested that the codecision procedure makes national parliamentary scrutiny more difficult than the previous decision making procedure where the European Parliament was merely consulted on legislative proposals and the final decision rested entirely in the hands of the Council. This is because scrutiny now entails keeping track of the “moving target,” with draft legislation reshaped through successive readings in the European Parliament and the Council.

2. I would submit, however, that national parliaments always faced the challenge of a “moving target.” Commission proposals invariably faced the prospect of being heavily amended during the internal discussions within the Council. It was ever thus. Indeed, if anything, the possibility of second and third readings in the European Parliament and the Council under the codecision procedure make it potentially easier for national parliamentary scrutiny to have a second bite at the cherry—all the more so as the “moving target” becomes visible as it passes between the institutions and as it is processed in the European Parliament, while the internal deliberations of the Council were always behind closed doors.

3. Of course, “first reading agreements” limit that particular advantage. But a first reading agreement is, at worst, the equivalent to the old single reading procedure, or, at best, a small but significant increase in scrutiny, as they do at least involve the European Parliament publishing and then adopting the agreed position before the Council takes its final decision.

Does the confidential nature of some negotiating documents hinder parliamentary scrutiny?

Question 1(b)

4. The Council’s internal deliberations remain as confidential under the codecision procedure as they were previously. Even if Council itself now meets in public when finalising legislation, COREPER proceedings, conciliation negotiations and “trialogue talks” are behind closed doors. However, the Parliament’s position in entering into such talks is a matter of public record. The initial Commission proposal is, of course, a public document too.

5. This means that, as before, national parliamentary scrutiny and comment will be addressed to the initial Commission proposal, knowing that this is the starting point of a process. Unlike parliamentary legislative procedures in the domestic context, when bills are only occasionally amended during their passage through parliament, in the EU context the Commission proposal really is a first draft and is almost always amended by the European Parliament and the Council.

6. Thus, as before, national parliamentary deliberations must be couched in terms of responding to the initial proposal and putting forward suggestions as to how it could be improved and amended, setting down limits as to what might be acceptable and giving guidance to government ministers as to the outcome they should seek. If the prolonged nature of some codecision procedures means that a further opportunity to do so arises in the course of the procedure then national parliaments should be able to seize such opportunities.

Question 2

7. Whether national parliaments have found certain procedures to be particularly difficult or complex to scrutinise, I think that is a question for national parliaments to answer. I would suggest, however, that the complexity of such subjects lies in their subject matter and not in their subjection to codecision: if anything, codecision will increase—and in any case not lessen—the opportunities for scrutiny by national parliaments. They certainly increase the possibilities for the European Parliament to scrutinise—and let us not forget that the whole purpose for having a full time elected European Parliament is to ensure extra parliamentary scrutiny at that level to complement the scrutiny exercised by national parliaments.

Governments and the new institutions

Question 3

8. Traditionally, it was up to each national government to provide its own national parliament with the appropriate documents for parliamentary scrutiny. The trend in recent years has been for the EU institutions to transmit certain categories of documents directly to national parliaments. This trend has been reinforced by treaty provisions and by the technological development of the internet making such transmission more speedy, cheaper and easier.

9. Within the EU institutional triangle, the European Parliament has insisted that, in the context of the codecision procedure, it be treated equally with the Council ie that any document submitted to the Council should at the same time be submitted to the European Parliament. It seems to me that a natural starting point for national parliaments would be to insist that they too have such equality of treatment, whether it be provided by their own government or by the EU institutions.

Question 4

10. It seems to me that there is nothing to prevent national parliaments sending the results of their scrutiny to those beyond their own governments. I think that the European Parliament, Commission and other national parliaments would welcome such information.

8 April 2009

Examination of Witnesses

Witnesses: RICHARD CORBETT, a Member of the European Parliament and ARLENE MCCARTHY, a Member of the European Parliament, examined.

Q229 Chairman: Thank you very much for coming to give evidence today, particularly in the light of events last week. We have benefited enormously from reading your contributions. I understand that Arlene McCarthy is quite happy for you to lead off and she will join us when she can. Is that right?

Mr Corbett: Indeed yes.

Q230 Chairman: Housekeeping things. This is a formal evidence-taking session. It is being webcast. That should not be of any concern to you whatsoever because we have never received any evidence that anybody has ever seen us. A full record of your evidence will be taken and you will get a copy of the transcript for any minor corrections which may have slipped in. Would you like to start by drawing our attention to the main issues around the whole issue of codecision and national parliamentary scrutiny?

Mr Corbett: May I first thank you for kindly inviting me? Forgive me for my attire and for not wearing a tie. I have had some complicated travel arrangements today which I will not go into. Thank you for your kind opening remarks. My colleague Arlene McCarthy is on her way but we had agreed that I

would go first and she would complement me with some specific examples. One of the main challenges which is perceived from the perspective of the national parliament is that you are having to deal with a moving target. What starts as a Commission proposal gets amended, moves on. Parts of that procedure are in public, the European Parliament part notably, parts of it are not in public, most of the Council part; that is changing of course now when it gets to the Council itself. Then there are the mysterious conciliation negotiations and triaologue, which are of course not in public and certainly not webcast. I would submit, however, that it has always been the case for national parliaments that you have to deal with a moving target. Even in the old days of the simple consultation procedure, which still applies in some areas unless and until the Lisbon Treaty comes into effect, under the consultation procedure as it always was you had a Commission proposal which was liable to be amended in the Council of Ministers, possibly as a result of the European Parliament opinion but possibly and usually for entirely different reasons, amendments that different Member States pushed for. In that sense I would

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submit that the challenge is not new. You always had to deal with the fact that a Commission proposal may well be, indeed usually is, amended. So you have to frame your response to it in terms of saying yes, that is broadly acceptable as it stands, or not, except this bit or that bit; we would view favourably certain changes in that direction, we would view unfavourably certain other changes in a different direction. Does the fact that there is now codecision with extra readings both in Parliament and in Council change that? In one sense those extra readings might make it easier, because with a longer timescale you might have a new version of a document, time to have a second bite at the cherry. Where you do not, because there is in effect a first reading agreement between Parliament and Council, then you are no worse off than before. That is the thrust of the written evidence I gave you. That being said, there is always room for improving procedures. We have been looking at the rules of procedure of the European Parliament and we already have a code of conduct which we have been thinking of making binding in our rules about clarifying the ground rules, as it were, for Parliament's delegation when there is a trialogue or any form of negotiation with the other institutions, notably prior to a formal conciliation. What we have in mind is requiring any guidelines that are given to the delegation to be approved formally by the responsible parliamentary committee. Of course, the delegation is in principle negotiating on the basis of a text which has already been adopted, at the very least at committee level or indeed, if it is a second reading, after the first reading, by the Parliament itself. But, guidelines for the negotiation saying "Look, given the situation in Council we might be prepared to drop this, but you really ought to make a fist of obtaining that" are what we are considering making subject to a formal approval in a public meeting by the relevant parliamentary committee. Those who then represent the Parliament in discussions with the Council presidency or whoever Council chooses to negotiate with Parliament would be expected to follow those guidelines of course. Who negotiates? Typically it would include the rapporteur of the responsible committee, the committee chair and one of the vice presidents of the European Parliament. I think you probably know already that for the full conciliation delegation, our delegation is led always by a vice president of the European Parliament. When codecision started we looked at various models about how to compose our delegation to the conciliation committee. The German model for negotiations between the *Bundestag* and the *Bundesrat* is that they have a permanent team to negotiate on all subjects; they become specialist negotiators, as it were, and are presumably representative of the political majorities in the *Bundestag*. If you look at the United States

conference system between the Senate and the House of Representatives, they compose a completely different ad hoc delegation each time for both chambers and always from among members who voted for the majority position of the House or the Senate. We went for a sort of hybrid. We said we would have three permanent members of our conciliation delegation, composed of three vice presidents of the Parliament, who thereby become specialists in the practices, the procedures, the precedents of conciliation. The remaining members would be made up on an ad hoc basis each time but must comprise the rapporteur and the chair of the committee responsible. The overall composition must reflect as closely as possible the composition of the Parliament as a whole in terms of the breakdown between the various political groups which would be proportional to that, or as proportional as possible. That is for the full conciliation team but, as you know, with the enlargement of the European Union, what was originally 12 + 12 has become 27 + 27 and that is not a very good forum for negotiating, hence the rise of trialogues. Within the trialogue we would normally include the relevant vice president who is leading on that particular dossier, the committee chair, certainly the rapporteur. I will leave it at that for my introductory remarks.

Q231 Chairman: Thank you very much. May I kick off with the first question? What we have seen over recent years has been the increase in the number of first reading and early second reading agreements and the proportion has risen significantly. How significant do you think that move is in the whole codecision procedure? Do you think it is likely to continue at its present level, to increase or fall back a bit?

Mr Corbett: I think it might fall back a bit. There are many reasons for it. One of course is the treaty changes agreed to the codecision procedure in the Amsterdam Treaty enabled first reading or second reading agreements. After all, why continue to send a text back and forth for successive readings if you have already approved an identical text anyway in first reading. That was the original idea. It followed from that to say that if your positions are quite close in first reading already, can you not have a few discussions and agree and obviate the need for second and third readings, if they are not necessary? From that then it went a stage further and quite often substantive negotiations on divergent positions began to happen at first reading or sometimes at second reading to avoid conciliation. The reasons are sometimes to save time, sometimes simply to avoid unnecessary extra procedures, sometimes there is a time constraint like in recent months the fact that the European Parliament was nearing the end of its life prior to the elections. However, there is a reaction to it because it

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is often argued that when you do it already at first reading and on the basis of a position adopted only by the parliamentary committee, not yet having gone through the whole Parliament, there are negotiations with the Council, you agree on a text or a set of amendments, you come back again to the committee and then go to the Parliament, there is often a feeling elsewhere in the Parliament that matters have been left too much in the hands of the particular committee. You might say that it is up to political groups to deal with that or you might say that opinion-giving committees should have a greater involvement at that stage but nonetheless it has created a feeling that on important subjects, politically sensitive subjects or where there are matters of substantial detail which need to be looked at with great care, confining yourself to a single reading in that way is curtailing what should be a longer procedure with extra scrutiny which would be provided by second readings and if necessary a third reading. There has been a little bit of a reaction. Part of the reaction was to clarify that the mandate given to the delegation should be clearer for everybody to see and any member who wishes to be involved in the discussion can be. The other part of the reaction has been to say no, that we should not do this when the subject matter is important and complex.

Chairman: Arlene McCarthy, thank you very much for coming to see us. Welcome. We have really just started and we are in the first round of questions and answers. I will leave it to the two of you to decide how you want to play it back to us. Let us go further with first and early second reading agreements.

Q232 Lord Dykes: You have done a tremendous amount of work on these matters over the years and I am sure people are very grateful for that. Going on from question one, focusing on the time span between the Commission and its adoption of a proposal to those first of early second readings, obviously one would imagine there must be lots of people who really want to follow that procedure and what is going on with a particular legislative instrument as closely as possible, not just parliamentary members of national scrutiny committees and other Members of the European Parliament but lots of people outside, lobbyists in the European Parliament, lobbyists approaching the European Commission, a whole host of people, trade associations, everybody; you can imagine an enormous list. Do you find in your experience that the problem for those who really want to follow in detail what is going on with these negotiations is the time span between those two stages, the Commission's adoption and the first or early second reading? Or do you find it is more, in your experience, that the key negotiations and decisions tend to be bunched together in quite an abrupt manner and

therefore it is very, very difficult for outsiders literally to follow the radar screen?

Mr Corbett: I think rather the latter. The legislative procedure as a whole is not normally rushed, nor should it be when you are adopting legislation which has to apply to most of the continent with diverse situations and with different starting points on an issue with different political realities in different countries. It is right that the Commission should consult widely before it makes a draft. It is right that then there is ample time for the Council of Ministers and the European Parliament to examine it, to consult, for national parliaments to give their views and so on. It is unusual for the whole legislative procedure to be rushed; there would have to be a very urgent reason. The difficulty lies in these negotiating stages where the deal is clinched, as it were, where compromises are reached, are brokered, sometimes in meetings which are of course not open to the public in these negotiations. That is where there is often a criticism. That being said, the initial positions have been staked out by that stage. Anybody who is following a dossier, a subject, will know the Commission's view, the view of that Member State, the view of this Member State, the Parliament's position, at least at committee stage if not Parliament as a whole, so they will know that the give and take will be within these parameters. Trade associations or others indeed should at least be aware of that if they have been following the subject.

Q233 Lord Dykes: Would it be artificial to try to adopt an evenly spread-out basis. That is presumably impossible, is it not, because it depends on the subject and negotiations and so on, the complexity of the subject?

Mr Corbett: These things do vary by subject but wherever a negotiation is needed at some point to establish a compromise between different positions—and when we are talking about European legislation that is the norm, you never ram things through by narrow majorities in the European Union, nor should you, it is more a consensual style of decision taking and that does involve give and take—you will always come to a moment where there is that give and take, so that moment may always be a problem for somebody who is not in the room.

Ms McCarthy: Perhaps I might add some practical points. The way we are sharing is that Richard is the expert in terms of the procedure and I have for the last three years been taking through and chairing many codecision and first reading agreements and I can perhaps give you a little insight into how I have dealt with that. In my committee, the Internal Market and Consumer Protection Committee, we have had 30 codecision reports adopted by the EP in the last two years. Of those, nine have been first reading agreements, none of them has been early

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second reading agreements and trialogue negotiations have been used to reach a normal second reading agreement in just two cases. It does show that the first reading procedure is something that we are perhaps taking advantage of in terms of trying to get through legislation. I do not think there is a real link between the adoption of a proposal and the conclusion of the legislative process and the choice that we decide to go for a first reading agreement. If I look at the Timeshare Directive, it was over 15 months from when we had the proposal to the conclusion and that is much more than many full second readings, so that was a longer process than many which go to a second reading agreement but the committee and Council will have entered trialogue negotiations with us. We did a full investigation, we had hearings, we had debates and indeed we took advantage of the very excellent House of Lords report which was produced on the Timeshare Directive review. I tabled some amendments from that report. I do not think that just because you have a first reading agreement there is not ample opportunity for national parliaments to be involved. It is a question of upstream thinking. Yes, when we go to doing the final agreements for a first reading agreement, it can be condensed into one or two months. That can be fast but I do not believe that is the critical point of the agreement. Much of the work has been done in advance and as Richard has said, we have hearings, we have a lot of preliminary negotiations with the Council and the Commission and we certainly do not embark on any proposal for a first reading agreement if we do not have substantive agreement already with the Council and Commission. We will not open a first reading agreement if we are so far apart there is no possibility of a final agreement. There is no forcing. Many people have made the point that sometimes the pressure can come from the Council, not from the Commission or the Parliament, because of the six-month rotating presidency. With the six-month rotating presidency, that means that presidency wants to notch this up as one of their achievements in their presidency and Lisbon, it is argued, could take away some of that pressure but that is a Council pressure, that does not come from the Parliament. If I take an example of the Defence Procurement Directive we did, the Weapons Directive, where we banned convertible weapons in other EU countries, where we regulated that; a very important issue for the UK. There we took that over three presidencies and it took a lot longer. We did not do the agreement in one presidency, we had to carry it forward over three consecutive presidencies and it was a first reading agreement that did not happen very quickly; it took quite a long time.

Q234 Lord Richard: Could you lift the veil a bit on informal trialogues? They are slightly shrouded and we should be very interested to know what actually

happens? I have a series of questions which I should like to put to you, if I might. First of all, who attends these meetings on behalf of the Parliament? How are they picked? How is the responsible committee in the Parliament kept involved? When in the actual process of legislation do these trialogue meetings actually begin? Do you ever get any conversations going on before the committee has held their first reading? Do they ever begin before the Council has agreed a mandate? The other one we would be very interested in—at least I would—is to what extent are the preparations for an informal trialogue through direct contact between rapporteur and COREPER Chair more important than the trialogues themselves? How much of the negotiation is actually the trialogue and how much is it screwed out in informal dialogue first? I suppose fundamental to the whole series of questions is how we can keep national parliaments involved in that.

Ms McCarthy: Again I am speaking from the perspective of a committee where we have done this many times. In IMCO the negotiating team is led by myself as chair and certainly since I have been chair I have always insisted that I lead those negotiations because it is my responsibility to take forward the result of the committee vote. The committee has voted, it has a position and I say that because sometimes individual rapporteurs will try to regain in the informal trialogue what they lost in committee, so it is very important that there is a firm line taken by the chair in terms of the committee's position. It is made up of the rapporteurs and the shadows attend. Group coordinators, group staff; where you have here parliamentary, House of Lords committee staff, group staff will attend. They can nominate in place of a shadow if they wish to send someone else but that person does need to be briefed on the position of their own group. How do we then keep the committee informed? It is my job to report back to the coordinator. As you probably know, the coordinators on each committee are effectively the political whips who take decisions and they must go back to their own individual groups to make sure they have political agreement for taking forward any provisions. So I will inform my coordinators.

Q235 Lord Richard: May I just interrupt here just on that very point? The informal trialogue has taken place, something happens there which causes a change to be made. Do you go back to the committee at that stage or do you wait until the whole thing is negotiated?

Ms McCarthy: I go back to the coordinator, but the coordinator is not the full committee. The coordinators are the political group leaders, so for the Christian Democrats, the Socialists, the Greens, all of those who are shadowing the rapporteur; if there is a Socialist rapporteur, there will be shadows for every

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other party. I go back to them because we have executive meetings of the chair, the vice president and the political coordinator. The political coordinators must take responsibility for their group to take the positions forward. They will consult with their own individual members on that committee and then the rapporteur, in addition to that—if you like, there is another triple lock—will come back to the committee and report on those informal discussions. He will come back as the rapporteur saying “This is what we agree” or “We haven’t got agreement” or “We have four outstanding issues”. That gives the committee members, the ordinary members, not the political group, the chance also to intervene in that.

Q236 Lord Richard: It is a very formal trialogue is it not rather than an informal one.

Ms McCarthy: It is informally formal I would say in the sense that what we do not want to do is be accused subsequently of not having given the groups enough time to meet and there is a very important reason why we do that. If we go ahead without getting the support of the political groups, we could then find ourselves in a position where we agree with the Council and the Commission, we go to sign off that piece of legislation and then, just before we vote in Parliament, suddenly there is a problem with a political group, let us say for argument’s sake the Liberal group shadow and someone says they were not informed of the changes or they were not informed that we had made that decision or made an agreement or made a compromise on the issue. So it is important for us to give ample opportunity to do that, otherwise we could end up with the whole legislation going down in the Parliament and that of course is not in the interests of spending time trying to find a first reading agreement, only to have it then voted down in a full plenary session. May I perhaps emphasise that we do not even start the informal process until after we have had a committee vote. There has to be a committee position. Rapporteurs themselves can only have informal discussions with Council or Commission staff. They can do that, shadows can do that, but we do not have the informal meeting where we decide whether we can go ahead with the first reading or whether it is something we have to take to plenary and allow the full plenary to vote. That can only be done after you have a committee vote, therefore I have a mandate as committee chair, the rapporteur has a position and the shadows have themselves also agreed that position. Council normally will also not enter into that process unless they have a QMV position behind their negotiating mandate. They will not come in to us saying they are ready to start informally if there are six or seven Member States not sure what they are doing. You need to have a negotiating mandate.

Mr Corbett: It might be that the term “informal trialogue” is something which has come down through history and should be dropped now because indeed it is now formalised. It was originally to contrast the formal conciliation committee with the informal contacts, but these have now developed so much that that word informal is indeed misleading.

Q237 Lord Richard: How much contact is there between the rapporteur and chair of COREPER? Is there much contact between the chair of COREPER and the rapporteur?

Ms McCarthy: Yes and I will have significant contact with the chair of COREPER. I will have the chair and the working group and the Council staff quite frequently in my office to make sure that we are—

Q238 Lord Richard: Moving in the right direction.

Mr Corbett: In your capacity as committee chair.

Ms McCarthy: Yes, in my capacity as committee chair I will do that.

Q239 Chairman: When we were in Brussels we took evidence from someone who had been involved in the French presidency and they described the informal trialogues and you finish up with a large number of people at these meetings which is not very conducive to negotiation. We had a discussion with the person. What came out was that a lot of effort seems to go into the relationship that Lord Richard has indicated, the relationship between the rapporteur, the COREPER chair and one or two people to get as much agreement informally outside the formal meetings than actually in the informal trialogue itself. Is that fair?

Mr Corbett: Yes.

Ms McCarthy: I undertook many dossiers under the French presidency. Again it depends on the nature of how the committee works and it is important that I say that because some committees work very differently. Some committees have chairs who are more hands off. I tend to take my responsibilities very seriously. Again I give you a practical example, when we had a quite difficult dossier on the control and acquisition of weapons, where we have in the European Parliament a very active inter-group on hunting and shooting, I was not prepared to accept at the last minute that a vice president of that group was allowed to join my committee at the last minute then come into that negotiating group in order to change the position that had been taken by the committee over a year ago. I run a very tight ship in the sense that I will not have a lot of people in my negotiating team. You have to have followed. As you well know, because you are very experienced in these issues, many of these dossiers are extremely technical and it is important that we have a rapporteur and shadow who are prepared to follow that assiduously from the

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start of the process through the hearings, through taking evidence right through to the final negotiating team and therefore you cannot swap and change.

The Committee suspended from 4.50 pm to 4.59 pm for a division in the House.

Q240 Lord Plumb: The procedure has been set out extremely well so far and I am sure that every Member of the European Parliament understands the procedure, but not many people do in this House. There are two things I would like to hear your views on. One is possible reform of some of the procedures so that they are better understood. Secondly, how you could better liaise with national parliaments. This was raised only yesterday in a meeting I was at that there does seem to be an enormous void here. Questions were being asked all the time of course during the election “Yes, but what do they do?”. This is the most important area of concern and perhaps criticism that we hear from people outside but certainly from people within national parliaments.

Mr Corbett: That is a wider question than just the trialogues and the conciliation procedures.

Q241 Lord Plumb: But it is the most important.

Mr Corbett: It is indeed very important. Having gone through a European election campaign with no debates and next to no European content as it were, I feel very strongly along the lines that you do. One thing which precludes a wider public understanding of the way European legislation is adopted is because we have so many different procedures: there is codecision, there is consultation, there is still on the statute book though not often used cooperation, assent procedures and so on. One advantage of the Lisbon Treaty, should it come into force, is that it would simplify that and the codecision procedure would become the normal regular legislative procedure and at least the bottom line of that is easy to explain. Any European legislation put forward, drafted by the Commission, to become law has to be accepted both by the Council, representing national governments, accountable to national parliaments and by directly elected MPs in the European Parliament; a double hurdle if you like but a double quality control, a double test and if you get agreement of those two bodies you have European legislation. If one or the other does not agree, you have no European legislation. That bottom line, classic bicameral system as it were, is at least easy to explain. The devil of course is in the detail but I would submit that is the case here as well. How many members of the public know the difference between ordinary bills and hybrid bills and the different readings in the Lords and the Commons and the report stage and exactly what order they go in? Most of the wider public would not know that. They do

know that there is scrutiny by two different parliamentary chambers, each bringing their own perspective and their own degree of expertise. If we can at least get a wider understanding that that exists as well at European level, that no laws, no legislation can be adopted without double scrutiny, ministers from governments accountable to national parliaments and directly elected MEPs bringing an extra level of scrutiny, not substituting for but additional to that of national ministers, that would be a good thing. As to national parliamentary involvement, I think the main focus of that should be of course on the minister representing your country in the Council. I think the advantage of what has built up over a number of years, but would be sort of reinforced and strengthened by the Lisbon Treaty, of what will be an eight-week period of allowing a prior scrutiny by national parliaments before the Council or the European Parliament take a position on an issue, if national parliaments take advantage of that fully, they should be in a much better position to shape beforehand the position adopted by the Minister who represents them or their country in the Council. That is up to you though. It is not the European Union which can tell you how to organise your national parliamentary affairs.

Q242 Baroness Howarth of Breckland: May I pursue this issue of understanding? I think that understanding the ways of the European Parliament and Commission is of a different dimension from understanding one's national parliament. I do wonder what more could be done to help the general public really to understand in a broad sense what is happening. There could not be a lower level of understanding or a greater scepticism than has been demonstrated recently in this country amongst the general public. As far as Parliament is concerned, it has been quite difficult for us to find ways through. Some of our committees have certainly found a niche in which to get their report and get it to the right place at the right time to influence, but that takes quite a lot of skill and advice from quite skilled people as we have as our advisers. If you are an ordinary person on the street it is just about incomprehensible. That does not mean that it has to change, but I wonder what plans you would have. If you were going to tackle this job of educating the general public of Europe, how would you take it forward?

Mr Corbett: The ordinary man or woman on the street would also think your procedures to be complex unless they began to familiarise themselves with them. At least they would have an understanding that anything that is proposed to become law has to be approved by the House of Commons and in many cases at least looked at and amended by the House of Lords as well. Similarly at European level, if we can simplify, which the Lisbon

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Treaty intends to do, and have at least a normal legislative procedure of a similar kind that proposals to become law have to be approved by the elected parliament and by the ministers and governments responsible to elected national parliaments, at that level at least that would be a basis for a wider public appreciation that what we have in the European Union is democratic. Part of our problem is not so much the lack of information about how the European Union works but deliberate misinformation that is put out from certain sources, people who go around saying that we are creating a centralised super state where 75 per cent of our laws are adopted at European level by bureaucrats, which is something I heard a lot in the last few weeks and of course it is absolute nonsense. The House of Commons Library estimated at nine per cent the volume of legislation adopted at European level. It is not adopted by bureaucrats, it is adopted by ministers and elected MEPs but that is not widely understood and it is incumbent on all of us involved in public life to try to make that better understood and I would like to see the media do likewise, but that is perhaps a forlorn hope.

Ms McCarthy: May I add a point on the media? If you have time, I would recommend members look at a recent BBC *The Record* report which was very cleverly done actually following the process of legislation and it was done in a very user-friendly way. It is rather difficult on technical dossiers to make these relevant and accessible to the public. It was done by Shirin Wheeler, one of the BBC correspondents who has been in Brussels for a long time and understands how to make these issues interesting and accessible. In fact when I was chairing a first reading agreement on the ban on the import of seal products, a very emotive issue for the NGOs, a 40-year campaign by NGOs, they were out on the forecourt of the Parliament with a giant seal, et cetera, there every week following our negotiations, indeed—to answer a previous point—they often had the Council recent texts before we as Members had them, so a Member State was probably leaking them to them—that was very well done because I as chair allowed the BBC to come in for the first time to watch me lead some of the negotiations, for them to be informed who was at the table. They then went to the commissioner and interviewed the commissioner who had brought forward the proposal saying “Will you accept that the Committee vote has changed your position and will you change your mind in the Commission to follow the Parliament’s view now?”. Then we had the Member State and COREPER negotiating for this also interviewed by the BBC. So it was a very good way to show in fact how this is a process which can actually lead to a decision and in a way that was very relevant to what people wanted to see because it was very clear to us that people wanted

a ban on the import of seal products; consumers certainly did. We already had a mandate from a written declaration, which is the equivalent of an early day motion, some two years in advance of that so we knew what the voting parliament would decide on it which made our job easier on the first reading agreement. It is certainly the case that all the way along that process the BBC reporter would say to me “Are you now anticipating you may lose a first reading agreement?” and indeed we had to work up to the wire on it. The media has a very good job to do on this issue and could do more to make it accessible. I certainly agree that what we need to do in terms of national parliaments is exactly what your committee has been doing, for you to influence these issues upstream. We had a very good timeshare report from the House of Lords which we used very actively both in our evidence and in the amendments which were tabled. We are also awaiting a report on consumer rights which we will look at with great interest because it is a very complex piece of legislation which we do feel needs more work and the work of national parliaments is very important in helping us to navigate our way through some of the complexities of these issues.

Q243 Lord Trimble: When we were in Brussels last week we saw a paper containing a code of conduct for the conduct of these negotiations which I think you were the author of. Could you tell us just exactly what is the status of that code of conduct? Has it just been recently arrived at?

Mr Corbett: It went through the conference of committee chairs first and then through a conference of presidents as a guideline. What I was referring to in my introductory remarks is that we are considering putting that in the rules of procedure of Parliament itself.¹

Q244 Lord Trimble: So it is not actually in the rules of procedure at the moment.

Mr Corbett: No, at the moment it is a guideline and we were thinking it had worked quite well, it had improved things, so we put it formally into the rules of procedure for the next Parliament.

¹ *Note by witness:* The European Parliament has approved this idea when it adopted the Corbett Report modifying its Rules of Procedure on 6 May. Amendment 59 Parliament’s Rules of Procedure Rule 65 a (new) (to be introduced under Chapter 6: Conclusion of the Legislative Procedure) Rule 65a Interinstitutional negotiations in legislative procedures 1. Negotiations with the other institutions aimed at reaching an agreement in the course of a legislative procedure shall be conducted having regard to the Code of Conduct for negotiating in the context of codecision procedures (Annex XVIe). 2. Before entering into such negotiations, the committee responsible should, in principle, take a decision by a majority of its members and adopt a mandate, orientations or priorities. 3. If the negotiations lead to a compromise with the Council following the adoption of the report by the committee, the committee shall in any case be re-consulted before the vote in plenary. However, this will only come into force on 14 July with the new Parliament.

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Q245 Lord Trimble: I could see how there were some advantages in the code of conduct but it seemed to me at the same time also that it had too much flexibility in it. While flexibility is very convenient for those on the inside of the system, for the people who are looking from the outside flexibility means they then do not know and have difficulty in working out just where things are in a procedure, if the procedure is too flexible.

Ms McCarthy: It is fair to say that the code of conduct came about as a result of the discussions that we had in the conference of committee chairs in that we felt that we did need to look at best practice, what had worked in committees in terms of conducting first reading negotiations but also that there had been complaints, exactly as you are saying, that there was not enough transparency, that people did not understand what was going on, that the pace was sometimes very fast and that is why there is this full report back to committee now, texts must be available in advance. You are absolutely right to say that they are guidelines and I may operate them but every committee chair does not have to operate them and I choose to take forward as chair my first reading negotiations. I could delegate that to a vice president or I could delegate that to a rapporteur if I wished.

Q246 Lord Trimble: If this code of conduct is now going to be made a part of the formal rules of procedure, will it be done in the way that it is presently drafted or will the drafting be looked at again?

Mr Corbett: We were looking at some improvements to the drafting.

Q247 Lord Trimble: I have been told in advance not to get into the detail if you are proposing any amendments at this stage.

Mr Corbett: A set of revisions to the European Parliament's rules of procedure was adopted in May on the basis of my report. My text was slightly modified, but entry into force has been postponed to the next Parliament.

Q248 Lord MacLennan of Rogart: I take your point and we heard it in Brussels from a number of quarters, that it is best to feed in upstream and early in the process and the eight weeks you referred to as being helpful is obviously helpful. The real dilemma we face as a national parliament is not just, as I see it, indicating to those who are participating in the Council meetings where we as a country stand on these things but how do we react to the progress of the legislation through the European process because there will be changes recommended by others? I am wondering whether it is at all practical to have national parliamentary input into the later stages of negotiation. I would be interested to hear your view

on that. If there is to be any kind of input, would it not help that process? We understand from statements from the President of the Commission and others that they would like to have it in principle. It does seem to me that some temporal framework enabling countries to have a greater dialogue or even dialogue outside their own countries would be helpful.

Mr Corbett: You are right that upstream is better; that is true of any legislative procedure. It is true in the national context as well. If you can influence the drafting of a government bill before it is drafted, your point of view is probably more likely to progress than if you come up with an amendment later in the procedure. Certainly being as upstream as possible is an advantage. Does that mean you should not intervene later on? That is up to you. There is nothing to stop it, but I would distinguish between two types of intervention. One is vis-à-vis ministers in your government, that is your executive accountable to Parliament, where you have a formal role. The other is seeking to influence other participants in the process, be they other Member States, either directly to their governments or via their national parliaments, or be it Members of the European Parliament. It is up to you to decide whether you want to go down that road and whether it is fruitful. There is nothing to stop it, but it is not quite the formal relationship which exists between you and your minister.

Q249 Lord MacLennan of Rogart: I understand that but I have a sense that at least lip service is paid to the concept of national parliaments being part of the process and not just, as we were told, ideally things can take between 15 months and two years. In that space of time it is not very sensible to suggest "We would love to hear from you at the beginning of this 18-month or two-year period". It seems to be that it is not just with the proposal as it comes out initially.

Mr Corbett: What stops you coming back again? Nothing.

Q250 Lord MacLennan of Rogart: Lack of awareness that the stage has been reached and lack of awareness of how the debate is going and to some extent the compression of these processes which you talk about as the negotiating process seems to me to be the reason why it is impractical in some ways to come through.

Ms McCarthy: It is quite simple. I do not accept that there is not enough time for national authorities to intervene but the Parliament's committees, particularly when you have a codecision committee, have changed their procedures now in a way because of the better regulation agenda. So we are not rushing through reports, we are taking quite a bit more time and the parliamentary committee timescale has

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extended. This is why we sometimes go for more first reading agreements because we take a lot longer to do impact assessments; we now have research budgets in each of our committees to conduct expert studies, something which we have actually taken from the House of Lords and House of Commons and we want to have more time to conduct studies. We have working documents which are available, we have hearings, we have evidence, we call in experts quite frequently. There is enough time from when we actually get the proposal from the Commission to influence that process. When we get to that final very truncated, as you say, possibility of a first reading agreement, my rule of thumb is that there should not be a surprise in that because it has followed effectively the principles, the positions that have been laid out a long time in advance. What I would like to understand in terms of our working relationship with national parliaments is how much technical detail you want to get into. Some of our discussions in the final analysis are very tiny technical details which do not change the principles or the general thrust of that piece of legislation. In many ways we would like the national parliaments to focus on the general principles and to focus, particularly if you are changing national legislation with a European piece of legislation, on where the detriment or the advantage or the benefit in the national law or to the British people in changing the legislation that way is. That is more your focus that would be helpful to us in making sure that we do not end up with unintended consequences of legislation.

Q251 Baroness Symons of Vernham Dean: You are very lucid in the descriptions which you give but what you are describing is something which is very complex and it has to be of necessity, because of the numbers of nations involved and the different structures which have to be accommodated within the EU. My concern is not dissimilar from that of Baroness Howarth of Breckland. My concern is that what you are describing at every juncture is a loosening of the relationship between the electors and the decision takers. You have elected MEPs from whom the chairs of the committees are drawn. You have elected MPs from whom the national ministers are drawn. You have NGOs who are coming into the dialogue who are after all the self-elected pressure groups and you have distinguished yourself between two types of intervention. We have had a discussion about whether the dialogues are informal or formal. We have gone through this enormously complex edifice and at every point my heart sinks as I recognise the dilution of the relationship between the electors and the decision takers. Maybe that is the inevitable consequence of the way that you have to operate in order to be inclusive, getting in the impact assessments, the experts, everybody else, but my

goodness you can see why people look at it and think “This is just not representing me. When I put my cross in that box this was not what I meant, that this whole edifice would be elected”. Can you not see the difficulty that this very complicated arrangement actually inspires and the feeling of despair for some people that they can actually get a grip on what is happening?

Mr Corbett: Not entirely.

Q252 Baroness Symons of Vernham Dean: At all? A little bit?

Mr Corbett: Of course when you are dealing with complex legislation of the sort that you also want expertise and inputs, just as happens at the national level when a government drafts a bill and consults and puts it to parliament and there are debates and discussions, if it is a complex matter and there are lots of inputs from outside and then compromises are made. That whole process indeed can be complex and, certainly at European level, equally, if not more so, because there are more Member States and more diversity to be accommodated.

Q253 Baroness Symons of Vernham Dean: May I interrupt you on that? When we do that in a national parliament we get our various briefs in from whoever it is who wants to get us to talk about seal culling or whatever it happens to be and you are then responsible for the way you have been seen to vote on this and your electors can say that is what their MP did. What I am describing to you, however, is a situation where people cannot see how the decision was actually taken. That is my point. It is the dilution of that relationship.

Mr Corbett: Then I do disagree with you because of course the final decisions, whatever discussions have gone on to try to reach a compromise between the two chambers, Council and Parliament, the final vote is of course a public vote in the elected chamber where you can see how your representatives voted. To the extent that the election campaign we have just had was not totally dominated by a domestic issue which we all know about, to the extent that we did have a little bit of European debate in it (and I hoped there would be more—normally there would perhaps have been more)—it is to a degree about that. We were attacked for the way we voted on all kinds of directives and we attacked our opponents for the way they acted on other proposals. That is and should be part of the normal political debate. Of course you have a problem; there is a challenge for democracy on those subjects that you decide you can more effectively deal with in a wider context than the national context. In the national context it is all much simpler. If you are dealing with something in a wider context because you have to, because it is a transnational problem, or you have advantages in

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doing so, then what happens? Normally in the World Trade Organisation or NATO or OECD or whatever it is dominated by diplomats and bureaucrats, loosely supervised by ministers who come in to put the final touches to make a deal between governments. Governments come back home to their national parliaments and say “This is the deal we have signed up to. Take it or leave it. We can’t change it any more”. The European Union is different. It has an elected parliament, directly elected representatives working with ministers and it is a much more open and transparent system than you normally get internationally.

Ms McCarthy: I understand what you mean; I understand. I do not believe even with a national law that every member of the public wants to look into how that procedure works. They are interested in outcomes; they are interested in what it has changed in terms of better protection. The example I give, because I have very practical examples of my committee, is the review of toy safety law. They are not interested in every detail of every expert we took on board to look at whether we wanted to ban some toxic metals in toys because now we have better information than 20 years ago when we had the original 1988 Toy Safety Directive. Consumers are interested in whether the toys they buy, that are imported from China predominantly but from right across Asia into all European countries, are safe for them to purchase, and whether we have taken away choking and other hazardous risks that should not be there. That is what they are interested in in terms of outcome and it is our job to communicate that not to communicate every dot and cross of how we go through every procedure, whether it is a first reading agreement, whether we have to take two readings through: it is communicating the message of what we have changed in that legislation which for me as an elected representative is more important.

Q254 Lord Mance: I have a question which relates primarily to Mr Corbett’s helpful written answers to the questions. You refer to the fact that the Council’s deliberations remain confidential, that conciliation proceedings and trialogue talks are confidential but you also say later that for the purpose of your consideration of matters you have insisted that “... any document submitted to the Council should at the same time be submitted to the European Parliament”. You suggest that might be an approach which national parliaments ought to encourage. The code of conduct which you referred to a moment ago refers to the four-column documents which we understood in Brussels last week are used as the basis for trialogue discussions. May I just understand what further documents you say are available to Parliament which have been submitted to the Council?

Ms McCarthy: On a simple procedure, the documents we get are usually working documents, non-papers, which will be circulated to us. They are available to those engaged in the process, members who are involved in negotiations, but they quite often will be circulated by the full committee. In my case I will ask the committee secretary to circulate them to members generally, so members have those documents. It is quite clear that they are widely disseminated because lobbyists often come to me knowing what is going on in a particular negotiation that one would think is behind closed doors and it is not in fact because the documents are circulated. Obviously some Member States we know will leak documents; it is in their interests to leak them to an NGO or trade association because they want us to engage on a particular issue.

Q255 Lord Mance: So do you see individual states’ positions in COREPER for example?

Ms McCarthy: No, not always. We will often know which states have difficulties with issues but we will not have 27 positions given to us because we do not need that. If there is general agreement on the principles of issues, we only need to know when there are difficulties. If I take as an example the ban on imports of seal products, it is very obvious that Sweden, Finland have difficulties with that. The question then is how we take that forward and whether that fits in with how the committee has voted as elected representatives. We will always be given a readout or a general view and we will be given position documents and sometimes it will not name a Member State, it will say a certain Member State has a problem with this particular issue or this particular amendment from the Parliament or with this particular point discussed in a negotiation. Then we have to try to resolve that.

Q256 Lord Mance: And the NOM papers will give you ideas as to possible compromises, options.

Ms McCarthy: Yes.

Q257 Lord Mance: You mentioned that they are circulated by you to members of your committee.

Ms McCarthy: Members of the working group will have them. Members of the committee do inevitably get them but sometimes we find that lobbyists will have them as well.

Q258 Lord Mance: Is there any understanding about further distribution, that they will not be further distributed?

Ms McCarthy: We do not have any restriction on them as far as I know.

Mr Corbett: Only if a document is classified as confidential, otherwise there is no restriction.

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Q259 Lord Mance: Will they not all be marked *limité*?

Ms McCarthy: No.

Mr Corbett: That is the lowest level. We find that different Member States have different national freedom of information acts, as it were. The Nordic countries are far more open in terms of what documents they give to their public than some other Member States.

Q260 Lord Richard: Funny Non-papers if they are all public. The object of Non-papers is to try to get agreement between people who need coaxing along to get agreement. Normally I would not have thought you would put it out.

Mr Corbett: In practice in Brussels very few documents are confidential.

Q261 Lord Mance: Are these documents fundamental to the Parliament's deliberation of proposals?

Mr Corbett: They help. They give information.

Q262 Lord Hannay of Chiswick: I wonder whether I may be forgiven for preceding my remarks by thanking Richard Corbett for the contribution he has made to relations between the European Parliament and this part of this national parliament. I have been to a number of the regular meetings with British members of the European Parliament in my two periods on this committee and he has made really outstanding contributions. I hope I can say that without trespassing beyond the question. As you have gathered and you have both said, we are grappling with how to influence a very complex procedure and listening to the debates you had with Baroness Symons of Vernham Dean I have to say I recall my attempts to understand the US congressional procedures which bear a much closer resemblance actually to the European Parliament than the European Parliament does to any national European parliament. The American one is infinitely complex but has to be understood by everyone, including foreign embassies who have to try to influence it. How can we influence the European Parliament properly in this process? For instance, if either of you were a rapporteur or chair of a committee, would you be happy to receive the views of a national parliament? Would you be happy to meet with the committee like this committee to discuss a particular piece of legislation? At what stage in the procedure? I think there you have already answered "as upstream as possible". Would you like to hear the views of national parliaments? Do you think in fact there should be perhaps some change to the current format of the meetings that the European Parliament hosts, the COSAC meetings and such like, so as to facilitate more in depth discussions of

some particularly important issues between the European Parliament's members who are most particularly involved in a piece of legislation and interested national parliamentarians?

Mr Corbett: Yes, we are open to looking at improving those sorts of meetings and any suggestions are welcome. Yes, to your first question, any rapporteur or committee chair that I know would be more than happy to receive and listen to the views of national parliaments and then engage in discussion. I do not know of anybody who would say no to the question. There is of course the fact that there are now 27 national parliaments, some of them with two chambers, most of them with two chambers, and there are inherent practical obstacles but as long as they can be overcome there is certainly the willingness.

Ms McCarthy: In my committee I have certainly encouraged national parliaments to give us their views and indeed only recently we held a specific session on consumer rights with national parliaments in April. It was a very useful and informative session, but Richard was absolutely right that we are having to deal with the views of 27 different Member States. To do that in one meeting is not particularly efficient or effective. It is better to have national parliaments bringing reports in to us, providing evidence where possible and, again, the point you made about "as upstream". Or I will invite members of national parliaments, if they have produced a particularly informative report on a legislative proposal we are dealing with, to come to give evidence to my committee. I have done that on a number of occasions with different Member States so that is indeed a useful way. It is also not just about influencing legislation. We have focused much more and are focusing more, particularly with the better regulation agenda, on looking at transposition and implementation. National parliaments have a very strong role to play after we sign off a piece of legislation in Europe in what happens to it in terms of how it is then turned into national legislation. We believe that there are some issues and problems of transposition and implementation which create difficulties in areas where we would like to see more follow-up done by national parliaments. The more engagement we can have in all parts of the process the better. You mentioned Congress and I am also a member of the US delegation and in fact on toy safety legislation we decided to have a twin-track procedure, working with Congress and some members who were also changing their legislation after we had a number of toy safety scares both in America and Europe. We used video link to do some of that. Because of the nature of travel, we could not always rely on meeting face to face but we do have a very good video conferencing system and we used that during the process to try to make sure we were

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actually going in parallel and not going off at tangents, particularly when you are talking about global trade in a particular product.

Q263 Lord Teverson: I should like to ask a contrary view. Is it not really the role of national parliaments purely to keep their own governments and executives under control in the Council of Ministers? If national parliaments start going off trying to influence the European Parliament, is that not diluting what their real role should be and is that not perhaps a symptom of a weak parliament which is controlled by its executive?

Mr Corbett: That is why I made the distinction earlier between your role vis-à-vis your executive, which is a formal one where there is a line of accountability and where you are shaping the position to be taken by the representative of your country in the Council and when you seek to embark, if you so wish, on a wider level of influencing other actors, be it other Member States or be it the European Parliament. I do think there is a difference but it is up to you. It is not up to us to decide whether you wish to widen your activities.

Ms McCarthy: It is not a bad thing to have a number of checks and balances in the system in fact. Let us take an example again. I will find that a briefing from

a House of Lords report will actually add value to the briefings I will get from the executive on a particular issue, which is more helpful in informing our work in the committee or what we agree, whether it is a first reading agreement or whether it is a decision we take in plenary after two readings. It can be helpful and add value and that is why I made the point about how much detail you want to get into. Some of that detail should be left to the civil servants if it does not change a fundamental principle in the text. It is the job of elected politicians to follow more closely the general principles, which we also do. I work very closely with my own staff who are there to advise us on all the technical issues, but it is for us to make political decisions as parliamentarians and that is the same both for House of Lords' committees and indeed the Commons' committees as well.

Chairman: Thank you very much; that is it. I do have to say that from time to time I do meet and have met with the Agriculture Committee of the Parliament and I can honestly say that they are truly enriching and rewarding experiences. Thank you very much and thank you, Mr Corbett, particularly and I hope that despite last week the European Parliament continues to benefit from your engagement with it because we certainly have. Thank you very much.

Written Evidence

Memorandum by Tim Ambler, London Business School and Francis Chittenden, Manchester Business School¹

1. Context. Our background and experience relevant to this inquiry are EU and UK regulations that materially affect business and/or the voluntary sector. Impact assessments (IAs), designed to challenge and improve regulation, from our main research topics at both EU and UK levels. We have published seven annual reports on the effectiveness of the IA process. The EU regulatory decisions covered by our work are all “codecisions” and are, as we understand the theory, jointly between Councils of Ministers on the one hand and the European Parliament on the other. Member state parliaments are not necessarily involved at all. We consider only the two chambers of the UK parliament.

2. Structure. QQ1–3 are outside our area of expertise. We address QQ4–6 but before doing so we describe how EU and UK IAs, should and do operate. We consider that the space devoted to this topic is well justified because IAs should be the basis for the consideration of proposed EU legislation. We then discuss our understanding of the two UK Scrutiny Committees and their effectiveness. These sections provide the rationale for our answers which then follow.

EU SOURCED LEGISLATION

3. The EU introduced its own IA system relatively recently, beginning with about 40 in 2004. For reasons we have not been able to establish, they are used for many kinds of Commission papers, not just regulation in the making but also non-binding instruments such as communications. EU IAs have also been broadened from considering economic effects on business, government and consumers as UK IAs require to social and environmental impacts.

4. In the year to June 2008, the EU published 3,059 legislative documents in the Official Journal. Of these, 2,779 (91%) were Decisions, Resolutions, Directives and Regulations. The remaining 9% were other forms of communication including Common Positions, Recommendations, Guidelines and Rules of Practice.² We were not able to divide these 2,779 documents into the creation of new laws and the application of existing laws (Resolutions and Decisions).

5. As in the case of Statutory Instruments in the UK, only a small proportion of “Regulations” are laws. Most are merely administrative orders. The Lisbon “Treaty” called for Regulations to be separated into laws and administrative orders which would be helpful but has yet to be implemented.

6. The EU IA Board reviewed 252 IAs in 2008 but a number of these were redrafts so that only 122 matters were the subject of IAs.³ Of these, 43 dealt with Directives, 33 Regulations and one with a White Paper. 44 were not to do with regulations/laws or prospective legislation at all. These figures should be compared with a search of the Official Journal showing that for 2007 and 2008 respectively, there were at least 75 and 120 Directives and 1,580 and 1,008 Regulations.

7. EU IA Board’s list of IAs does not quite match the summary in their own annual report⁴ which said: *In 2008, the Board examined 135 draft impact assessments, compared to 102 in 2007. The number of impact assessments that the Board asked to examine for a second or third time increased even more: from 10 (or 10%) in 2007 to 43 (or 32%) in 2008. As a result, the Board issued a total of 182 opinions in the course of the year. In spite of the increase in numbers, the Board examined all impact assessments that were submitted to it. It did not need to prioritise the cases to be examined, as it announced might be the case in its report for 2007, although the Board’s capacity was at times stretched to the maximum.*

¹ Senior Fellow, London Business School, and Professor, Manchester Business School, respectively. Submitted on an individual basis.

² Eur-Lex, 2008. “Welcome”, *Access to European Union Law*. Available at <http://eur-lex.europa.eu/en/index.htm> (accessed 28 December 2008)

³ http://ec.europa.eu/governance/impact/cia_2008_en.htm, accessed 26 March 2009

⁴ Commission Staff Working Document, Impact Assessment Board Report For 2008, Brussels, 28.1.2009, Sec(2009) 55

8. The EU Impact Assessment Board, created in 2006, appears to be having a robust and positive affect on EU IAs. Its reports are admirably transparent. On the other hand, there seems to be a shortfall as the number of IAs for Directives appears to be less than half the number of Directives. It is impossible to know how many of the 1,000–2,000 Regulations or even Directives merit IAs and therefore how many IAs should be published. The guidance provided by the EU on when to use the IA procedure states: “*Impact assessment is applied to major Commission proposals, ie those listed in its Annual Policy Strategy or its Work Programme*”.⁵ That may well be so but it does not define what should, and should not, have an IA.

9. The EU IA system has a long way to go in being fully used, simplification, quantification and coordination with member state IA systems. Before that it needs to limit IAs to proposals for legislation and to ensure that IAs and [proposed] business burdening legislation match up in practice, allowing for revisions to IAs as the proposals develop.

10. EU IAs should specifically consider SMEs, since the relative burden is greater for SMEs, and show why they cannot, up to some limit, be exempted without material harm to the policy proposed. Regulations should be split into laws and administrative orders. Directives and other laws should all be listed and indicate the dates of the IAs or, if no IA is needed, why not.

UK IAS FOR EU SOURCED LEGISLATION

11. UK IA guidance from the Better Regulation Executive requires IAs for EU sourced as well as UK sourced regulation. An EU Regulation requiring an EU IA would therefore also require a UK one and a Directive would require at least two UK IAs, one for the Directive itself and at least one for its transposition. At the EU 2008 rate of 43 IAs for Directives and 33 for Regulations, we would expect 76 UK IAs per annum for EU Scrutiny Committees since they are not concerned with transposition.

12. Up to and including 2007, about one third of UK IAs were for EU sourced legislation, ie about 70–80 per annum, well short of the 120 or so we should be seeing.⁶ In 2008, according to the UK records, only 18% of the 247 UK IAs were EU sourced legislation, ie 40 or about a third of those we should have and UK IAs were not synchronised with EU IAs in timing terms, ie they are produced too late to have any impact. In other words Whitehall needs to ensure its production of IAs is consistent with its own guidance notes in terms of numbers and timing.

13. Scrutiny Committees may ask why they should rely on IAs given the problems described. The answer is that IAs should meet their needs and partially do so now. It would be better to make the system work than use its failings as a reason to ignore IAs.

EU SCRUTINY COMMITTEES⁷

14. Proposed EU legislation comes under scrutiny in both Houses of Parliament. Both the Lords and Commons committees, almost without connection,⁸ consider EU “Documents”. In the case of the Commons, the primary responsibility is:⁹ *to report its opinion on the legal and political importance of each such document and, where it considers appropriate, to report also on the reasons for its opinion and on any matters of principle, policy or law which may be affected;*

15. It can also recommend further consideration and “consider any issue arising”. Note that this mandate is not whether each EU proposal should be accepted, but only invites the committee to report its *opinion* of its importance. Matters are referred to the European Committees on the basis of whether they are interesting enough to be worth discussion. Ministers are supposed to refrain from taking any position with the EU while the relevant documents are still being considered by the Scrutiny Committees but Ministers can, and occasionally do, over-ride that.¹⁰

⁵ European Commission, 2008. “Proposals covered”, European Commission, *Impact Assessment*. Available at http://ec.europa.eu/governance/impact/proposals_en.htm (accessed 28 December 2008)

⁶ Allowing multiple IAs for EU Directives to cover transposition.

⁷ This section has been partly informed by discussion with the Clerk to the Commons EU Scrutiny Committee but any errors or misunderstandings are entirely our responsibility. This discussion is not to benefit members of the House of Lords European Committees, who are fully aware of their own processes, but to explain our understanding, correct or otherwise, which underlies our subsequent answers to the questions posed.

⁸ Members of the scrutiny committees of the two Houses participate in COSAC, which brings together the European affairs committees of the national parliaments of Member States and candidate countries, together with MEPs. It meets twice a year.

⁹ “The European Scrutiny System in the House of Commons: A short guide for Members of Parliament by the staff of the European Scrutiny Committee,” The Department of the Clerk of the House, June 2005.

¹⁰ Only four times between January and July 2008. It was more common during the long summer recess but to address that problem the Scrutiny committees now meet during the recess.

16. The parliaments of other EU countries, Denmark, Estonia, Finland, Latvia, Lithuania, Poland (*Sejm*), Slovakia, Slovenia and Sweden, have far stronger powers and mandate what their Ministers can, and cannot, agree to.¹¹

17. From the 1,000¹² Documents deposited with the Scrutiny Committees, the Commons committee sent 52 in 2008 for discussion by their European Committees. After sifting by the Chairman, 399 were sent for consideration by the Lords' European Select Committee and its seven sub-committees.¹³ From the analysis so far conducted, and so far as the Commons is concerned, only a small number of the Documents sent for further discussion are related to proposed legislation. At the same time, many of them are indeed important, albeit not legislative in nature, the EU budget being an example.

18. The 12 parliamentary EU committees (eight in the Lords, four in the Commons) deal with a vast amount of paperwork and provide valuable advice to Ministers and the EC. On the other hand, we have to ask what it all adds up to. The argument that the committees increase transparency fails because meetings¹⁴ are in private and their reports are impenetrable by the man on the Clapham omnibus. They can demand more information from departments and even, very rarely, demand that Ministers explain themselves. The bottom line is that the work of these committees needs radical reform if it is to be an effective challenge to new EU legislation.

RESPONSES TO THE QUESTIONS ASKED

19. Q4: The role of parliaments. The scrutiny committees in the UK parliament have two roles: advisory and influential on UK Ministers. In the UK, parliament does not and maybe cannot mandate the executive, as they can in some EU member states. In our view, Ministerial accountability is more show than substance. Our view of the advisory process is more positive: the House of Lords, perhaps in the light of their greater experience, directly advises the EC as well as UK Ministers, the House of Commons only the latter. We see no reason not to do both when the advice seems likely to influence legislation. It should be represented as what is good for the EU first and the UK second. When that is the case, we see no objection to sharing the advice also with other key member state parliaments.

20. Q5: The effectiveness of scrutiny. This is an ambiguous question. At the trivial level, we believe that the Scrutiny Committees, and their expert advisers, take a hard look, in effect, at the necessity of reviewing the 1,000 or so documents provided to them by UK departments. The process of sifting items for discussion appears unrelated to the EU legislative programme, EU IAs or the impact of future legislation on UK interests. Despite the volume of paper, some prospective EU legislation may be omitted altogether and there should certainly be some process of reconciliation. EU and UK IAs are not used as they should be used and as a result, scrutiny time does not seem to be used efficiently or effectively.

21. If "effectiveness" in Q5 means that something happens as a result of the scrutiny, eg EU legislation is blocked or improved, then it would appear that scrutiny is not effective beyond the provision of advice.

22. Whilst the European Committees of the two Houses will and should remain separate, selection of the items for their consideration could be more effectively and efficiently conducted by a Joint Scrutiny Committee. The criteria for selection should be what is important for the [EU and] UK and which items are capable of being impacted by the European Committees as distinct from what is interesting for them to discuss.

23. The benchmark for the UK Scrutiny Committees should be the EU IA Board. After all, they are all looking at the same proposed legislation in much the same way. Excluding re-drafts, this suggestion would reduce the 1,000 or so documents now considered to about 100 EU IAs, supplemented by the relevant UK IAs and some other key issues such as the EU budget. Not only would this allow better focus and provide higher quality raw material but the coordination of scrutiny at the EU and member state levels should improve the quality of EU legislation.

24. Q6: The points at which scrutiny should take place. Whether the outcome is proactive influence or merely passive advice, scrutiny needs to be as early as possible. It should therefore be driven by the EU annual Work Plan (CLWP) and other EU sources, and not by UK departments. EU and UK IAs should provide the key information for scrutiny and missing IAs should be chased up by the committees. In this respect, the Better Regulation Executive should perhaps be the coordinating unit using their IA Library but independent checks would be needed.

¹¹ Eighth bi-annual report: "Developments in European Union Procedures and Practices Relevant to Parliamentary Scrutiny," XXXVIII Conference of Community and European Affairs Committees of Parliaments of the European Union, 14–15 October 2007, Estoril.

¹² Although the number should be the same, presumably due to different timetables the Commons reported 1,100 in 2008 and the Lords 926.

¹³ House of Lords, European Union Committee, 32nd Report of Session 2007–08 Annual Report 2008, 20 November 2008, HL Paper 191

¹⁴ Or at least the EU Scrutiny Committee.

25. Conclusion. EU and UK IAs should become the bases for the scrutiny of proposed EU codecisions and forthcoming legislation. IAs would lead to less paper and more focus. The EU Committees in both chambers should demonstrate that they have made real improvements in EU legislative proposals either by showing them to be unnecessary or by improving what is necessary. Their annual reports should analyse incoming documents to show in summary the changes achieved and what has been done to harmonise EU and UK legislation, specifically showing why new UK only regulation is not required in the rest of the EU.

9 April 2009

**Memorandum by Dr Giacomo Benedetto, Department of Politics and International Relations,
University of London**

THE CODECISION PROCEDURE ITSELF

1. Conciliation meetings between the EP and the Council and trialogues, which also involve the Commission, make national parliamentary scrutiny difficult to exercise. Firstly, these meetings are held behind closed doors and, secondly, because the Council is represented only by the national government exercising the Council Presidency. Besides conciliation and trialogues, there are also less formal forums where backroom deals take place, although such behaviour is normal under legislative bargaining in any system. Trialogues occur after the second reading and focus only on the areas where there is disagreement between the Council and EP. By that stage, it is too late for national scrutiny to be effective.

- a) As the question suggests, first and early second reading deals are a point where national parliaments should be able to exercise greater scrutiny. These deals have become more common but have not in themselves made the system less accountable to national parliaments, because the unavoidably secretive deals later on during trialogues and conciliation are in fact less accountable.
- b) As above the secretive nature of the dossiers hinders scrutiny. The only solution is for national parliamentary committees to move swiftly as soon as the Commission tables legislation. The first reading process in the EP lasts at least several weeks and must be approved by the EP's relevant committee. The UK Parliament should mobilise as fast as the EP once the legislation is tabled. The consensus of scholars of legislative politics is that the UK, Ireland and France have among the weakest committee systems of any parliamentary democracy. The only means for effective parliamentary scrutiny in the UK of codecision legislation is to reform the committee systems of the Lords and Commons. The EP, like the US Congress, combines the roles of select and standing committees. For example, its environment committee is permanent and has investigative, scrutiny and legislative functions. A weakness of the British parliament is that its legislative committees are not permanent and fulfill a separate role from select committees. Furthermore, it seems that EU politics, which has direct effect on domestic politics, is still regarded as an extension of foreign policy. Instead of an overburdened European select committee trying to handle scrutiny of EU legislative dossiers, this task should be handed to permanent (legislative) committees that shadow each respective committee in the EP.

2. There have been very complicated and technical instances of legislation, some of which became highly controversial. Among these are REACH, which is a chemicals directive, as well as the Services directive. An independent scientific or research service would be required for any meaningful scrutiny to take place. On cost grounds alone these may be unfeasible. The only solution is for the UK Parliament to hold ministers and government officials to account and study the input of MEPs into legislative dossiers.

GOVERNMENTS AND THE EU INSTITUTIONS

3. Prior to tabling legislation, the Commission consults widely with interest groups and national governments, but not with national parliaments. However, there is nothing to prevent national parliaments from scrutinizing EU legislation as soon as the Commission tables it. Once again, speed is of the essence.

4. There are no formal rules for national parliaments to address their scrutiny to the EU institutions. Again, there is however nothing to prevent them from lobbying MEPs from their member state who happen to be members of the appropriate EP committee, writing to the responsible Member of the European Commission, or of using COSAC as a means to transfer information between national parliaments.

7 April 2009

Memorandum by Dr Charlotte Burns, School of Politics and International Studies, University of Leeds

1. *Introduction*

The focus of this evidence is upon the evolving operation of the codecision procedure and the implications of the increased use of informal meetings and early first and second-reading agreements, referred to below as fast-track procedures. There is no doubt that the increasing “informalisation” of EU policy-making under codecision raises a number of challenges for accountability and transparency within the EP and Council, which makes it harder for national parliaments to scrutinise effectively decisions made at the European level. Meetings are held behind closed doors with only a few key actors involved and there are often serious time pressures placed upon all parties. Consequently, the institutional forums that are supposed to debate and scrutinise decisions at the European level—the European Parliament’s plenary and meetings of the competent Council of Ministers—are being used to rubber stamp agreements negotiated by a select few. Under these circumstances there is often little if any scope for national chambers to scrutinise or shape government decisions beyond the initiative and proposal phases of decision-making.

2. *The Codecision Procedure*

Under codecision (Article 251 TEC) the European Parliament (EP) has up to three readings of legislation, the opportunity to reject legislative proposals and a right to face-to-face negotiations (conciliation) with the Council when the two sides cannot agree. The conciliation process is conducted by equal size delegations from the EP and Council (up to 27 delegates from each) with the Commission present as an interlocutor and facilitator of agreement.

3. The procedure has evolved considerably since its inception in 1993 through the development of informal norms, some of which have been formally institutionalised via Treaty revisions in 1999; via internal rules changes; and via inter-institutional agreements between the Commission, Council and the Parliament. The principal reforms of interest to this committee have been:

- The increased use of informal meetings as a means to reach agreement.
- The development of fast-track first-reading and second-reading agreements.

4. *The Use of Informal Meetings*

It rapidly became apparent that conciliation committee meetings were not the best negotiating forums, not least because of the size of the delegations. Moreover, only a few people within a meeting have the requisite knowledge to be able to make a meaningful contribution to the negotiations. Consequently the EP and Council have, over the years, developed a system of informal meeting known as *trilogues* where a few key personnel meet to hammer out a compromise agreement that is subsequently endorsed by the committee. The full conciliation committee tends to be reserved for endorsing agreements taken by the *trilogue* and for discussion of issues that have been difficult to resolve.

5. Whilst the development of these informal norms has increased the efficiency of decision-making, it has also made the process less transparent. There is little or no scope for national parliamentary committees to exercise scrutiny over these private negotiations—the time deadlines involved (a conciliation committee has to be convened within six weeks of the Council’s opinion on the EP’s second reading and must reach agreement within six to eight weeks) means that there is little or no opportunity for national governments to report back to national parliaments. However, if a proposal goes all the way to conciliation there is the opportunity throughout the legislative process to track what has been decided and potentially to feed into the process via national delegations in COREPER or via national MEPs.

6. Another point worth noting is that the wording of the Amsterdam Treaty which provides the basis for the current operation of the procedure was deliberately drafted to preclude the possibility of the EP introducing into the negotiations matters that had not been covered by its second-reading amendments. However, the ECJ ruling in the IATA case (Case C44/04) opened the possibility for items to be introduced into the conciliation discussions that have not previously been the subject of EP second reading amendments, thereby potentially widening the scope of discussions and further limiting the ability of national scrutiny committees to exercise genuine oversight.

7. *The development of fast-track procedures at first and second reading*

The fast-track procedure under codecision is increasingly being used at first and second reading. The fast track process at first reading was introduced in 1999 to speed up decision-making particularly on policies where there was no substantial disagreement between the EP and Council or where the proposals concerned were merely technical, for example, recasting directives with no substantive policy implications.

8. However, over time the fast-track first-reading procedure has been used more extensively, particularly in the current 2004–09 session of the EP. The EP's own figures show that the process was used in 28% of cases between 1999–2004, but that increased to 63% of cases between 2004 and 2006. The fast-track first-reading procedure is being used on complex and controversial packages of legislation such as the recent Climate Change Package agreed in December 2008. There is anecdotal evidence of increasing pressure from states holding the Presidency for the fast-track procedure to be used on dossiers for which they wish to take credit.

9. Similarly the EP has now developed a norm of using fast-track second reading procedures or early agreements. This process has been used increasingly since 2004, accounting for 15% of codecision cases between 2004 and 2006. I anticipate that figure will be much higher once the figures from 2007–09 are calculated at the end of the current session. In research I have conducted with colleagues at the University of York (Professor Neil Carter and Dr Nicholas Worsfold) investigating environmental policy we found that 31% of the cases that we have analysed between 2004 and November 2008 were concluded via fast-track second reading agreements.

10. *How does the fast-track procedure operate?*

Under the fast-track first-reading procedure the committee's report is taken as a mandate for negotiations with the Council. There is a joint declaration between the institutions spelling out how these negotiations should be conducted and the EP has its own rules outlining best practice. Nevertheless, committees and rapporteurs take different approaches. Generally speaking the committee rapporteur and shadow rapporteur are delegated responsibility for conducting negotiations with the Council. The Council in turn delegates responsibility for conducting negotiations to Presidency representatives. The Presidency follows discussions on the relevant dossiers in the EP committee and once the report has been adopted by the committee, the Council's representatives open informal negotiations with the EP's rapporteur. The two sides negotiate a compromise which is then endorsed by the Council and submitted to the EP's plenary normally as a block of amendments that are endorsed. In essence the process misses out the formal step of the EP's plenary adopting the committee's report and amendments to that report. It raises the prospect of some viewpoints in the EP not being heard and it also potentially reduces the scope for national delegations in Council to feed into the process, as it is the Presidency that takes responsibility for conducting negotiations. There is pressure placed upon both EP and Council delegates to agree within tight timeframes.

11. Under a fast-track second-reading procedure the EP adopts its first-reading opinion and then opens negotiations with the Council before the Council has formally reached its common position. The final text agreed between the EP and Council delegation is then recommended to the EP's plenary for a second reading which simply endorses the product of the negotiations. As with the fast-track first-reading procedure there is scope for pressure to be placed upon national delegations to reach agreements under a very tight timetable, with limited scope for discussion.

12. *What are the implications of the wider use of these procedures for scrutiny by national parliaments?*

The question as to the impact of the increased use of these procedures is entirely dependent upon the norm of scrutiny currently employed. If scrutiny normally takes place at the stage at which the Commission proposes legislation with little further input as the legislative process unfolds (as is often the case in the UK) then the development of these new informal norms under codecision will have limited, if any, impact. If, however, national scrutiny committees wish to track the progress of some dossiers, the use of fast-track procedures will make doing so more difficult, but not impossible. National scrutiny committees have two principal means by which they can be kept informed of the progress of negotiations via the European Parliament or via the Council.

13. *Tracking proposals via the EP*

National scrutiny committees that wish to track proposals subject to fast-track procedure at first reading will inevitably have to focus upon the discussions within the EP committees concerned, as it is the committee report that is taken as the mandate for negotiation with the Council. The EP's committees in turn could and should think about how they can make those discussions more accessible to a wider public by, for example, publishing more detailed records of meetings and roll-call votes. National scrutiny committees may wish to discuss with the EP ways in which they can be kept routinely informed of progress via, for example, committee secretariats. The EP has created a new directorate in its secretariat with responsibility for relations with national parliaments, which may offer a medium for communication with national scrutiny committees and the national parliamentary offices based in Brussels.

14. *Tracking proposals via the Council*

National scrutiny committees may wish to request that when proposals are made that the government informs them if the dossier is likely to be the subject of a fast-track first reading procedure and of the likely implications for the government's position.

15. They may wish on controversial proposals to push their governments to ask for longer decision-making processes so that they can scrutinise decisions taken at first and second reading. There is currently a very real risk of national delegations being rushed under both fast-track approaches to sign up to an agreement where there has been little scope for wider discussion within the Council. Committees may also wish to consider asking their governments to feedback information on the progress of dossiers in the EP's committees and their likely position on the amendments under discussion.

16. *Conclusion*

The inevitable problem faced by national scrutiny committees concerns the timetables for response and the ability of national delegations to shape the final legislative proposal. EU legislation is the product of a compromise between 27 states, the voice of an individual state is now more likely to be drowned out and the pressure to agree quickly with limited discussion can limit the scope of national scrutiny committees to shape proposals beyond the initial proposal stage. Committees should then consider other means by which they scrutinise EU legislation; for example, by using and building upon their existing links with the EP to be able to track legislation particularly when it is at the committee stage.

14 April 2009

Memorandum by Margot Wallström, Vice President, European Commission

Thank you very much for the letter of 18 March 2009 concerning the House of Lords' current inquiry into the implications of codecision for national parliamentary scrutiny, which you addressed to both the Secretary General and myself.

The replies hereafter, which are also given on behalf of Ms Day, are focussed on those particular aspects of your questionnaire, where in our view the Commission's comments could add most value to your inquiry.

Question 1. *Are there aspects of the codecision procedure which make it particularly difficult to achieve effective parliamentary scrutiny?*

In general, the codecision procedure is no more difficult than any other legislative procedure as regards achieving effective parliamentary scrutiny: the key here, as elsewhere, is in the timing and in a good knowledge of the procedures. These procedures have developed over time and are to a large extent enshrined in the Revised Joint Declaration on Codecision of June 2007 (Annex 1), in the Rules of Procedure of the European Parliament and in the European Parliament's more recent internal guidelines for its committees on the procedure. The Commission's codecision website on Europa also provides a comprehensive guide http://www.ec.europa.eu/codecision/index_en.htm.

It requires an understanding of the "milestones" in the procedure, which provide the opportunity for those not immediately involved to follow and intervene as appropriate. As a general rule, the earlier the intervention/scrutiny, the more likely it is to be effective. Once the first reading stage has been completed by the EP in a Plenary vote, and by the Council in the adoption of a political agreement on a Common Position, the boundaries for the final form of the legislation have been drawn and there is little further room for manoeuvre outside them.

These timely "milestones" include in particular:

- the prelegislative phase, eg:
 - (i) the launching by the Commission of preparatory debates in the form of Green and White papers; and
 - (ii) the adoption by the Commission of its Legislative Work Programme for the next year;
- the legislative phase, in particular:
 - (i) the adoption by the Commission of the legislative proposal;

- (ii) the vote on its draft first reading report in the responsible Committee of the European Parliament, ie the mandate for the EP's representatives in their negotiations with the Council; and
- (iii) the increasingly frequent use by the Council of the conclusion of a "General Approach" (political agreement on a preparatory position), which can be used by the Council's representatives as their mandate for their negotiations with the EP,

Question 1a. *What effects have "first reading deals" and "early second reading deals" had on the ability of national parliaments to conduct effective scrutiny?*

Since the entry into force of the possibility for first reading deals in 1999 under the Amsterdam Treaty, they have progressively become the norm. Attached are some comprehensive statistics listing all files concluded in the last 10 years, where it can be seen that more than 70% of files are now concluded at the first reading stage. (Annex 2, 3 and 4) (Not printed) However, as the rules of codecision limit the possibility for new or different amendments at the subsequent stages of the procedure, where all efforts are rather concentrated on seeking compromise between positions already on the table and well-known, it is at the first reading stage that parliamentary scrutiny can be most effectively conducted in all cases.

Question 1 b. *Does the confidential nature of some negotiating documents hinder national parliamentary scrutiny of codecision legislation? If so, how can this problem be resolved?*

The confidential nature of documents relates essentially to the conduct of negotiations in the informal trilogues. The proceedings of these meetings, as is the case for international negotiations, are confidential and there is no official record. However, the preparation of and follow-up to these meetings in the European Parliament, as well as the documents concerned, are usually open to all. In the same way the Council of Ministers has progressively made its deliberations and documents on codecision legislation more readily available. Moreover, the recent introduction by the EP of a "cooling off" period of one month between the negotiation of a deal and its submission to plenary should facilitate the task of parliamentary scrutiny.

Question 3. *What role is therefore governments and the EU's Institutions in ensuring that national parliaments can conduct effective scrutiny of proposals negotiated under codecision? What information should be provided, when and by whom? Is the role being performed satisfactorily?*

Question 4. *What role is there for parliaments to address the result of their scrutiny to those beyond their own government: for example the European Parliament, Commission or national parliaments?*

With a view to bringing the European Union closer to its citizens, by involving National Parliaments more closely when it comes to define European policies, and by highlighting the importance of the principles of subsidiarity and proportionality, the Commission in its Communication of 10 May 2006 "A citizens' agenda—Delivering results for Europe" announced its intention to transmit its new proposals and consultation papers to the National Parliaments, inviting them to react so as to improve the process of policy formulation. The move was welcomed by the European Council at its mid-June 2006 summit. Heads of State and Government asked the Commission to duly consider comments by the National Parliaments, in particular with regard to the subsidiarity and proportionality principles. Thus, on 5 September 2006 the Commission started to transmit its new proposals and consultation papers to the National Parliaments and adopted principles of its internal procedure of replying to opinions coming from the National Parliaments. This has become the so called "political dialogue" with National Parliaments.

The fact that the majority of National Parliaments participate in this dialogue illustrates the success of this initiative. Since October 2006, the Commission has received almost 450 opinions from 32 national assemblies of 24 Member States, the House of Lords being definitely among the most active assemblies in this regard.

The replies given by the Commission to the different opinions received by the National Parliaments essentially reiterate the initial motivations of its proposal and the different steps of the inter-institutional dialogue, and provide answers to concrete questions raised by the National Parliaments. It should be equally noted that the opinions received by the National Parliaments as well as the Commission responses are also transmitted to the European Parliament and the Council, who are thus duly informed of the results of the scrutiny conducted by National Parliaments.

By sending the relevant legislative proposals and communications directly to the National Parliaments, and by replying in detail to their opinions and comments, the Commission facilitates the scrutiny conducted by National Parliaments. Apart from the questions raised in the context of the political dialogue itself, which mainly concern the substance of a proposal, the Commission remains of course available during the whole legislative process to answer any other request that National Parliaments might express with regard to the respective codecision procedure.

I hope that these considerations and explanations are useful for the current inquiry conducted by the House of Lords.

8 April 2009

COMMISSION

JOINT DECLARATION ON PRACTICAL ARRANGEMENTS FOR THE CODECISION PROCEDURE (ARTICLE 251 OF THE EC TREATY)

(2007/C 145/02)

GENERAL PRINCIPLES

1. The European Parliament, the Council and the Commission, hereinafter referred to collectively as 'the institutions', note that current practice involving talks between the Council Presidency, the Commission and the chairs of the relevant committees and/or rapporteurs of the European Parliament and between the co-chairs of the Conciliation Committee has proved its worth.
2. The institutions confirm that this practice, which has developed at all stages of the codecision procedure, must continue to be encouraged. The institutions undertake to examine their working methods with a view to making even more effective use of the full scope of the codecision procedure as established by the EC Treaty.
3. This Joint Declaration clarifies these working methods, and the practical arrangements for pursuing them. It complements the Interinstitutional Agreement on Better Lawmaking ⁽¹⁾ and notably its provisions relating to the co-decision procedure. The institutions undertake fully to respect such commitments in line with the principles of transparency, accountability and efficiency. In this respect, the institutions should pay particular attention to making progress on simplification proposals while respecting the *acquis communautaire*.
4. The institutions shall cooperate in good faith throughout the procedure with a view to reconciling their positions as far as possible and thereby clearing the way, where appropriate, for the adoption of the act concerned at an early stage of the procedure.
5. With that aim in view, they shall cooperate through appropriate interinstitutional contacts to monitor the progress of the work and analyse the degree of convergence at all stages of the codecision procedure.
6. The institutions, in accordance with their internal rules of procedure, undertake to exchange information regularly on the progress of codecision files. They shall ensure that their respective calendars of work are coordinated as far as possible in order to enable proceedings to be conducted in a coherent and convergent fashion. They will therefore seek to establish an indicative timetable for the various stages leading to the final adoption of different legislative proposals, while fully respecting the political nature of the decision-making process.

⁽¹⁾ OJ C 321, 31.12.2003, p. 1.

FIRST READING

11. The institutions shall cooperate in good faith with a view to reconciling their positions as far as possible so that, wherever possible, acts can be adopted at first reading.

Agreement at the stage of first reading in the European Parliament

12. Appropriate contacts shall be established to facilitate the conduct of proceedings at first reading.
13. The Commission shall facilitate such contacts and shall exercise its right of initiative in a constructive manner with a view to reconciling the positions of the European Parliament and the Council, with due regard for the balance between the institutions and the role conferred on it by the Treaty.
14. Where an agreement is reached through informal negotiations in trilogues, the chair of Coreper shall forward, in a letter to the chair of the relevant parliamentary committee, details of the substance of the agreement, in the form of amendments to the Commission proposal. That letter shall indicate the Council's willingness to accept that outcome, subject to legal-linguistic verification, should it be confirmed by the vote in plenary. A copy of that letter shall be forwarded to the Commission.
15. In this context, where conclusion of a dossier at first reading is imminent, information on the intention to conclude an agreement should be made readily available as early as possible.

Agreement at the stage of Council common position

16. Where no agreement is reached at the European Parliament's first reading, contacts may be continued with a view to concluding an agreement at the common position stage.
17. The Commission shall facilitate such contacts and shall exercise its right of initiative in a constructive manner with a view to reconciling the positions of the European Parliament and the Council, with due regard for the balance between the institutions and the role conferred on it by the Treaty.
18. Where an agreement is reached at this stage, the chair of the relevant parliamentary committee shall indicate, in a letter to the chair of Coreper, his recommendation to the plenary to accept the Council common position without amendment, subject to confirmation of the common position by the Council and to legal-linguistic verification. A copy of the letter shall be forwarded to the Commission.

SECOND READING

19. In its statement of reasons, the Council shall explain as clearly as possible the reasons that led it to adopt its common position. During its second reading, the European Parliament shall take the greatest possible account of those reasons and of the Commission's position.
20. Before transmitting the common position, the Council shall endeavour to consider in consultation with the European Parliament and the Commission the date for its transmission in order to ensure the maximum efficiency of the legislative procedure at second reading.

24. If it becomes clear that the Council will not be in a position to accept an amendment proposed by the European Parliament at second reading and when the Council is ready to present its position, a first trilogue will be organised. Each institution, in accordance with its own rules of procedure, will designate its participants for each meeting and define its mandate for the negotiations. The Commission will indicate to both delegations at the earliest possible stage its intentions with regard to its opinion on the European Parliament's second reading amendments.
25. Trilogues shall take place throughout the conciliation procedure with the aim of resolving outstanding issues and preparing the ground for an agreement to be reached in the Conciliation Committee. The results of the trilogues shall be discussed and possibly approved at the meetings of the respective institutions.
26. The Conciliation Committee shall be convened by the President of the Council, with the agreement of the President of the European Parliament and with due regard to the provisions of the Treaty.
27. The Commission shall take part in the conciliation proceedings and shall take all the necessary initiatives with a view to reconciling the positions of the European Parliament and the Council. Such initiatives may include, draft compromise texts having regard to the positions of the European Parliament and of the Council and with due regard for the role conferred upon the Commission by the Treaty.
28. The Conciliation Committee shall be chaired jointly by the President of the European Parliament and the President of the Council. Committee meetings shall be chaired alternately by each co-chair.
29. The dates and the agendas for the Conciliation Committee's meetings shall be set jointly by the co-chairs with a view to the effective functioning of the Conciliation Committee throughout the conciliation procedure. The Commission shall be consulted on the dates envisaged. The European Parliament and the Council shall set aside, for guidance, appropriate dates for conciliation proceedings and shall notify the Commission thereof.
30. The co-chairs may put several dossiers on the agenda of any one meeting of the Conciliation Committee. As well as the principal topic ('B-item'), where agreement has not yet been reached, conciliation procedures on other topics may be opened and/or closed without discussion on these items ('A-item').
31. While respecting the Treaty provisions regarding time-limits, the European Parliament and the Council shall, as far as possible, take account of scheduling requirements, in particular those resulting from breaks in the institutions' activities and from the European Parliament's elections. At all events, the break in activities shall be as short as possible.
32. The Conciliation Committee shall meet alternately at the premises of the European Parliament and the Council, with a view to an equal sharing of facilities, including interpretation facilities.
33. The Conciliation Committee shall have available to it the Commission proposal, the Council common position and the Commission's opinion thereon, the amendments proposed by the European Parliament and the Commission's opinion thereon, and a joint working document by the European Parliament and Council delegations. This working document should enable users to identify the issues at stake easily and to refer to them efficiently. The Commission shall, as a general rule, submit its opinion within three weeks of official receipt of the outcome of the European Parliament's vote and at the latest by the commencement of conciliation proceedings.

as the Conciliation Committee's secretariat, in association with the Secretariat-General of the Commission.

GENERAL PROVISIONS

39. Should the European Parliament or the Council deem it essential to extend the time-limits referred to in Article 251 of the Treaty, they shall notify the President of the other institution and the Commission accordingly.
40. Where an agreement is reached at first or second reading, or during conciliation, the agreed text shall be finalised by the legal-linguistic services of the European Parliament and of the Council acting in close cooperation and by mutual agreement.
41. No changes shall be made to any agreed texts without the explicit agreement, at the appropriate level, of both the European Parliament and the Council.
42. Finalisation shall be carried out with due regard to the different procedures of the European Parliament and the Council, in particular with respect to deadlines for conclusion of internal procedures. The institutions undertake not to use the time-limits laid down for the legal-linguistic finalisation of acts to reopen discussions on substantive issues.
43. The European Parliament and the Council shall agree on a common presentation of the texts prepared jointly by those institutions.
44. As far as possible, the institutions undertake to use mutually acceptable standard clauses to be incorporated in the acts adopted under codecision in particular as regards provisions concerning the exercise of implementing powers (in accordance with the 'comitology' decision⁽¹⁾), entry into force, transposition and the application of acts and respect for the Commission's right of initiative.
45. The institutions will endeavour to hold a joint press conference to announce the successful outcome of the legislative process at first or second reading or during conciliation. They will also endeavour to issue joint press releases.
46. Following adoption of a legislative act under the codecision procedure by the European Parliament and the Council, the text shall be submitted, for signature, to the President of the European Parliament and the President of the Council and to the Secretaries-General of those institutions.
47. The Presidents of the European Parliament and the Council shall receive the text for signature in their respective languages and shall, as far as possible, sign the text together at a joint ceremony to be organised on a monthly basis with a view to signing important acts in the presence of the media.

⁽¹⁾ Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission (OJ L 184, 17.7.1999, p. 23). Decision as amended by Decision 2006/512/EC (OJ L 200, 27.7.2006, p. 11).

30.6.2007

EN

Official Journal of the European Union

C 145/9

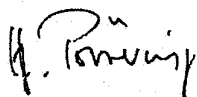
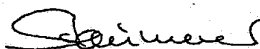

48. The jointly signed text shall be forwarded for publication in the Official Journal of the European Union. Publication shall normally follow within two months of the adoption of the legislative act by the European Parliament and the Council.
49. If one of the institutions identifies a clerical or obvious error in a text (or in one of the language versions thereof), it shall immediately notify the other institutions. If the error concerns an act that has not yet been adopted by either the European Parliament or the Council, the legal-linguistic services of the European Parliament and the Council shall prepare the necessary corrigendum in close cooperation. Where this error concerns an act that has already been adopted by one or both of those institutions, whether published or not, the European Parliament and the Council shall adopt, by common agreement, a corrigendum drawn up under their respective procedures.

Done at Brussels, on the thirteenth day of June in the year two thousand and seven.

For the European Parliament
The President

For the Council of the European
Union
The President

For the Commission of the European
Communities
The President

Memorandum by the Council of the European Union

LEGAL FRAMEWORK¹⁵

The legal framework for the activities of the Council of the EU concerning the codecision procedure is laid down by the Treaty Establishing the European Community (in Article 251 thereof), and is also developed in the Council's Rules of Procedure¹⁶ and in the Joint Declaration on Practical Arrangements for the Codecision Procedure.¹⁷ The role of the General Secretariat of the Council (GSC) is to help the Council in participating in this procedure.

Detailed information concerning procedural and technical aspects of codecision is available in the GSC's *Codecision Guide*.¹⁸ In addition, the respective Interinstitutional Agreements on better law-making¹⁹ and on Common Guidelines for the quality of drafting of Community legislation²⁰ also influence to a certain extent the Council's role in the codecision procedure.

The Protocol on the Role of national Parliaments in the European Union and the Protocol on the Application of the Principles of Subsidiarity and Proportionality annexed to the Treaty both anchor in primary law the special status of national parliamentary scrutiny of the Community's legislative procedure.²¹ In this regard, the Conference of European Affairs Committees (COSAC) performs a key function.

¹⁵ In this Reply, the General Secretariat of the Council (GSC) confines itself to commenting on those matters raised in the Call for Evidence which pertain to its own functions.

¹⁶ The 2009 consolidated version of the Rules of Procedure is available online at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:2006D0683:20090101:EN:PDF>

¹⁷ Published in the Official Journal of the European Union: OJ C 145, 30.6.2007, p. 5.

¹⁸ http://www.consilium.europa.eu/uedocs/cmsUpload/code_EN.pdf

¹⁹ OJ C 321, 31.12.2003, p. 1.

²⁰ OJ C 73, 17.3.1999, p. 1.

²¹ The special contribution of national Parliaments to the good functioning of the Union is further emphasised by Article 12 TEU as it would be amended by the Treaty of Lisbon and by the abovementioned Protocols as amended by the Treaty of Lisbon. See, for example, a recent detailed analysis of this topic undertaken by the European Parliament's Committee on Constitutional Affairs (European Parliament document no. A6-0133/2009, the "Brok Report").

THE PRINCIPLE OF TRANSPARENCY

The European Council, when it met on 15 and 16 June 2006, underlined that, with a view to increasing the confidence of citizens in the European Union, it is important to enable them to acquire a first hand insight into its activities, notably through further increasing openness and transparency beyond what is required under Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents.²² Therefore, while recognising the need to ensure its effectiveness, the work of the Council has been further opened up, particularly when the Council deliberates on legislative acts under the codecision procedure.

Accordingly, Article 8 of the Council's Rules of Procedure provides that deliberations on legislative acts to be adopted in accordance with the codecision procedure shall be open to the public, and Article 9 provides that the results of votes and explanations of votes by Council members, as well as statements in the Council minutes and items in those minutes relating to the adoption of legislative acts, shall be made public.

The Council's deliberations on codecision matters—including confidential deliberations—are obviously open to the members of the Council (*ie* the representatives in the Council of the Governments of the Member States), and relevant documents are made available through the GSC's internal electronic archive system "AIS". Documents are also automatically circulated to the members of the Council through the GSC's external electronic distribution system U32.²³ Non-confidential documents concerning legislative procedures in codecision are automatically made public in the Council's public register.²⁴ Confidential documents which contain time-sensitive negotiating positions are made public once the negotiations in question have finished.

THE CODECISION PROCEDURE IN PRACTICE

The Protocol on the Role of National Parliaments provides that a minimum period of *six weeks* must elapse between the Commission's adoption of a legislative proposal and the date when that proposal can be placed on the Council's agenda for the adoption of a common position or for its adoption as a legislative act.

However, even a codecision procedure which results in an agreement at first reading takes an average of 14 months²⁵ from the time of the Commission's initial proposal to the adoption of a legislative act.²⁶ Agreements at second reading and after Conciliation (*ie* in a third reading) take commensurately longer; 27 and 34 months, respectively. Therefore, even for the most rapidly adopted proposals (where there is an agreement at first reading), there is sufficient time for national Parliaments and other interested parties to form and communicate their views to the co-legislators and to the Commission.²⁷

With regard to agreements in first reading, active negotiations between the Council and the European Parliament generally take several months. "Face-to-face" negotiations, which are also attended by the Commission, begin only after each institution has established internally its own negotiating position. At the start of the legislative process, the work of the co-legislators often in practice runs in parallel. The European Parliament discusses the proposal in the relevant committee, and the Council discusses it in the relevant working party. The file then rises to the level of the Committee of Permanent Representatives (COREPER), which mandates the Presidency to open formal negotiations with the European Parliament.

During any initial informal or exploratory contacts, the Presidency cannot commit the Council to anything that has not yet been formally mandated by COREPER. Therefore, after each trilogue, the Presidency reports to COREPER on the outcome, and COREPER adapts the negotiating mandate accordingly.

Once a provisional agreement is reached (in both first and second reading) between the Presidency (on the basis of COREPER's mandate) and the European Parliament, the agreed text is submitted to COREPER for its approval before being sent to the European Parliament as the Council's offer.

²² Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ L 145, 31.5.2001, p. 43).

²³ Typically, Members of the Council receive documents through two contact points; their Permanent Representation to the EU and the ministry of foreign affairs. Their further dissemination within Member States is a matter of national law and practice.

²⁴ Accessible through <http://www.consilium.europa.eu>. In addition, legislative procedures can be looked up through the specific Codecision procedures website: <http://www.consilium.europa.eu/showPage.aspx?id=435&lang=en>.

²⁵ See statistical Table A, in annex.

²⁶ Prior to the Proposal, there may also have been periods of public consultation, green or white papers and published impact assessments. The Commission transmits new legislative proposals and consultation papers to national parliaments, and hosts the public interparliamentary database IPEX (www.ipex.eu), which publishes parliamentary reactions to Commission proposals, and the corresponding replies of the Commission.

²⁷ Practical arrangements for the negotiations in codecision are similar at each successive reading, and they will therefore not be discussed individually. The principal differences can be summarised as follows: in the case of a so-called "early second reading" agreement, the European Parliament has already fixed its position in first reading by a vote in plenary and has thus given its Opinion. The Council therefore coordinates ongoing negotiations with a view to a Common Position. If, after additional trilogues, the co-legislators are in agreement, the European Parliament confirms by letter to the Council that it will approve the Common Position without amendment at second reading. If a "full" second reading procedure takes place, the practical arrangements for negotiations are unchanged, save for an additional time-limit of three plus one months, the failure to abide by which triggers a conciliation procedure (a third reading).

This constant mandating and reporting obligation ensures that the Members of the Council are kept closely and promptly informed about the course of the negotiations and that the Presidency acts within its mandate. It also influences the rhythm of the negotiations and effectively creates periods during which national Parliaments and other parties may continue to make their views known. At each stage, the GSC distributes relevant working documents to the Members of the Council. These documents are often made available to the public via the internet immediately or with only a brief delay (see the section above on the Principle of Transparency).

INTERVENTION BY NATIONAL PARLIAMENTS

National Parliaments can intervene as interested parties at any stage in the codecision procedure. The GSC regularly receives both contributions made by COSAC and direct contributions from national Parliaments, which are circulated by the Secretariat to the Council's members (following translation, if necessary). National Parliaments, for example, scrutinised the proposal which led to the adoption of Directive 2008/6/EC which recently amended Directive 97/67/EC with regard to the full accomplishment of the internal market of Community postal services²⁸ from the viewpoint of the subsidiarity and proportionality principles.²⁹

In addition, national Parliaments can state their positions to their national Governments, which give instructions to the delegations in Council and they can also, if national law and parliamentary practice so allows, scrutinise the negotiating positions taken by them within the Council. In practice, such manifestations of parliamentary scrutiny carry considerable weight in COREPER and in working parties, and it is not uncommon for a member to negotiate subject to a so-called "parliamentary reserve". In the 45 COREPER I sessions of 2008, for example, 46 parliamentary reserves were placed (including 11 by the United Kingdom and 27 by France).³⁰ A parliamentary reserve, like all other types of reserves, if not lifted by the member concerned, counts, according to the Council's Rules of Procedure, as a "no" vote.

Although this does not correspond to the Council's view of the co-decision process, the Council is aware that the European Parliament Working Party on Parliamentary Reform ("Roth—Behrendt" group) issued a report³¹ in which it stated that first reading agreements involve a lack of transparency and democratic legitimacy at the expense of open political debate, and called for tighter political control. It further proposed that conciliation meetings should be open to the public, while trilogues should remain closed.

20 April 2009

CODECISION PROCEDURE: MAY 1999 TO DECEMBER 2008

Annex

STATISTICAL DATA

Table A

		<i>1st Reading</i>	<i>2nd Reading</i>	<i>Conciliation</i>	<i>Total</i>
May 1999–2006	Number of files	217 38.5%	249 44.1%	98 17.4%	564 100%
	Average time in codecision	13.7 months	26.5 months	33.7 months	
	Number of files	34 68%	12 24%	4 8%	50 100%
	Average time in codecision	17.3 months	34.6 months	38.7 months	
2007	Number of files	48 84.2%	8 14%	1 1.8%	57 100%
	Average time in codecision	14.8 months	29.8 months	29.6 months	
	Number of files	299 44.56%	269 40.08%	103 15.35%	671 100%
	Average time in codecision	14.28 months	26.95 months	33.85 months	
2008	Number of files	299 44.56%	269 40.08%	103 15.35%	671 100%
TOTAL 1999–2008		14.28 months	26.95 months	33.85 months	

²⁸ OJ L 52, 27.2.2008, p. 3.

²⁹ See Council document 13114/07. Further information on the May 2007 Seventh bi-annual report and its Annex submitted to the XXXVII COSAC meeting in Berlin on 13–15 May 2007 is available on <http://www.cosac.eu/en/documents/biannual/>

³⁰ See statistical Table B, in annex.

³¹ See European Parliament document PE406.309.

The average duration of a codecision procedure was calculated using the weighted average of the duration of the procedures in the periods 1999–2006, 2007 and 2008.

Table B
**PARLIAMENTARY RESERVES ON FILES CONCLUDED UNDER
THE CODECISION PROCEDURE IN 2008**

<i>COREPER I meeting number</i>	<i>United Kingdom</i>	<i>France</i>	<i>Malta</i>	<i>Denmark</i>	<i>Slovakia</i>	<i>Parliamentary Reserves per COREPER I Meeting</i>
2253	1	2				3
2250	1	2				3
2249		1				1
2247	1	1				2
2246	1		1	1	1	4
2242	1					1
2240		1				1
2236		1				1
2234	1					1
2233	2			1		3
2232	1	3		1		5
2231	1	3		1		5
2230		1				1
2228		2				2
2219		4				4
2216				1		1
2214		3				3
2212	1	1		1		3
2211		2				2
Total Number of Parliamentary Reserves						
	11	27	1	6	1	46

Total number of COREPER I meetings in 2008 (numbers 2211–2255)	45
Total number of parliamentary reserves	46
Average of parliamentary reserves per COREPER I meetings	1.02

Memorandum by the Federal Trust for Education and Research

Please find below our response to the Call for Evidence from the House of Lords European Union Committee on “The implications of codecision for national parliamentary scrutiny”.

The Federal Trust is a think tank that studies the interactions between regional, national, European and global levels of government. We have a longstanding interest in the issue of the role of the UK Parliament in the democratic oversight of European Union policy and legislation.

1. In this submission we set out a general argument, indicating where appropriate which of the questions in the Call for Evidence are being dealt with by a particular question from the Committee.
2. Our overall view is that the possible implications of the codecision procedure for national parliamentary scrutiny vary according to the length of the co-decision procedure applied to any particular piece of legislation considered.

3. If the procedure is a relatively short one, involving a “first or early second reading deal” (Question 1a), a clear advantage from the perspective of national parliaments is that the legislation which eventually emerges will be identical with or very similar to the document which was first brought to their attention. Any views expressed by national parliaments to their national governments on the initial proposal will retain their validity throughout the legislative procedure. A potential disadvantage for national parliamentary scrutiny, however, arising from “first or early second reading deals” is that once they have made their initial comments on the European legislation under review, they will have little opportunity to refine their views later, teasing out problems within legislation that they might have noticed if they had had more time to assess a particular proposal.

4. Conversely, if the co-decision procedure is any particular case more protracted, involving a full second or third reading, the advantage from the point of view of national parliamentary scrutiny is that there will be more opportunity for national parliamentarians to reconsider the content of the proposal, identifying any problems which may emerge from the debates in the European Parliament and taking further action they may deem necessary. The potential disadvantage in this case for national parliamentary scrutiny is that, during the course of a protracted procedure, the content of the proposal may change, implying that national Parliaments are faced with the difficulties of dealing with a moving target, the movements of which they cannot always follow in detail.

5. Although the preceding paragraphs set out the theoretical advantages and disadvantages arising from the co-decision procedure for national parliamentary scrutiny, the likelihood should not be overstated that in practice a proposed piece of European legislation will be transformed by negotiations between the European institutions in such a way as to invalidate the original comments of national legislatures. In particular, changes through negotiation to a legislative proposal which would suddenly render the measure unacceptable to a national parliament, and of which there was no indication in earlier drafts, are extremely unusual. An altogether more likely outcome of negotiations between the European institutions is the dilution of the original proposal, in order to *remove* elements of the first text which are considered undesirable from certain national perspectives. For instance, this approach was taken with the European Services Directive of 2006, which became a less radical document than was originally hoped by the UK government or the European Commission.

6. In general the Federal Trust thinks that it is national governments that are the most appropriate recipients of views from national parliaments, particularly on specific legislative items (Question 4). In recent years a number of reports from the House of Lords European Union committees have been widely read within European institutions and other national political cultures, but these have tended to be wider reviews of policy rather than detailed investigations of specific legislative proposals. When a protracted codecision procedure is taking place, the 27 ministerial representatives are defenders and advocates for the interests of their own countries. The degree of flexibility accorded them in these circumstances by national parliaments in this task will vary from country to country. Ultimately it is an issue for each national parliament to decide how it wishes to ensure that ministers are held to account for their actions in the Council of Ministers. National governments in their turn will vary in their willingness to provide information to their national legislatures throughout the co-decision procedure. Even within the same national government, individual ministers may well vary in the degree of supervision they exercise over officials negotiating on their behalf during the European legislative procedure. This will affect their ability to keep national legislatures up to date with continuing negotiations.

7. If there are systemic barriers to effective parliamentary scrutiny of codecision procedures in the UK they are likely to arise not from the nature of codecision but from organisation and practices of national parliaments, and the political and organizational choices they make. The administrative and political resources devoted to the scrutiny of European legislation vary greatly between national parliaments, reflecting these different choices. National parliaments that have substantial resources of staff to assist them and which exercise consistent pressure upon national ministers to keep them informed, are much more likely to be able to make their voices count, in either shorter or longer co-decision procedures than national legislatures with limited administrative resources and limited interest in pressing their national ministers for information.

14 April 2009

Unofficial translation of the memorandum by the French Sénat

QUESTION 1a

The Sénat monitors the progress of European legislation in two ways.

The first is **scrutiny of the government's actions in Council**. Here, the Sénat can take a position on a legislative proposal. Such a position would invite the government to argue for certain priorities during the negotiations. The Sénat attempts, more and more frequently, to take such a position quickly and **as early as possible after**

the presentation of the legislative proposal (indeed the July 2008 revision of the constitution now also allows the Sénat to take a position on preparatory documents). Later on in the process, when negotiations are well advanced or completed, the Sénat can ask the government for a report on how it put forward the Sénat's views.

The second form is through the **dialogue with the European Commission** on the application of the principles of subsidiarity and proportionality (the so-called Barroso initiative). Here too, the timing of the Sénat's intervention is similar in that it is at the beginning of the decision process.

So, for both these forms of monitoring, the fact that a legislative proposal is subject to codecision does not influence the way in which the Sénat seeks to scrutinise.

QUESTION 1b

The Sénat is well informed through its receipt of diplomatic telegrams. Where additional information is considered necessary this can be obtained through the Sénat's office in Brussels. This office is based in both the European Parliament and the French Permanent Representation.

QUESTION 2

No.

QUESTION 3

As mentioned above, the information sent to the Sénat by the government is satisfactory.

QUESTION 4

The priority must be developing the exchange of information between parliaments on their scrutiny activities through the IPEX website.

QUESTION 5

The European Affairs Committee in the Sénat scrutinises all legislative proposals made under the auspices of the European Communities and European Union. There is no particular allowance made for texts adopted under codecision.

QUESTION 6

Scrutiny must begin with the initial proposal from the Commission. National parliaments must give their views as early as possible.

30 March 2009

The French version is available on request from the Committee Office.

Memorandum by the Committee on European Union Questions, German Bundesrat

Thank you very much for forwarding the questions for the inquiry into the implications of co-decision for national parliamentary scrutiny. It is very important, particularly in view of the forthcoming early warning system under the Lisbon Treaty, for national parliaments to review their procedures and, if necessary, adapt these to the changed circumstances. Efforts in this field should always focus on ensuring that national parliaments can exercise their powers of co-decision as effectively as possible. Please find enclosed our answers to the questions you sent.

THE IMPLICATIONS OF CO-DECISION PROCEDURES ON DELIBERATIONS IN THE BUNDESRAT

1. The co-decision procedure

There is a certain tension between the co-decision procedure and the right of national parliaments to participate in questions pertaining to the European Union in compliance with the provisions in force in each country. The Protocol to the Amsterdam Treaty on the role of national parliaments in the European Union therefore stipulates that once the Commission has forwarded proposals on draft legislation to the Council and the European Parliament, as a general rule a decision should be taken within six weeks to either adopt the draft as legislation or place it on the agenda of the Council to determine a common position. This deadline will be extended to eight weeks after entry into force of the Lisbon Treaty and its various protocols.

Generally national parliaments will be able to exercise their rights of co-decision by implementing their own consultation procedures expeditiously. The early warning system stipulated in the Lisbon Treaty will anyway make this indispensable in the future in order to breathe life into the new rights accorded to national parliaments. To date the Bundesrat has already been examining EU draft legislation speedily (in generally around eight weeks after a proposal is adopted by the Commission) and has made preparations to ensure that it will always be possible to conclude deliberations on schedule (c.f. point 3.).

So far there are no examples of deliberations on EU draft legislation examined under the co-decision procedure that proved to be particularly difficult or complex as a result of this procedure. The fact that certain documents have been classified as confidential has not had a negative impact on deliberations in the Bundesrat. Where confidentiality needs to be respected, the Chamber of European Affairs may be convened (more details on the Chamber of European Affairs under point 3).

2. Governments and EU institutions

One of the main tasks and duties of the federal government is to transmit all documents to the Bundesrat immediately. Furthermore it is also obliged to provide information at all times on the progress of debates in Brussels. The federal government complies fully with these obligations. This ensures that the Bundesrat can exercise its rights of co-decision on EU matters effectively.

These obligations could be transferred to EU institutions *mutatis mutandis*. It is preferably for the Council to transmit Commission documents rapidly and this is generally the case in practice too.

Since September 2006 the Bundesrat has forwarded particularly significant opinions on EU draft legislation directly to the Commission. In addition, it also makes the results of its deliberations available to other national parliaments through the IPEX system.

3. Deliberations in the Bundesrat

The Bundesrat generally begins its deliberations immediately after the federal government forwards EU draft legislation to it. Pursuant to the Bundesrat's rules of procedure, the Bundesrat is also entitled to start its deliberations again at any point after successfully adopting a decision and may adopt follow-up decisions, should developments in deliberations at the EU level make this necessary. The possibility of relaunching deliberations at any point in time has proved its worth. The Bundesrat uses this option if the original Commission proposal is substantially altered due to discussions at EU level.

The Bundesrat deliberates and takes decisions in frequent meetings. It generally meets every three weeks. This ensures that current EU draft legislation is addressed speedily. In particularly urgent cases the Chamber of European Affairs can also be convened and take decisions on opinions relating to EU draft legislation in lieu of the plenary session. The Chamber of European Affairs may also adopt decisions using a written procedure.

The key factors for effective Bundesrat participation in examining EU issues are thus speedy deliberations and close cooperation with the federal government.

6 April 2009

Memorandum by the Committee on the Affairs of the European Union, German Bundestag

1a) Generally, there has been no evidence of the codecision procedure to complicate parliamentary scrutiny. Concerning "first reading deals" or "early second reading deals", however, parliamentary scrutiny is limited. Since those deals are mostly negotiated in the so called trialogues between Council, Commission and European Parliament, hence in small and informal meetings, information provided by the Federal Government concerning these negotiations is limited. Because of their informal nature the trialogues are not regulated under the Agreement between the German Bundestag and the Federal Government on cooperation in matters concerning the European Union. This agreement clarifies, amongst others, the parliament's right to information and the government's obligation to report on EU Affairs.

1b) The confidential nature of negotiating documents creates, by nature, difficulties for parliamentary scrutiny. Particular problems concerning the codecision legislative procedure have not been noticed so far.

One practical solution, which would maintain confidential nature and allow parliamentary scrutiny, could be a "data room" where authorized persons would get access to the confidential documents.

2) No.

3) Currently all relevant information on matters concerning the European Union (documents etc.) is provided by the Federal Government and partly by the European Parliament (EP resolutions etc.) to the German Bundestag. The procedure as it is currently being administered is for the most part satisfactory and facilitates parliamentary control. Political discussions mostly concentrate on technical details of the communication between Bundestag and Federal Government. The corresponding legal basis is—amongst others—article 23 of the German Constitution (basic law) and the mentioned Agreement between the German Bundestag and the Federal Government on cooperation in matters concerning the European Union.

4) Currently, the results of the Bundestag's scrutiny are only communicated to the Federal Government. Nevertheless the scrutiny results of the COSAC subsidiarity checks are also sent to the EU Institutions. The procedure might be revised after the entry into force of the Treaty of Lisbon.

5) For the first part of the question please refer to question 3).

Participation of national parliaments in European Union matters at an early stage is one key to effective scrutiny. The Agreement between the German Bundestag and the Federal Government on cooperation in matters concerning the European Union warrants an early participation of the Bundestag.

6) It can not generally be said at which point of the codecision procedure parliamentary scrutiny should be executed. Effective parliamentary scrutiny can only be achieved through an oversight approach.

8 April 2009

Memorandum by Professor Simon Hix, London School of Economics

1. My evidence to the committee focuses on two issues relating to national parliamentary scrutiny of EU legislation under the codecision procedure: (1) the development and implications of “early agreements” between the European Parliament and the EU Council; and (2) the operation of the Council when acting in a legislative capacity.

2. Regarding early agreements, there are powerful incentives for the Council and the European Parliament to reach agreements on legislation at an early stage in the co-decision procedure. A first set of incentives relate to the need to speed up EU decision-making. With several readings of legislation in both institutions, policies proposals have at times taken too long, and with the latest enlargements it was decided between the institutions to seek first reading agreements when possible.

3. A second set of incentives relate to each of the institutions' considerations about how to maximise their influence over policy outcomes. The Council would prefer to reach an agreement before the conciliation committee, as the conciliation process, which was originally designed for 12 or 15 member states, is unwieldy with 27 member states as well as the same number of representatives from the European Parliament. On the other side, the European Parliament has an incentive to reach agreement at first reading, because amendments can be passed by only a “simple majority” at this stage whereas an “absolute majority” of MEPs is required to pass amendments at second reading.

4. Research by Raya Kardasheva³² at the London School of Economics and Political Science has shown that these incentives have led to a significant increase in first reading agreements between the European Parliament and the Council since 1999. For example, while only 21% of codecision proposals were decided at first reading in 2000, more than 85% were agreed at first reading in 2007 and 2008.

5. Legislation is now passed at a significantly quicker pace. In 2000–01 it took on average 686 days to pass a piece of legislation under the co-decision procedure, whereas in 2006–07 it took on average only 206 days. Also, directives are now passed more quickly than regulations.

6. There has also been an increase in the use of informal “trialogues” between the European Parliament and the Council, to facilitate these early agreements. Since 2004, 94% of codecision bills (201 out of 219 agreements) were discussed via the informal triologue procedure, before open deliberations and votes could take place in committee or on the floor of the European Parliament.

7. Because of these deals between the EU governments and the European Parliament behind the scenes it is now difficult for “backbench” MEPs, let alone national MPs, to scrutinise codecision legislation. One example of this is the decline in the number of European Parliament committee reports which are amended by the plenary of the European Parliament. In 2003–04 the plenary amended almost one-third of committee reports (18 out of 57 bills), whereas in 2006–07 the plenary amended only 10% of committee reports (3 out of 28 bills).

³² Raya Kardasheva (2009) *Legislative Package Deals in EU Decision-Making*, PhD Thesis, London School of Economics and Political Science.

8. In general, these trends suggest that it is increasingly difficult for national parliaments to monitor what either the Council or the European Parliament is doing under the codecision procedure. In the past draft directives and amendments from the Council and the MEPs were debated across several readings and over several months. These days, in contrast, most directives are adopted via a deal between a small group of MEPs and the Council Presidency, often in informal and non-recorded meetings, and then rubber-stamped by the European Parliament plenary and the Council. Full scrutiny by the MEPs, let alone by national parliaments or the wider public, is increasingly difficult.

9. Turning to the operation of the Council when acting in a legislative capacity, it is clear to most Council observers—such as the Centre for European Policy Studies and the European Policy Centre³³—that there has been a fundamental shift in the way the Council works as a result of the enlargement of the EU from 15 to 27 member states. With 15 member states the Council was able to operate as a forum for all EU negotiations: with each member state acting independently, negotiations in Council bodies (such as COREPER) conducted through bilateral and multilateral negotiations by diplomats and civil servants, amendments submitted by individual governments, and Council meetings starting with a “tour of the table” where each member state could explain its position on the issues on the table.

10. With 27 member states, in contrast, when conducting legislative business the Council operates more like a normal legislative body. For example, the tour of the table has been removed. Instead, member states are required to share their speaking time. This forces governments to agree common positions before Council meetings. More fundamentally, it is widely understood that member states are now required to co-sponsor amendments rather than promoting amendments individually. This is a significant shift from the traditional practice in the main legislative body of the EU. Furthermore, these changes, as well as the increasing size of the Council, have increased the ability of the Council Presidency to set the agenda of meetings and to adjudicate between the various composite amendments.

11. These changes in the operation of the EU Council are consistent with what political science would predict about how increasing the size of a committee or political body would affect the allocation of power and resources in that body. Essentially, increasing the size of a body generally leads to greater specialisation (such as joint speaking time and joint amendments in the case of the EU Council) and greater delegation of power to agenda-setters (the Council Presidency in the case of the EU Council).

12. These changes to the Council raise serious questions about the ability of national parliaments to scrutinise the operation of national government when they are conducting EU legislative business. The Council is certainly a more open and accessible institution than it was a decade or so ago. For example, the media can attend certain Council meetings, the results of some legislative votes in the Council are now made public (although very few votes are formally reported), and Council documents are more accessible on-line than they used to be.

13. Nevertheless, this is not the same as full public scrutiny of what is meant to be a democratic legislative chamber. If one compares the access of the public and national parliaments to the legislative business of the European Parliament and the Council the differences are stark. Whereas in the European Parliament the public has full access to almost all committee deliberations on legislative issues as well as full access to all plenary deliberations, in the EU Council there is no public access to any meetings of COREPER and incomplete access to legislative deliberations of ministerial meetings of the Council. Whereas in the European Parliament all legislative documents are available to the public and national parliaments, including all amendments by all parties, committees or individual MEPs, in the Council the public and national parliaments are not able to see what legislative amendments are proposed by which national governments, and also which governments co-sponsored which amendments.

14. I would consequently urge the committee to ask the British government to make available to the committee every single amendment proposed by a British civil servant or minister to any piece of EU legislation (as opposed to an executive action of the EU, where secrecy is perhaps more defensible), and also to indicate which of these amendments were co-sponsored, and with which other member states. Several governments are under pressure to divulge this information, and it is only a matter of time until this information becomes available. It would surely be better for the British government to lead the push for transparency in the EU’s main legislative body than to try to stop what is probably an irresistible tide.

12 May 2009

³³ Sara Hagemann and Julie De Clerck-Sachsse (2007) “Old Rules, New Game: Decision-Making in the Council of Ministers after the 2004 Enlargement”, Brussels: Centre for European Policy Studies, and Sara Hagemann (2008) “Voting, Formal Statements and Coalition Building in the Council from 1999 to 2006”, in Daniel Naurin and Helen Wallace (eds) *Unveiling the Council of the European Union: Games Governments Play in Brussels*, London: Palgrave.

Memorandum by the House of Representatives, The Netherlands

(The numbers refer to the questions put forward in House of Lords Call for Evidence.)

1) The development of first and second reading deals in codecision procedures has complicated matters because of their confidential nature and because Council is represented by the Presidency/Troika only. This can make it hard to control the process even for Governments, let alone National Parliaments. Given the fact that negotiations are inevitable in codecision procedures, it is becoming more important for National Parliaments to thoroughly scrutinize those proposals they consider of political importance.

2) Standing practice in the Netherlands is that Government should consult Parliament about draft replies to Green Papers and White Papers. Furthermore, Government provides a so-called assessment-form within six weeks after a proposal has been published by the European Commission, and sends annotated Agendas ahead of each Council meeting (and reports afterwards). These Annotated Agendas and assessment-forms are discussed in designated EU-debates between Ministers and Parliamentary Committees shortly before the Council takes place. In general, this set-up works quite well, but information gaps can emerge in the course of the often lengthy negotiation process and certainly when informal dealings take place between Council meetings (see 5).

3) Subsidiarity checks are being sent to the European Commission, and copied to European Parliament and Council. The Tweede Kamer aims to use the IPEX database to exchange scrutiny information. This may include, in addition to the subsidiarity checks, Parliamentary motions, official letters to Government etc. The network of Parliamentary Representatives should be used more systematically to exchange scrutiny information between National Parliaments.

4) The present set-up generally works well, but informal dealing, in Council Working Groups or with the European Parliament, is hard to scrutinize. There are no standard reporting procedures concerning informal negotiations. Occasionally, Parliamentary Committees request updates.

In the ratification process of the Treaty of Lisbon a legislative amendment and a motion have been adopted enabling the Tweede Kamer to operate a system of scrutiny reservations. Such reservations would be used for proposals designated by the Tweede Kamer as politically important. If it comes to that, Government should make a Parliamentary scrutiny reservation in Council. Government and Tweede Kamer would then make specific arrangements to ensure adequate exchange of information and consultation.

A specific challenge are the so-called “A”-points at Council agendas, which may also involve draft codecision deals. It may be necessary to scrutinize these before they are rubber stamped in COREPER/Council. The Government has committed itself to timely inform the Tweede Kamer about these points, yet concrete measures are still being awaited.

5) The Tweede Kamer’s objective is to oversee the entire decision making process, starting well before a proposal is made (Green Paper, White Paper, Commission Communication, etc.), right up to the final decision and its implementation.

18 March 2009

Memorandum by the Joint Committee on European Scrutiny, Oireachtas, Irish Parliament

I wish to thank you for your letter of 18 March 2009 and for inviting the Joint Oireachtas Committee on European Scrutiny to contribute to your Committee’s inquiry into the implications of codecision for national parliamentary scrutiny.

I also wish to thank you and your colleagues on the House of Lords’ EU Committee for addressing such an important issue. The Joint Committee on European Scrutiny understands your Committee’s concerns regarding certain aspects of the codecision procedure and the potential implications for national parliamentary scrutiny. We have also noted the increase in first reading agreements in recent years and the impact that these agreements could potentially have on ensuring that the full rigours of parliamentary scrutiny, both at the EU level and at the national level, are applied.

I have enclosed a response from the Joint Committee on European Scrutiny to your Committee's call for evidence. As you will see, we have decided to offer some general observations as well as an overview of how EU scrutiny works within the Oireachtas. We hope that you and the Committee will find our contribution useful and we look forward to reading the results of your Committee's inquiry.

As you may be aware, the Joint Committee on European Scrutiny has requested a visit to the Houses of Parliament sometime this month in order to gain a detailed insight into your scrutiny reserve system. Perhaps on this occasion, we can also discuss the issue of codecision and its implications for national parliamentary scrutiny in greater detail.

8 April 2009

RESPONSE

1. The scrutiny of draft EU legislation by the Irish Parliament (Oireachtas) is governed by the European Union (Scrutiny) Act 2002 (enclosed). The operation of the Act is managed on behalf of the Oireachtas by the Joint Committee on European Scrutiny (JCES) which is made up of members of both Houses of the Oireachtas, Dáil Éireann and Seanad Éireann.
2. Under the Act, the Government is obliged to provide a copy and a statement on proposed measures presented by the European Commission or initiated by a Member State, as the case may be. The Act defines a measure as: (i) a regulation or directive adopted under the Treaty establishing the European Community; (ii) a joint action or common position adopted under CFSP; and (iii) a draft Decision or Framework Decision in the area of Justice and Home Affairs. Therefore, under (i) above, the Oireachtas receives information from the Government on draft EU legislation which falls under the codecision procedure.
3. On receipt of the draft text and the statement (information note) from the Government (usually within four working weeks), the JCES will undertake an examination of the material provided and decide which individual measures it feels require further scrutiny. On completion of its scrutiny of an individual measure, the JCES will produce a scrutiny report containing its position and recommendations on the draft measure. This report is forwarded to the relevant Government Minister, who is obliged under the Act to "have regard to any recommendations made to him or her from time to time by either or both Houses of the Oireachtas or by a committee of either or both Houses in relation to a proposed measure". Some of the Committee's scrutiny reports on the most important measures are also debated in plenary session.
4. Therefore, the focus of the JCES' scrutiny is on the Government Minister as legislator within the EU's Council of Ministers rather than the interplay with the European Parliament. The JCES' objective is to make its position and recommendations on a proposed measure known to the relevant Government Minister as early as possible, and preferably before the Council of Ministers adopts its "General Understanding" and/or "Common Position" on a draft measure.
5. However, the JCES is very much aware of the key role played by the European Parliament in forming and adopting important EU legislation under the codecision procedure. The JCES strongly supports the codecision procedure as it adds democratic legitimacy to the EU's legislation process and to this end supports the proposed extension of codecision under the Lisbon Treaty to nearly all EU legislation. With this in mind and conscious of influence MEPs can have over draft EU laws, the JCES forwards all its scrutiny reports to the Irish MEPs on an informal basis. The Committee is also kept informed of the European Parliament's position on specific legislative proposals by the Oireachtas representative in Brussels.
6. In line with the 2002 Act and the Irish scrutiny system, the JCES work focuses almost exclusively on the initial legislative proposal from the European Commission. However, the JCES will sometimes request that the Government keep it informed on the evolution of a draft measure throughout the negotiations, including on changes that may be agreed with the European Parliament. It is always open to the JCES to consider a draft measure further on the basis of information it may receive on amendments to the draft measure made by either the Council of Ministers or the European Parliament.
7. The JCES understands the concerns of the House of Lords' EU Committee on certain aspects of the codecision procedure and the potential implications for national parliamentary scrutiny. We have also noted the significant increase in recent years in the number of "first reading deals" and "early second reading deals". It could be argued that first reading agreements, which are an acceptable part of the codecision procedure but are also sometimes confidential in nature, may not ensure that the full rigours of parliamentary scrutiny, both by the European Parliament and national parliaments, are applied.

8. To this end, the JCES would encourage the Council of Ministers and the European Parliament to introduce measures that would bring greater transparency to the process of first reading agreements. While the JCES does not believe, given the nature of our scrutiny system, that the codecision procedure has undermined our effective scrutiny of draft EU legislation, we do accept that the practice of first reading agreements is an issue that warrants examination. Therefore, we welcome the House of Lords' inquiry and look forward to its results. The JCES would also propose that this issue, which is systemic in character, should be addressed by COSAC.

Memorandum by Davor Jančić PhD candidate, Utrecht University, The Netherlands and visiting Fellow at Sciences Politiques, Paris

INTRODUCTION

1. In its Call for Evidence of 17 March 2009, the House of Lords' European Union Committee inquired, among other things, whether there is a role for national parliaments beyond the scrutiny of their own government. Here below I will first analyse some of the critical points concerning the normative framework of the codecision procedure as regulated by the currently applicable founding treaties and by the Treaty of Lisbon. Thereafter, I will examine in turn the following three issues: a) the general aim of the inquiry termed "better legislation", b) the more specific aim of the inquiry termed "to assess how to increase the impact of the Committee's scrutiny on the Government and, if considered appropriate, *on the European Parliament*",³⁴ and c) questions no. 3 and 4 on what role there is for governments and the EU institutions in ensuring that national parliaments can conduct effective scrutiny of proposals negotiated under codecision and what role there is for national parliaments to address the results of their scrutiny to those beyond their own government: for example, the European Parliament, the Commission or other national parliaments. These will be used to expose the hypothetical interactions between national parliaments and EU institutions, which I will sketch by using two simple models (direct and indirect), and which might themselves serve to better visualize and assess the options for further action by the Committee.

CODECISION IN THE FOUNDING TREATIES³⁵

2. The codecision procedure was introduced by the Treaty of Maastricht³⁶ in 1992 (effective since 1 November 1993) and was amended by the Treaty of Amsterdam³⁷ in 1997 (effective since 1 May 1999). The applicable procedure is the one laid down in Article 251 TEC. It comprises a maximum of three readings and a conciliation procedure, which may take place after the second reading and may lead to the third reading. It suffices for the present purposes to highlight the position and functions of three EU institutions involved in this decision-making procedure: the Commission, the European Parliament and the Council.

The Commission

3. The codecision procedure starts with the Commission's submission of a proposal for a legislative act contemporaneously to the European Parliament and the Council.³⁸ Besides its legislative initiative, the Commission's role in codecision is threefold:

- In the first reading, the Commission shall inform the European Parliament fully of its *position*.³⁹ This is not legally binding and does not entail legal consequences for the European Parliament's deliberations.
- In the second reading, the Commission shall deliver an *opinion* on the amendments that the European Parliament might insert into the Council's common position.⁴⁰ The legal consequence of the Commission's opinion is that, if it is negative, the Council may only adopt the Commission's proposal by unanimity.⁴¹
- In the Conciliation procedure, the Commission shall take part in the Conciliation Committee's proceedings and shall take all the necessary *initiatives* with a view to reconciling the positions of the European Parliament and the Council.⁴²

³⁴ Emphasis added.

³⁵ The text used is the one laid down in the consolidated versions of the Treaty on European Union and the Treaty establishing the European Community published in the English language in the Official Journal of the European Union C 321 of 29 December 2006.

³⁶ Article G, point 61 of the original Treaty of Maastricht is the Treaty on European Union inserted Article 189b into the Treaty of Rome ie into the Treaty establishing European Community.

³⁷ Article 2, point 41 of the original Treaty of Amsterdam.

³⁸ Article 251 (2) TEC

³⁹ Article 251 (2)(2), third indent, TEC

⁴⁰ Article 251 (2)(3)(c) TEC

⁴¹ Article 251 (3) TEC

⁴² Article 251 (4) TEC

- In the third reading, which follows the Conciliation procedure only if the Conciliation Committee yields a joint text, the Commission has no explicit role.

4. A degree of uncertainty remains as to who is the ultimate “Master of the Proposal”. In other words, the dilemma is whether the Commission can withdraw its proposal at any stage of codecision procedure or whether instead the Council’s common position becomes the new basis for negotiation and deliberation with the European Parliament. This matter is not covered by the founding treaties. It is only provided in Article 250 (1) TEC that:

- when acting on a proposal from the Commission, the Council needs a unanimous vote to amend the proposal; and that
- as long as the Council has not acted, the Commission may alter its proposal at any time during the procedures leading to the adoption of a Community act.

5. Though there are no explicit indications to that effect in the legal sources, some authors have claimed that the Commission’s position in the conciliation phase is weaker, because it cannot withdraw its proposal in that phase, which it could do in the first and second readings.⁴³ The European Parliament’s codecision guide reveals divergent interpretations of this issue by all of the three EU institutions involved, which surfaced on the occasion of the first European Parliament’s rejection of a Council’s common position. It is explained in the following terms:

“In July 2005, the Parliament made use of this possibility for the first (and, so far, only) time when it rejected the Council common position for a Directive on the patentability of computer implemented inventions (‘software patents’; report *Rocard*). This very controversial Commission proposal was rejected by an overwhelming majority of Members (648 to 14 and 18 abstentions). In line with Article 251 (2)(b) EC, the rejection by Parliament led to the termination of the procedure. In the course of the discussions the question arose whether the Commission can withdraw a proposal that has passed the first reading stage. While the Commission maintains its right to withdraw a proposal at any stage, the Parliament and the Council, based on Article 250 (2) EC, consider that as soon as the Council has adopted a common position the latter—and not the Commission proposal anymore—forms the basis for the further procedure. Consequently the Commission cannot withdraw a text, of which it has not the ‘ownership’ anymore”.⁴⁴

The European Parliament

6. The European Parliament is the first institution to act upon the Commission’s proposal both in the first and second readings. It has the power of veto in all stages of codecision, except in the first reading, when its opposition is communicated to the Council for further action.

7. Yet it should be noted that the European Parliament’s inaction leads to the Council’s right finally to decide on the adoption of the Commission’s proposal. Therefore, if the European Parliament “does not propose any amendments” in its first reading, the Council is free to adopt the act.⁴⁵ Similarly, if the European Parliament “has not taken a decision” on the Council’s common position in its second reading, the common position becomes law.⁴⁶ However, if the European Parliament does not “approve the proposed act” in the third reading, the act fails.

The Council

8. It has become a truism that the Council is the dominant EU institution in codecision. Still, the introduction of codecision represented a constraint on its lawmaking freedom by it having assumed the obligation to negotiate with the European Parliament for the first time. In 1994, the European Parliament’s rejection of the Voice Telephony Directive demonstrated that the Council had to take the former’s positions seriously. It has thus been pointed out that codecision led to increased interaction and interdependence between the Council and the European Parliament.⁴⁷

9. After the Maastricht codecision rules had resulted in 66 out of 165 legislative acts adopted in conciliation (around 40%),⁴⁸ the Amsterdam codecision rules pertinently introduced the following two changes: a) it allowed the Council to adopt the European Parliament’s amendments at first reading, and b) it scrapped the

⁴³ Nugent, Neill. *The European Commission*. Basingstoke: Palgrave, 2001:256; Rasmussen, Anna. “The role of the European Commission in co-decision—a strategic facilitator operating in a situation of structural disadvantage.” *European Integration online Papers*, Vol. 7, No. 10, 2003: 3.

⁴⁴ European Parliament. *Conciliations and codecision—a guide to how the Parliament co-legislates*. Brussels, 2007: 7.

⁴⁵ Article 251 (2)(2), second indent TEC

⁴⁶ Article 251 (2)(3)(a) TEC

⁴⁷ Shackleton, Michael and Raunio, Tapio. “Codecision since Amsterdam: a laboratory for institutional innovation and change.” *Journal of European Public Policy*, Vol. 10, Issue 2, April 2003: 171.

⁴⁸ *Ibid*, 173.

possibility for the Council to re-introduce proposal after conciliation. The concerns of time and effectiveness were therefore decisive in bringing about both the Amsterdam novelties and the reformed Council's attitude towards codecision.

10. In addition, these developments were encouraged in 2007, as evidenced by the Joint Declaration of European Parliament, the Council and the Commission on practical arrangements for the codecision procedure.⁴⁹ Among other ones, it included their agreement "to cooperate in good faith throughout the procedure with a view to reconciling their positions as far as possible and thereby clearing the way, where appropriate, for the adoption of the act concerned at an early stage of the procedure".⁵⁰ This is especially urged in case of the first reading.⁵¹ They acknowledged that the "trilogue system has demonstrated its vitality and flexibility in increasing significantly the possibilities for agreement at first and second reading stages [...]".⁵² These developments prompted the Council to reform its machinery and adjust to the emerging Union's decision-making culture.

11. While the trilogue system and the accompanying negotiations on draft legislative proposals have been a success in terms of efficiency, they carry the potential to impede national parliamentary scrutiny of the agreements reached thereby. They lack visibility both to the public and the parliamentary institutions. It seems that the advantage has been given to the so-called "output legitimacy" at the cost of "input legitimacy". This might be an incentive to liaise with EU institutions directly so as to increase the chances that parliamentary scrutiny will be taken into consideration not only by the own government participating in codecision but also by the Commission and the European Parliament. Such action by a national parliament could underscore the government's position but also provide the parliament's own opinion on a given draft proposal.

CODECISION UNDER THE TREATY OF LISBON⁵³

Competences

12. Besides dividing the competences of the Union into exclusive, shared and supporting/coordinating/supplementing,⁵⁴ the Treaty of Lisbon extends codecision to such fields as agriculture,⁵⁵ fisheries,⁵⁶ structural funds⁵⁷ and the policies falling within the ambit of the area of freedom, security and justice (among which border checks, asylum, immigration,⁵⁸ judicial cooperation in civil matters,⁵⁹ judicial cooperation in criminal matters,⁶⁰ police cooperation⁶¹). However, two caveats are in order which might add nuance to the Committee's conclusions reached in its report on the Lisbon Treaty.⁶²

13. First, despite the fact that common organization of agricultural markets under the Lisbon provisions is established pursuant to the ordinary legislative procedure, it is the Council alone which shall adopt measures on fixing prices, levies, aid and quantitative limitations and on the fixing and allocation of fishing opportunities.⁶³ Thus, the move to codecision in this field is not absolute.

14. Second, whilst both the EC Treaty and the Lisbon Treaty envisage codecision as the applicable decision-making procedure in the field of transport,⁶⁴ the latter treaty provides that appropriate provisions for sea and air transport shall be laid down pursuant to the ordinary legislative procedure. At present, it is solely the competence of the Council.⁶⁵ So, this might be seen as a step towards greater coverage by codecision in the field of transport.

⁴⁹ Official Journal of the European Union C145/6 of 30 June 2006.

⁵⁰ *Ibid.*, point 4.

⁵¹ *Ibid.*, point 11.

⁵² *Ibid.*, point 7.

⁵³ The text used is the one laid down in the consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Community as published in the English language in the Official Journal of the European Union C115 of 9 May 2008.

⁵⁴ Article 2 TFEU

⁵⁵ Article 43 (2) TFEU

⁵⁶ *Ibid.*

⁵⁷ Article 177 (1) TFEU

⁵⁸ Border checks, asylum and immigration were transferred to the Community pillar by Article 2, point 15 of the Treaty of Amsterdam in 1997 by way of insertion of the title "Visa, asylum, immigration and other policies related to free movement of persons" into Part Three of the EC Treaty. Border checks are referred to as "external border control" in the EC Treaty.

⁵⁹ Article 81 (2) TFEU

⁶⁰ Article 82 (1)(2) TFEU

⁶¹ Article 87 (2) TFEU

⁶² House of Lords, European Union Committee. "The Treaty of Lisbon: an impact assessment." *HL Paper 62-I, 10th Report of Session 2007-08*, 2008: 66, 72.

⁶³ Article 43 (3) TFEU

⁶⁴ Compare Article 71 (1) EC and Article 91 (1) TFEU

⁶⁵ Compare Article 80 (2)(1) EC and Article 100 (2) TFEU. A rather ambiguous formulation of the EC Treaty article providing that "the Council may, acting by a qualified majority, decide whether, to what extent and by what procedure appropriate provisions may be laid down for sea and air transport" may be taken to mean that the Council can decide to exclude the European Parliament from decision making.

Procedure

15. Furthermore, although it does not alter the codecision mechanism, the Treaty of Lisbon brings a number of important terminological and legal-technical clarifications into the procedure.⁶⁶ The latter includes the division of the new Article 294 of the Treaty on the Functioning of the European Union (TFEU) into a greater number of paragraphs instead of into indents.

16. Firstly, under the provisions of the Treaty of Lisbon, codecision becomes the “ordinary legislative procedure”. This serves to corroborate the European Parliament’s status in EU decision making as a legislator equal to the Council. Further, it can be seen as an indirect consequence of the abovementioned extension of codecision.

17. Secondly, the new treaty explicitly designates and so confirms the currently existing stages of the codecision procedure in the following order: a) first reading, b) second reading, c) conciliation, d) third reading. This is welcome in order to avoid confusing conciliation and third reading.

18. Thirdly, it further approximates the positions of the European Parliament and the Council by equalizing the acts that they adopt during the course of the procedure. Namely, both the Council’s “common positions” and the European Parliament’s “opinions” in the first reading become merely *positions*.

19. Fourthly, it does away with the ambiguity regarding the requirements for the European Parliament’s voting in the second and third readings. So, the “absolute majority of its component members” currently needed for the European Parliament to reject and to propose amendments to the Council’s common position in the second reading becomes “majority of its component members”.⁶⁷ While voting systems vary across the Union, the current formulation is to some extent superfluous, because absolute majority principally means the majority of component members. Therefore, there is no change regarding this provision. However, the “absolute majority of the votes cast” currently needed for the European Parliament to adopt the text jointly agreed during conciliation is somewhat contradictory,⁶⁸ because it facilitates the confusion between the notions of absolute and simple majorities. The number of votes requisite for the adoption of an act is most commonly either the majority of the component members (absolute majority) or the majority of the votes cast (simple majority). Notwithstanding the fact that it is possible to understand “absolute majority of the votes cast” as meaning the majority of the votes that also represent the majority of all the component members, this interpretation is not crystal-clear and the Treaty of Lisbon resolves this dilemma by opting for the more logical formulation—“majority of the votes cast”.⁶⁹ To be sure, the EC Treaty is not the only document which uses such terminology. The Rules of Procedure of the European Parliament also use it at several instances.⁷⁰ The rules of procedure of the Council and of the Commission avoid such terms and instead use descriptive formulations.⁷¹ Though these definitions vary from one legal system to another, avoiding double qualifications of the voting rules, such as eg a majority that is both “absolute” and “of the component members”, may be beneficial to the addressees of these rules.

20. Lastly, it adds two special provisions which regulate the situation where the proposal is submitted by the Member States, on a recommendation by the European Central Bank, or at the request of the Court of Justice. In these cases, the European Parliament and the Council shall communicate the proposed act to the Commission with their positions at first and second readings. The Commission is not obliged to inform the European Parliament of its position but may deliver it on its own initiative; yet the European Parliament and the Council may request the opinion of the Commission throughout the procedure. Also, if the Commission’s opinion in the second reading is negative, the Council need not act unanimously to introduce amendments to the proposal. As regards conciliation, the Commission may participate if it deems it necessary. These additions are a logical consequence of the fact that the proposal is not initiated by the Commission.⁷²

SCRUTINY ACROSS LEGAL ORDERS: BEYOND OWN GOVERNMENT

21. To begin with, one of the most crucial tools for effective parliamentary scrutiny of the EU lawmaking process lies in a clear and flexible perception by a national parliament of its constitutional prerogatives both regarding its own Member State and the EU. This perception is a matter for each parliament to adopt, develop and modify according to the changing formal and informal decision-making environments in the European

⁶⁶ These follow the norms of the Treaty establishing a Constitution for Europe.

⁶⁷ Compare Article 251 (2)(3)(b) and (c) EC and Article 294 (7)(b) and (c) TFEU

⁶⁸ Article 251 (5) EC

⁶⁹ Article 294 (13) TFEU

⁷⁰ See for example Rule 13 and 14 on the election of President and Vice-Presidents of the European Parliament respectively. See also Rule 182 on Committee bureaux.

⁷¹ See for example Article 11 on voting arrangements and quorum of the Council’s Rules of Procedure, which uses both “majority of the Council’s members”, “majority of the members of the Council” and “qualified majority”. Similarly, see for example Article 8 of the Commission’s Rules of Procedure on decision-making, which uses “majority of the number of Members specified in the Treaty”. None of these documents uses the problematic phrase “absolute majority of the votes cast”.

⁷² Article 294 (15) TFEU

Union. The House of Lords has been doing this ever since 1974, when the Committee was first appointed. It has sought to delve into the intricacies of EU decision making and has succeeded in establishing a distinctive method of scrutiny in the Union. I will turn now to the three points of analysis mentioned in the introduction.

Better legislation

22. Aiming to achieve “better legislation” implies a very important causal relationship—the one between national law and Union law. Supposing that “better” is given an comprehensible meaning, it is paramount to be aware of the fact that better Union’s policy making results in better Union’s decision making, which then translates into better Union’s law, and consequently into better national law. We should differentiate here between different types of Union law, which might be grouped into those containing directly applicable provisions and those requiring prior implementation.

23. In case of regulations and some provisions of the founding treaties, better Union’s law is automatically better national law, because they are directly applicable to the citizens.⁷³ Certain exceptions to the application of the provisions of the founding treaties to a given Member State (and remotely possibly also to the citizens) can be made by negotiating opt-outs during Intergovernmental Conferences, at which the Union’s founding treaties are concluded. The United Kingdom’s opt-out from the Economic and Monetary Union is an example thereof.⁷⁴ Somewhat different is the British opt-out concerning the measures taken under Title IV of the EC Treaty “Visas, asylum, immigration and other policies related to free movement of persons”, because of the existence of opt-in arrangements.⁷⁵ The British opt-in regarding the Schengen *acquis* is different because it may render applicable the otherwise inapplicable provisions of Union law regarding the regulation of the abolition of checks at common borders.⁷⁶ It should be stressed that Treaty provisions are applicable to the citizens only by exception, that is, when the founding treaties themselves so allow⁷⁷ or when the European Court of Justice reaches such a conclusion.

24. In case of directives, the effect for the citizens is not direct, because they need to be implemented by the Member States. Yet it is possible that these acts have direct effect if the period left for their implementation has expired and the provisions in question are sufficiently clear and precise so as to be able to be applied directly to the citizen. Nonetheless, as a rule, they are addressed at the Member States obliging them to give effect to Union’s law by adopting certain measures. Besides, it is widely accepted that national parliaments are not left wide room for manoeuvre in their implementation of Union law. In case of framework decisions, direct effect is expressly excluded by the EU treaty.⁷⁸

25. While codecision is applicable to regulations and directives, it is excluded in case of framework decisions, which are instead adopted by unanimity. It should also be mentioned that, as an exception, it is possible that a directive is adopted by unanimity.⁷⁹

26. By scrutinizing Union’s draft proposals for legislative acts, a national parliament contributes to better legislation in the form of directly applicable Union law by putting forward its concerns, recommendations, suggestions for amendments or indeed approval; as well as in the form of non-directly applicable Union law by raising the prospects for successful and timely implementation into national law.

Impact of scrutiny on the European Parliament

27. Both the European Parliament and national parliaments represent the citizenry of the European Union. They operate under a direct electoral mandate, from which they derive their competences. The contexts in which they function differ and their two main competences of legislation and political accountability are spread across different fields of action and across the levels of the Member States and of the European Union. Yet their ultimate goal is the same: to provide the citizens with a coherent legal framework that will regulate their social behaviour in a manner which corresponds to the interests, values, attitudes and preferences of the majority of them. Consequently, the end results materialize in the Member States and impact on the citizens’ everyday lives.

28. However, whether the European Parliament and national parliaments are partners, opponents, or neutral, separate actors is far from clear. In its Resolution on relations between the European Parliament and the national parliaments in European integration of 2002, the European Parliament stated that it “does not see itself as the exclusive representative of the citizens and guarantor of democracy and that the role of the national

⁷³ See the well-known *Van Gend en Loos* judgment of the European Court of Justice and Article 249 TEC.

⁷⁴ Protocol no. 25 on certain provisions relating to the United Kingdom of Great Britain and Northern Ireland (adopted in 1992)

⁷⁵ Protocol no. 4 on the position of the United Kingdom and Ireland (adopted in 1997)

⁷⁶ Article 4 of the Protocol no. 2 integrating the Schengen *acquis* into the framework of the European Union (adopted in 1997)

⁷⁷ For instance, Article 232 (3) allows individuals (natural persons) to have recourse to the European Court of Justice if an institution of the Community has failed to address to that person any act other than a recommendation or an opinion.

⁷⁸ Article 34 (2)(b) TEU

⁷⁹ For example in the field of self-employment. See Article 47 (2) TEC

parliaments is very important". It pointed out that "the peoples of the Union are represented to the full by the European Parliament and the national parliaments, each in its own realm". The European Parliament also affirmed its "willingness to contribute to an in-depth dialogue with the national parliaments at the time of the adoption of the Commission's programme with a view to ensuring that the principle of subsidiarity is adhered to in the Community legislative process".

29. Perhaps the most important is the recurrent European Parliament's view that it is "particularly important for national parliaments to use fully their power of scrutiny in all cases where there is no codecision". The European Parliament underpinned this by urging that "the parliaments elected by the people at national and European elections must jointly ensure that the governments do not create new intergovernmental rights and instruments from which the parliaments are excluded, eg 'open coordination' or 'co-regulation'" and "it would be desirable to step up and improve the exchange of information between the European Parliament and the national parliaments in relation to questions concerning the CFSP or the European Security and Defence Policy, in order to make more extensive dialogue between them possible".

30. Moreover, in this document, the European Parliament claimed unambiguously that the role of national parliaments is to be exercised in their own realm, which means within their own legal and constitutional orders, and that their main task is to control the national government. Yet certain initiatives aimed at a closer cooperation between the European Parliament and national parliaments have been forwarded and have by now become forums for interparliamentary dialogue in the European Union. The most significant ones involve:

- COSAC (Conférence des Organes Spécialisés dans les Affaires Communautaires et Européennes des Parlements de l'Union européenne),⁸⁰
- Joint parliamentary meetings (co-organised and co-chaired by the European Parliament and the national parliament of the Member State holding the Presidency);
- Joint committee meetings (organised at the sectoral level); and
- Bilateral meetings of the committees of the European Parliament and of national parliaments.

Several personal interviews conducted with the permanent representatives of the parliaments of the United Kingdom, France and Portugal have shown that the purpose of these meetings is not only to exchange information and best practices but also to test the ground for the European Parliament's initiatives and policies and to win support for them among national parliaments. It was pointed out that there was no common voice for national parliaments and the main drawback was recognized in the difficulty to find specialists in EU affairs among national members of parliaments, the absence of European topics in national parliaments and the lack of time.⁸¹

31. The relations between national parliaments and the European Parliament can also be appraised through the lens of the claims that national parliaments make in the performance of scrutiny of EU decision making. The House of Lords' and the European Union Committee's attitude towards the European Parliament can best be illustrated by two recent examples, both from the session 2007–08. These concern the Committee's reports on Frontex and on the Working Time and Temporary Agency Workers directives.

32. On the one hand, in its Frontex report,⁸² the Committee made a few remarks which could be understood as directly addressing the European Parliament and Union law. It expressed the belief "that before the European Parliament considers withholding part of the budget of Frontex, it should bear in mind the importance of Frontex being seen as a secure and responsible employer",⁸³ whereby, in a sense, it put forward a recommendation to the European Parliament regarding the financial management of Frontex. It also made a suggestion of amendment of Union's law by assessing that "consideration should be given to introducing into the Frontex Regulation a provision requiring, subject to strictly limited exceptions, compulsory deployment of vessels and equipment in joint operations and other Frontex activities".⁸⁴ However, the Committee further emphasized that "Frontex should be more formally accountable to the European Parliament",⁸⁵ thereby designating the institution which it deems appropriate as a forum of Frontex's accountability.

⁸⁰ See more in: Bengtson, Christina. "National parliaments in European decision-making: a real prospect or wishful thinking." *The Federal Trust for Education and Research, London, Online Paper 29/03*, September 2003; Bengtson, Christina. "Interparliamentary cooperation within Europe." In *National parliaments within the enlarged European Union: from victims of integration to competitive actors?*, by John O'Brennan and Tapio Raunio (eds), 46–66. Abingdon: Routledge, 2007.

⁸¹ Interviews conducted in Brussels on the premises of the European Parliament in the period 26–30 May 2008.

⁸² House of Lords, European Union Committee. "FRONTEx: the EU external borders agency." *HL Paper 60, 9th Report of Session 2007–08*, 2008.

⁸³ *Ibid*, para 79.

⁸⁴ *Ibid*, para 163.

⁸⁵ *Ibid*, para 199.

33. On the other hand, in its report on the Working Time and Temporary Agency Workers directives,⁸⁶ the Committee gave a more explicit interpretation of its relation towards the European Parliament. It also specifically referred to the codecision procedure by claiming the following:

“We welcome the agreements reached in Council on 9 June on both these long-standing proposals. Bearing in mind, however, that under the co-decision procedure the agreement of the European Parliament must also be achieved, we urge the Government to argue energetically the case with MEPs for the merits of the texts agreed in Council. Nevertheless, we recognise that achieving the agreement of the European Parliament may not be straightforward and that, since both the proposals are subject to co-decision, a process of conciliation may be necessary. We plan therefore to retain both these proposals under our scrutiny reserve and to consider further any revised texts that may be brought forward following the European Parliament’s deliberations.”⁸⁷

Therefore, in this case, the Committee did not address its recommendations to the European Parliament directly, but rather insisted that the British Government acts in a certain manner towards the European Parliament.

34. These two examples serve to demonstrate the variety of possible perceptions and interpretations related to the interinstitutional dynamic between the European Parliament and the House of Lords. The predominant trait in this relation is the reliance by both institutions on the well-established constitutional mechanisms of their respective legal orders. Instances at which these are surpassed occur but do not seem to be the distinctive feature of this relation. This does not mean that direct contact with the European Parliament should not be established and maintained. It might contribute to the exchange of arguments and reasons for or against certain proposals and might produce more material for the accountability of the Union’s two most closely involved executive offices: the Commission and the Council.

Scrutiny beyond own government: modelling parliamentary interaction with EU institutions

35. Here below I adumbrate a landscape of relations between national parliaments and EU institutions (the European Parliament, the Commission, the Council), which are based on the academic literature and the most common types of parliamentary scrutiny of EU affairs.

36. Since it is the governments that represent the Member States in the Council, national parliaments have hitherto crafted their response to the EU’s development in different yet comparable ways. All of them have established special committees devoted to the scrutiny of EU decision making and have, for that purpose, instituted some sort of relationship with their respective governments. These have varied from the mere provision of information to the parliament by the government (eg Greece,⁸⁸ Belgium⁸⁹) to the intense scrutiny of draft EU legislative proposals and other documents coupled with the possible use of scrutiny reserve (eg the United Kingdom,⁹⁰ France⁹¹) to the mandating of the government as a matter of constitutional practice (eg Denmark⁹²) or of constitutional law (eg Austria⁹³).

37. In an abstract fashion, the institutional parliamentary adjustments tailored to EU decision making could be grasped by the following scheme:

- A. *No action.* In this case, a national parliament accepts the government’s dominance in devising and executing that Member State’s EU policy, and remains a passive actor.

⁸⁶ House of Lords, European Union Committee. “Working time and temporary agency workers: towards EU agreement.” *HL Paper 170, 26th Report of Session 2007–08*, 2008.

⁸⁷ *Ibid.*, paras 16 and 17.

⁸⁸ Zervakis, Peter and Yannis, Nikos. “The Parliament of Greece: slow but constant moves towards European integration?” In *National parliaments on their ways to Europe: losers or latecomers?*, by Andreas Maurer and Wolfgang Wessels, Baden-Baden: Nomos Verlag, 2001: 147–173.

⁸⁹ Vos, Hendrik et al. “Belgian parliaments and EU decision-making: ‘In the Government we trust’”, In *National parliaments and European democracy: a bottom-up approach to European constitutionalism*, by Olaf Tans et al. (ed), Groningen: Europa Law Publishing, 2007: 99–121.

⁹⁰ Cygan, Adam. “EU affairs before the United Kingdom parliament: a case of scrutiny as substitute sovereignty?” In *National parliaments and European democracy: a bottom-up approach to European constitutionalism*, by Olaf Tans et al. (ed), Groningen: Europa Law Publishing, 2007: 75–96.

⁹¹ Siritzky, David. “Ensuring democratic control over national government in European affairs: the French model”, In *National parliaments and the European Union: the constitutional challenge for the Oireachtas and other Member State legislatures*, by Gavin Barrett (ed), Clarus Press, 2008: 433–455.

⁹² Arter, David. “The Folketing and Denmark’s ‘European policy’: the case of an ‘authorizing assembly’”, In *National parliaments and the European Union*, by Philip Norton (ed), London: Frank Cass, 1996: 110–124.

⁹³ Blümel, Barbara and Neuhold, Christine. “The Parliament of Austria: a ‘normative’ tiger?”, In *National parliaments and European democracy: a bottom-up approach to European constitutionalism*, by Olaf Tans et al. (ed), Groningen: Europa Law Publishing, 2007: 143–163.

B. *Action*. If the parliament decides to react, two main options seem possible.

- B1. *Indirect action*. It may choose to influence the government and try to insert its own preferences in the Member State's EU policy; or
- B2. *Direct action*. It may choose to influence the European institutions directly and so act as an independent participant in the process of creation of Union's law.

38. The literature has demonstrated that a vast majority of national parliaments have so far chosen either not to act (option A) or to seek their imprint on EU decisions through the government (option B1). However, if a national parliament aspires to affect these decisions directly, by acting upon draft legislative proposals independently from the government (option B2), it would mean to transgress the imaginary border of the national constitutional order in which it is inherently embedded. By opening up to the European constitutional realm, a national parliament becomes a counterpart not only to its own government but also to the European institutions.⁹⁴ To better visualize the position of national parliaments under the last option (option B2), it is indispensable to compare it with the penultimate option (option B1) and reconfigure the constitutional relations that would thereby arise between national parliaments and European institutions. The ideal schematic structure would then assume the following contours.

Assumptions as to "option B2": the "direct" model

39. First, a national parliament's fulfilment of the condition of representativeness must be juxtaposed with the European actor that also fulfils it—the European Parliament. This relation is necessary because the essential condition for their action is constitutionally of the same nature: both come into being through direct democratic elections, and could therefore collide but also complement each other.

40. Second, the legislative competence of a national parliament must be juxtaposed with that of both the European Parliament and the Council, which together constitute the Union's legislature. Here, a national parliament's relation towards the Council is elusive, because the latter is a legislative institution that is executive in nature (the ministers legislate), not permanent (the ministers gather only to decide and not to prepare legislation), with multiple structure (different configurations exist), and the one in which a Member State's own competent minister participates as a legislator. These characteristics indicate the lack of collective identity of the Council and the fact that a national parliament would have to act towards the ministers of the other Member States. This suggests that the Council as a whole could not effectively be taken as an addressee of national parliamentary scrutiny, but rather the government acting within it.

41. Third, the accountability competence must be juxtaposed chiefly with the Commission as the Union's main legislative initiator. National parliaments would perform *ex ante* and *ex post* scrutiny of the Commission's draft legislative proposals and consultation documents (green and white papers) in the same manner as they do nationally. Again, this claim would co-exist with that of the European Parliament.

42. Fourth, once a national parliament's scrutiny claims are gathered and analysed, addressing European institutions directly would raise the question of capacity in which a parliament acts. When performing its competences, a parliament could presumably act as a national and as a European organ. Whereas in both cases it safeguards the interests of the citizens, in the latter case it acts in order to achieve a certain result that is otherwise unattainable by means of scrutinizing the government.

Counter-assumptions as to "option B2": the "indirect" model

43. Since the above constitutional relations admittedly seem controversial, it is in order to ask the fundamental question of whether the national postulates of parliamentary democracy permit it and hypothesize why a national parliament would opt to act in this fashion. The decisive reason why a national parliament would arguably be entitled to act directly towards the EU institutions lies in the fact that the Union exercises public power over the citizens, whom national parliaments represent. However, a number of issues challenge this assumption.

44. First, there is a question of limitations posed by the existing mechanisms of parliamentary democracy operating in the Member States. While abstracting from its vicissitudes, it is a fact that the ostensible purpose of parliamentary democracy is to produce stable state structures that would govern the legislative, executive

⁹⁴ A recent study has called for a more direct involvement of national parliaments in EU decision making: Tans, Olaf. "Conclusion: national parliaments and the European Union—coping with the limits of democracy," by Olaf Tans (ed), Groningen: Europa Law Publishing, 2007: 242.

and judicial life of that state on behalf of the citizens. Regardless of how the executive branch comes into being, the role of a parliament is to legislate and to ensure that the executive offices fulfil their electoral promises and execute the policies for which they were elected by the citizens or appointed by the parliament. If the government does not pursue its agenda or deviates from it drastically, the parliament might lose confidence in it and oust it. Thus, the parliament can exert a certain degree of control over the government in respect of national decision making. Furthermore, the constitutionally designated part of the executive branch represents the state externally in its foreign affairs. Against this background, it is vital to ask whether EU affairs fall within the ambit of a Member State's foreign affairs or are understood as domestic or internal. Provided that the EU has the power to enact legislation that is directly applicable to the citizens, it appears disingenuous to take the stance that EU affairs are foreign to the Member States. Nonetheless, whether the expression of a national parliament's views on proposed EU decisions would qualify as meddling in and encroaching on the executive's foreign affairs prerogatives is not entirely clear. Moreover, the literature has shown that the most severe impediment to national parliaments' influence on EU decision making is majority voting in the Council, which makes it possible for a minister to be outvoted and so prevented from communicating and defending the parliament's view on a given legislative proposal. In addition, factors such as party discipline, type of government's cabinet, and other similar considerations also question the possibility of the parliament's direct linkages with EU institutions.

45. Second, the European Parliament also represents the citizens. This raises the questions of whether therefore national parliaments remain entitled to act only in the fields where the European Parliament is excluded from decision making (currently II and III pillar) or instead retain the title to act also when the European Parliament co-decides with the Council. In other words, the question is whether the electoral mandates given to the European Parliament and national parliaments by the citizens are of general scope or separated, so that the European Parliament represents the citizens at the EU level and national parliaments at the national level. The latter option seems more plausible, because if their electoral mandates did not differ, then it would be dubious to have a European Parliament in the first place. Nonetheless, it is equally difficult to sustain the argument that the empowerment of the European Parliament strips national parliaments of any substantial function regarding EU decision making.

46. Third, by approving the founding treaties and their amendments, national parliaments have consented to the empowerment of the EU. This is in turn tightly connected to the question of sovereignty and whether a national parliament has permanently relinquished or limited its sovereignty regarding decision making in the transferred fields or not.⁹⁵ This is especially a bone of contention in the United Kingdom, where the fundamental principle of parliamentary sovereignty has been the very foundation of British democracy.

47. Fourth, some more mundane, technical problems such as the lack of information about the Union's legislative agenda, insufficient time for scrutiny, shortages in personnel, lack of interest on the part of MPs to deal with EU affairs, also make it unsurprising that national parliaments have opted to voice their standpoints about EU decision making through the government ie according to option B1.

Concluding remarks: reconciling two models

48. Having in mind these assumptions and counter-assumptions, we return to the observations most frequently made in the literature. While many authors support the strengthening of national parliaments,⁹⁶ some deny it.⁹⁷ When they support it, they view it through the lens of the principles of ministerial responsibility and parliamentary confidence in the government; when they deny it, they again view it through these principles. Both are correct in doing so. Yet the stumbling stone of such analyses derives from the fact that the achievement of European goals is viewed entirely through national actors. This is why much of the literature concludes with negative prospects for parliamentary control of EU decision making and epitomizes them as marginal players or latecomers.⁹⁸

49. It remains a matter for each parliament to decide on its method and approach to scrutiny of EU decision making. These will be determined to a great extent by the national constitutional contexts, in which national parliaments have operated long before the European Union came into existence and this is especially valid for the United Kingdom.

⁹⁵ See the three questions of sovereignty related to the EU in: Trevor, Hartley. *Constitutional problems of the European Union*. Oxford: Hart Publishing, 1999: 123–183.

⁹⁶ Cygan, Adam. *The United Kingdom parliament and European Union legislation*. The Hague: Kluwer Law International, 1998.

⁹⁷ See for example: Kiiver, Philipp. *National parliaments in the European Union: a critical view on EU constitution-building*. Aspen Publishers, 2006.

⁹⁸ Maurer, Andreas and Wessels, Wolfgang (eds). *“National parliaments on their ways to Europe: losers or latecomers?”*. Baden-Baden: Nomos Verlag, 2001.

50. The above remarks permit to conclude that there is no compelling reason not to address the results of scrutiny to EU institutions directly. It might contribute to building a more cooperative decision-making setting in the European Union by providing its complex legislative machinery with alternatives for legislative solutions in which national concerns or endorsements are expressed and made visible to the Union's institutions as well as its citizenry. No particular adverse effects seem likely to occur should a national parliament opt to act in this fashion.

14 April 2009

Memorandum by Dr Helle Krunke,⁹⁹ University of Copenhagen

THE CO-DECISION PROCEDURE ITSELF

Question 1a) The effect of first reading deals is that many important decisions are made at a very early stage of the negotiation process. This calls for an earlier involvement of the national Parliaments. However, at this early point of the decision making process the position of the European Parliament is not clear and this weakens the basis for scrutiny in the national Select Committees on the European Union.

Another problem for the national Parliaments deriving from the co-decision procedure is that the proposals might be subject to quite extensive alterations during the co-decision legislation process. If the national Select Committees on the European Union are only given an opportunity to scrutinize the proposals at an early stage of the negotiations the national Parliaments are not able to scrutinize the alterations. This can undermine the quality/effectiveness of the parliamentary scrutiny of the European legislation.

Question 1b) Duty of confidentiality in the Select Committees on the European Union in the Member States makes it possible to discuss almost all negotiating documents. If further security is needed it can be obtained by the government by not giving the members of the committee any papers only an oral presentation. If possible one copy of documents which are in particular confidential can be placed (in a safe box) with the secretary of the Select Committee on the European Union and members of the committee can then study the documents there with no permission to bring the documents with them or take copies of them etc. The co-decision procedure does not apply to the European Union's Foreign and Security Policy (pillar 2). Even though there often is a close connection between politics under the three pillars it is obvious that the need for confidentiality is more extensive under pillar 2 than under pillar 1 and pillar 3. Under pillar 1 duty of confidentiality in the national Select Committees on the European Union should provide sufficient security when it comes to the confidential nature of negotiating documents.

GOVERNMENTS AND THE EU INSTITUTIONS

Question 3) The purpose of scrutiny arrangements like a Scrutiny Reserve (UK) or mandate procedures (in for instance Denmark) are to give the national Parliaments a chance to scrutinize the European legislation and to influence the governments' EU policy. These procedures compensate the national Parliaments for the sovereignty transferred to the EU. Under the co-decision procedure the legislative proposals might get altered to an extent where it is necessary to involve the national Parliaments once more. There will always be a certain estimate build into the decision of when this is necessary. Obviously, the larger the alterations the more need for a new scrutiny or a new mandate. It is difficult to give an exact guideline for when the national governments should consult the national Parliaments again especially in Member States which do not practice a mandate procedure. In Member States which practice a mandate procedure a new consultation of the Select Committee on the European Union is necessary when the alterations exceed the mandate given by the Committee. In Member States without a mandate procedure but with a Scrutiny Reserve there seems to be left more of an estimate to the government but also in this case there is a limit for how extensive alterations of EU legislation can be before the national Parliaments must be involved once more. This follows from the scrutiny reserve and its purpose. The larger alterations to an EU legislation proposal the closer the proposal gets to turning into what is in reality a new proposal. In the Danish legislation process there is a so-called "identity principle". The principle is considered a constitutional principle. It follows from Article 41, part 2, of the Danish Constitution according to which proposals for legislation must go through three readings before being adopted by Parliament. The idea of the identity principle is that if a proposal for new legislation changes too much during Parliament's readings it must be regarded as a new proposal and thus it can not be adopted at the third reading of the original proposal. The new proposal must go through three readings. The principle secures the democratic guarantee based on the three readings in Parliament. Scrutiny Reserves and mandate procedures are also principles/conventions/rules which secure democratic guarantees and they would be circumvented if a proposal for EU legislation could be altered extensive without involving the national Parliaments once more. The national governments must consider how far the alterations are from the original proposal and they must

⁹⁹ This evidence is submitted on an individual and not a corporate basis.

hold it together with the national Parliaments' positions on the proposal. The governments must estimate whether the alterations are of importance to the national Parliaments. Thus, it is important that national Parliaments discuss and comment thoroughly on EU legislation so the governments are aware of the Parliaments' position. This limits the governments' estimations. This also applies to Member States with mandate procedures because a mandate procedure also leaves an estimate to the government when the mandate is to be interpreted.¹⁰⁰

Question 4) Obviously, a close cooperation between the national Parliaments strengthens parliamentary scrutiny of European legislation. COSAC plays an important role in obtaining this. Cooperation between the national Select Committees on the European Union and between other national select committees are important. Also, a closer cooperation between national Parliaments and national representatives in the European Parliament can contribute to a more effective parliamentary scrutiny of European legislation. See paragraph 5). The early warning system in the Protocol on the application of the principles of subsidiarity and proportionality of the Lisbon Treaty is a good example of how it is possible to strengthen the national Parliaments by giving them direct influence on EU legislation instead of just influence through their national governments.

SCRUTINY PROCEDURES IN PARLIAMENTS

Question 5) The most important keys to effective parliamentary scrutiny under the co-decision procedure are:

- involvement of and information to the national Parliaments as early as possible in the process,
- opportunity for the national Parliaments to new scrutiny and/or to give new mandates to the governments if the negotiations give rise to fundamental alterations of the proposal or to alterations of the proposal in a field which is especially important to the national Parliament or if the mandate is exceeded,
- national Parliaments obtain oversight throughout the negotiations, and
- close contact between the national members of the European Parliament, the national Select Committees on the European Union and the other national select committees.

As it will appear the Danish Select Committee on the European Union has almost managed to adjust its scrutiny procedures according to all the mentioned aspects.

The Danish Select Committee on the European Union has—compared to select committees in other Member States—always had a quite strong position. The Committee was early aware of the problems relating to parliamentary scrutiny of European legislation which rose from the co-decision procedure and the strengthened position of the European Parliament. Thus, the Committee already in 1994 started working on new procedures which could counterbalance the scrutiny difficulties arising from the new development. The Committee regularly rethinks the scrutiny problems relating to the co-decision procedure and the scrutiny procedures are regularly adjusted. The Committee has dealt with co-decision in several reports (Report no. 2, 1994, Report no. 6, 1996, Report no. 1, 1999, Report no. 3, 2001, Report no. 2, 2004 and Report no. 6, 2006).

The co-decision procedure and the strengthened role of the European Parliament have given rise to a number of new procedures in the Danish Select Committee on the European Union. These procedures have been approved of by the Danish government. The parliamentary scrutiny of European legislation has been strengthened in five ways:

1. The Danish government has made a commitment to provide the Select Committee on the European Union with *ongoing* information on proposals of major import as *early as possible* in the process. A permanent item on the agenda for the meetings in the Committee provides the opportunity for this. (Report no. 6, 2006)

The Danish Select Committee on the European Union meets once a week.

2. With regard to proposals of major import the Danish government obtains a mandate from the Select Committee on the European Union *before* the Danish position is determined for instance in connection with a first reading deal. (Report no. 6, 2006)

The Danish government interprets the above the following way. The government shall try to avoid the combination of mandate proposal/part A when presenting a Council meeting and in matters of major import the government will present a mandate proposal before COREPER gives the presidency mandate to enter into an agreement with the European Parliament. Furthermore,

¹⁰⁰ In 2005 the Danish Select Committee on the European Union and the Minister of Economic Affairs had a disagreement on whether the minister had exceeded his mandate in the negotiations on the Software Patent Directive Com (2002) 92. The *interpretation* of the mandate played an important role in these discussions.

regarding matters in which the Committee has expressed a special interest during the first briefing the government shall seek to present a mandate proposal even earlier. (Report no. 6, 2006)

It is an advantage for the Danish Select Committee on the European Union that it is consulted before the first reading in the European Parliament. At this early point of the decision making process the opportunity of gaining influence is best. On the other hand, at this point the Committee has no knowledge of the views of the European Parliament and this weakens the basis for decision making in the Committee. Therefore, the Committee has requested that the government is especially aware of providing the Committee with information on the preliminary views of the European Parliament in these cases (if possible). (Report no. 2, 2004).

The Danish mandate procedure dates back to 1972 but throughout the years it has been refined. According to the mandate procedure ministers only vote for a proposal of major import if the majority of the Select Committee on the European Union is not against it. See for instance Helle Krunke, *Developments in National Parliaments' Involvement in Ordinary Foreign Policy and European Policy*, European Public Law, Vol. 13, Issue 2, June 2007, pp. 335–348.

3. If the Council and the European Parliament do not agree after the first reading Parliament must be informed in a memorandum on to which extent the proposal has been fundamentally altered. (Report no. 2, 2004).
4. If the negotiations give rise to fundamental/basic alterations of the proposal the government obtains a new mandate from the Select Committee on the European Union. (Report no. 6, 2006)

As Denmark has a mandate procedure (which at least by parts of legal theory is considered legally binding on the government) the government must consult the Select Committee on the European Union if the alterations of the proposal will exceed the mandate.

5. A strengthening and systematisation of the informal cooperation between the Select Committee on the European Union and the Danish members of the European Parliament has taken place. Also, a strengthening and systematisation of the informal cooperation between the other select committees and the Danish members of the European Parliament has taken place. Finally, the cooperation between the Select Committee on the European Union and the other select committees has been strengthened. (Report no. 2, 2004)

For instance, once a month a meeting is held between the Danish members of the European Parliament and the Danish Select Committee on the European Union.

Question 6) It is important that the national Parliaments are given a chance to scrutinize the proposals at the earliest possible time. It is also important that the national Parliaments obtain oversight throughout the negotiations, though. The national Parliaments must be informed on the position of the European Parliament. If the negotiations give rise to fundamental alterations of the proposal it is especially important that the national Parliaments are given a new chance to scrutinize the altered proposal, express their opinion and in Member States which have a mandate procedure provide the government with a new mandate.

14 April 2009

Memorandum by the Folketinget, Parliament of Denmark

INTRODUCTORY REMARKS

Two things should be noted concerning the answers given in this evidence on the implications of the codecision procedure for national parliamentary scrutiny: Firstly, the answers are based on experience drawn from the parliamentary scrutiny in the Danish Parliament only. Secondly, it should be noted that the scrutiny of EU draft legislation in the Danish Parliament is based on a mandating-system, which has existed since October 1973 shortly after Denmark entered the European Communities.

The Danish tradition of minority governments implied that Parliament and the Government agreed on an arrangement that obliged Government to appear before the European Affairs Committee prior to every Council meeting in order to obtain a negotiation mandate from the Committee on the most important dossiers. More specifically, the Government must ensure that no majority exists in the Parliament against the Government's position in all matters of major significance.

The scrutiny procedures in the Danish Parliament are outlined in a series of reports or agreements between the Danish Government and the Parliament's European Affairs Committee, in one of these dated 23 June 2006, it is stipulated that the Government must on a continued basis and as early as possible inform the European Affairs Committee of proposed EU legislation that is deemed to be of major significance. Furthermore, the Government must obtain its negotiation mandate in the European Affairs Committee *before the Danish*

negotiation position is established. Lastly, the Government is obliged to seek a renewed mandate from the European Affairs Committee in case the negotiations move outside the original mandate. (Details of the Danish scrutiny procedures can be found on:

<http://www.eu-oplysningen.dk/upload/application/pdf/7943011a/Ref.pdf> and http://www.euo.dk/upload/application/pdf/77305369/euo_brochure_europaudvalg_gb_web.pdf)

ON THE CODECISION PROCEDURE ITSELF

Question 1) Today, codecision has become a consensus-oriented process, where the EU Institutions begin bargaining and conciliation from day one. A practice of organising informal meetings throughout first and second readings has evolved and facilitated agreements between the Parliament and the Council earlier than they would otherwise have been able to. (These meetings are referred to as “trialogues”—because they bring together representatives of the Parliament, Council (Presidency) and the Commission, and have since 2007 been regulated by an interinstitutional agreement (C 145, p. 5).

The use of informal trialogues has made it more difficult for the Danish Government to determine when exactly Ministers should appear before the European Affairs Committee and obtain a negotiation mandate—the main reason being the fluent nature of the trialogues where a deal is reached among a relatively small number of people. This requires a more proactive approach on behalf of the Government, where the national representation in Brussels makes sure it is adequately informed about the stage of the negotiations, and that the government reports this back to the European Affairs Committee.

Question 2) The increasing number of first reading or early second reading deals poses a general problem for the scrutiny by national parliaments, and no legislative proposal as such can thus be highlighted. A report from the European Parliament dated 15 May 2008 shows that first reading deals were reached on 28% of all legislative proposals in the period 1999–2004, and that this number had gone up to 64% in the period 2004–07.

GOVERNMENTS AND THE EU INSTITUTIONS

Question 4) Scrutiny of proposed EU legislation currently takes place at informal monthly meetings between the Danish MEP’s and the Danish MP’s of the European Affairs Committee. Informal contacts with other national parliaments also take place on an *ad hoc* basis.

The European Affairs Committee also sees a possibility of national parliaments strengthening their knowledge of each others’ scrutiny procedures and thus increasing the information level in national parliaments by making better use of the IPEX database as well as the national parliaments’ representatives in Brussels.

SCRUTINY PROCEDURES IN PARLIAMENTS

Questions 5) and 6) As mentioned above, the scrutiny procedures in the Danish Parliament are outlined in a series of reports or agreements between the Government and the Parliament’s European Affairs Committee. Here it is stipulated that the Government must obtain its negotiation mandate in the European Affairs Committee *before the Danish position is established*.

The Government has interpreted “before the Danish position is established” to be when the EU presidency obtains its mandate in COREPER to enter into a first reading or early second reading deal with the European Parliament. The European Affairs Committee is currently debating if this is indeed not too late in the negotiations to give its mandate as a deal at this point in time is often already a fact. Hence, it is debated, if the government should in the future obtain its mandate in due time for COREPER representatives to take into consideration the position of the European Affairs Committee.

14 April 2009

Memorandum by the Eduskunta, Parliament of Finland

GENERAL BACKGROUND

1. To appreciate the replies below, it should be understood that the Finnish Parliament does not scrutinise EU documents as such. Instead, the Eduskunta mandates Finland’s negotiating position, monitors negotiations and updates the national position as required. The procedure is broadly the following: The government is obliged to identify those European proposals for which Parliament must approve the national negotiation objectives, and submit them to the Eduskunta without delay. (The criteria are in the Constitution. In simplified form: if adopting the underlying proposal, without EU membership, would have required an Act of Parliament, Parliament decides the national position. If the proposal could have been adopted through delegated legislation, the government need not submit it to Parliament.) The operative document is a

standardised memorandum, giving the government's analysis of the proposal and (normally) suggesting what the national position should be. The Eduskunta, represented by its Grand Committee, authorises the national position. The government periodically informs the Eduskunta of progress, and may request the Grand Committee to amend or update the negotiating position. This scrutiny continues until the proposal has been finally disposed of in the European institutions.

THE CODECISION PROCEDURE ITSELF

1) *Are there aspects of the codecision procedure which make it particularly difficult to achieve effective parliamentary scrutiny?*

2. The codecision procedure has been the norm for European decision-making since before Finland joined the European Union in 1995. The difficulty of effective parliamentary scrutiny is linked to the difficulty (for the government) in promoting the national position on two fronts. That is, the government needs to monitor progress on each particular dossier both in a Council working group and in the European Parliament—and make sure that the national parliament is kept abreast of developments.

a) *What effects have “first reading deals” and “early second reading deals” had on the ability of national parliaments to conduct effective scrutiny?*

3. “First reading deals” (etc.) occur in closed sessions involving a smallish task force of the Presidency-in-Office and the European Parliament. This means that deals may be made without the participation of all Member State governments. Once such deals have been made, there is usually strong political pressure for them to be adopted rapidly by the Council. These situations are problematic for the Eduskunta: typically, they call for a reassessment at short notice of a national position that may have been the result of careful and lengthy deliberation. The Eduskunta is simply faced with a document (that the government may or may not support) and told that Finland has the choice of approving it immediately, or being outvoted or “spoiling” a much-desired result. Clearly, such situations are not compatible with effective scrutiny by national parliaments. It does not help that the procedure leading to “first reading deals” is quite opaque. The mechanics of “first reading deals” raise serious questions about the transparency and accountability of EU decision-making; these need to be addressed in an appropriate context. One may also question whether “first reading deals” give the European Parliament more power than is foreseen in the treaties.

b) *Does the confidential nature of some negotiating documents hinder national parliamentary scrutiny of codecision legislation? If so, how can this problem be resolved?*

4. Confidentiality of documents is not a problem for the Eduskunta. In Finland, the government is obliged by the Constitution to provide all information needed by the Eduskunta for its work, and all documents that have been specifically requested by the Eduskunta. Confidentiality is not, legally, grounds to deny documents wanted by the Eduskunta. Where confidentiality is deemed necessary by the government, it asks the Eduskunta's Grand Committee to declare the document confidential. The government has to provide reasonable justifications—government requests for confidentiality are not automatically approved by the Grand Committee. The Grand Committee's confidentiality orders have invariably been respected.

2) *Are there any examples of legislative proposals negotiated under codecision which have been particularly difficult or complex to scrutinise effectively in national parliaments?*

5. Codecision is the norm in European decision-making, and scrutiny mechanisms need to allow for this. Effective scrutiny becomes difficult when the speed of decision-making in Brussels leaves too little time for consultations between national governments and national parliaments. This typically occurs towards the end of each six-month presidency and in the case of proposals that have become prestige items for the presidency.

GOVERNMENTS AND THE EU INSTITUTIONS

3) *What role is there for governments and the EU's Institutions in ensuring that national parliaments can conduct effective scrutiny of proposals negotiated under codecision? What information should be provided, when and by whom? Is this role being performed satisfactorily?*

6. In the Finnish system, the role of the government is crucial. The purpose of scrutiny is to ensure that whatever is said or done on behalf of Finland has the approval of the legislature. The government, as executive, represents Finland in the EU Council, but gets its authority from the parliament, as legislator. It follows that the government is both best placed and constitutionally obliged to keep parliament informed. One might argue

that decision-making in the EU is in this respect not different in kind from the many other areas in which the government exercises authority that has been delegated to it by the parliament.

7. The role of EU institutions towards parliaments has been newly defined in the Lisbon treaty. We are not convinced that the Lisbon treaty's arrangement is helpful. National parliaments are, by definition, high organs of their respective member states. They are not independent actors that adopt political opinions in a vacuum. The focus of the Finnish parliament's EU work is on monitoring and directing the policies and activities of Finland in the EU Council. The Lisbon arrangement, with parliaments communicating directly with the EU Institutions, does not sit easily with the Finnish parliament's (and most parliaments') constitutional role. The proper role for the EU Institutions would be to maintain a high standard of transparency, with documents and deliberations open to scrutiny by the general public; this would benefit national parliaments as well.

8. The information to be provided is difficult to define in abstract terms. The Eduskunta expects to receive from the Finnish government information that is timely, accurate and sufficient to determine Finland's position on whatever subject is on the EU table. In practice, the government needs to provide justifications in advance for positions/actions that it proposes. This may involve formal documents or informal briefings on the state of play or on other member states' motives. On the whole, the Eduskunta is satisfied with the information received from the government. Nonetheless, keeping up with the increased speed of European decision-making is challenging.

4) What role is there for parliaments to address the results of their scrutiny to those beyond their own government: for example, the European Parliament, Commission or other national parliaments?

9. The primary purpose of parliamentary scrutiny is national: the Eduskunta defines the Finnish position on a particular subject. Communicating the Eduskunta's views to European Institutions or other national parliaments is generally helpful and may support the national position but is more in the realm of information policy than of the Eduskunta's core functions. The Lisbon treaty's provisions (the yellow and orange card mechanisms) will be implemented by the Eduskunta, but the provisions are of minimal use for the issues normally addressed in our scrutiny procedures.

SCRUTINY PROCEDURES IN PARLIAMENTS

5) How effective are the scrutiny procedures in national parliaments (or your own parliament) at ensuring effective scrutiny of proposals subject to codecision? Which particular aspects of the parliamentary scrutiny procedure are key to effective scrutiny?

6) At which points in the codecision procedure should parliaments seek to scrutinise the proposals? Should they maintain oversight throughout the negotiations or should they scrutinise only the initial legislative proposal from the Commission?

10. The Eduskunta's scrutiny procedures were introduced in 1995, when codecision already had to be taken into account. The Eduskunta (and the general public) are broadly satisfied with the system's effectiveness. We believe that three elements are key: (1) The focus is on the national position, rather than on EU documents. (2) The scrutiny procedure begins soon after the proposal has been made and continues until the proposal has been finally disposed of in "Brussels". (3) The system includes a "filter" to ensure that the Eduskunta needs to deal only with proposals that are of interest.

11. The purpose of parliamentary scrutiny is to exercise influence. The Eduskunta decides what Finland thinks about European proposals and monitors that the government is effective in getting Finland's views into the final European enactment. In the Finnish understanding, the EU Council—including its numerous working groups—is similar to a large diplomatic conference: what has been said on a Member State's behalf in the Council or working group is effectively binding, or at any rate difficult to retract. It is essential for the Eduskunta to be involved throughout the procedure, and specifically to ensure that anything said on Finland's behalf has been approved by the Eduskunta first. It follows that the Eduskunta needs to provide its views at an early stage, by the time that negotiators in the working groups withdraw their general reservations and start talking about the substance of the proposal. The Eduskunta further needs a mechanism to revise the national position, if needed in the course of negotiations in "Brussels", and to monitor the government's effectiveness in negotiations. In the Finnish system, it is the government's responsibility to consult the Eduskunta "without delay" after a proposal has been tabled, and every time a policy decision needs to be taken thereafter.

12. From the Finnish perspective, scrutiny only of initial legislative proposals would be insufficient: proposals often are very different from the legislation that is ultimately enacted. It would also not be sufficient to scrutinise only formal meetings of the EU Council: proposals normally only come to the Council when the working group phase has ensured that they have enough support to be adopted. Ministers attending the Council do not, as a rule, override what has been said on their behalf in the working group. Parliamentary

scrutiny only before the formal Council meeting would come too late to have any real effect. (The Eduskunta's Grand Committee does hear ministers before each Council meeting, but the purpose is to monitor and update positions that have been approved much earlier.)

13. The importance of an effective "filter" can not be overstated. No parliament could scrutinise every European proposal without being swamped. Nor should they; in the Finnish experience, about 80% of European proposals concern subjects that, nationally, would be the subject of delegated legislation. The Finnish solution is to have the government apply domestic constitutional criteria to decide whether a proposal should be submitted to the Eduskunta. (As a safeguard, both the Eduskunta and the government also have discretion to submit EU proposals to parliamentary scrutiny, eg, on grounds of political importance, even when there is no constitutional obligation.)

OTHER CONCERNS

Consultation papers

14. The inquiry may wish to address the growing importance of consultation documents and other pre-legislative procedures in the European Union. The Grand Committee is growing aware that the content of European legislation may frequently be determined already before a formal proposal by the Commission. This may occur when a Commission proposal is based on preparatory work with wide consultation of interested parties. The Eduskunta's response is to insist on being consulted by the government before the government gives its views on important consultation papers. The reason is that, however tentative, views expressed in consultation procedures do indicate some level of commitment to a particular position. For a State to change its mind in public is never good policy, so positions expressed in a consultation procedure may limit Parliament's options later on. The Eduskunta is less keen on the option of responding directly to the European Commission on consultation papers; as the supreme organ of state, the Eduskunta chooses to take part in formulating the Republic's official position rather than join the social partners and other bodies that are also consulted. This has to do with consistency as well as status: the Republic of Finland as a Member State can and should speak with a single voice in the EU.

25 March 2009

Memorandum by the Riksdag, Parliament of Sweden

This response is prepared by officials and must not be understood as in any way representing an official view of the Riksdag.

BACKGROUND

According to the Swedish Constitution the Government has a general obligation to inform and to consult with the Riksdag concerning developments within the framework of the EU cooperation.

Following specific provisions in the (semi-constitutional) Riksdag Act, the Government's consultation with the Riksdag on individual EU-matters, such as legislative proposals under the co-decision procedure, involves the relevant specialised committees as well as the EU Affairs Committee.

The specialised committees have the right to request formal consultations with the Government—normally represented by the responsible minister—whenever they deem appropriate. The result of the consultation is taken to the Protocol of the committee. The specialised committees should come in early in the process, but also renew consultations when it is needed. In addition to the possibility to request formal consultations, the committees receive information in different forms from the Government. Information could be given at the initiative of the Government or of the committee.

The specialised committees also formally scrutinise green and white papers as well as other documents of interest from the EU institutions and present their findings in statements to the Chamber.

The EU Affairs Committee is consulted by the Government—as a rule the responsible minister—before all formal Council meetings. The result of the consultation constitutes a mandate which the Government is expected to follow. The Government will submit a report in writing to the Riksdag within a week after of the meeting and the minister in question will address the past meeting next time he or she is present in the Committee.

The specialised committees should in their consultations give emphasis to the substance of the proposal, whereas the Committee on EU Affairs is focused on the state of play of the negotiations with a view to giving the Government a mandate. It goes without saying that in real life it is difficult to draw a clear line for this division of labour.

The model with the specialised committees and the Committee on EU Affairs sharing responsibility for the EU consultations has in principle been applied since Sweden became a member of the European Union. The rights—and responsibilities—of the specialised committees were, however, emphasised in legal terms as a result of a reform, which took effect in 2007.

RESPONSE

It is true that the co-decision procedure poses difficulties from the point of view of parliamentary scrutiny. In its practical application the procedure is lacking in transparency and any “real” negotiations are only as an exception taking place when the proposal are on the table at Council meetings. These difficulties are particularly pronounced in the case of deals being struck in the early stages of the procedure, when the content of the deal has been negotiated in informal dialogues with no “natural” points at which to apply parliamentary scrutiny.

In the Swedish case it is legally possible to apply strict provisions on secrecy in the consultation between the government and the Riksdag. The confidentiality aspect would therefore not be seen as a main problem in this context.

There are many examples of difficult co-decision acts. One obvious recent example is the legislative package on climate change which was extremely complex and had to be negotiated within a very short time frame.

In the Swedish case the Government is expected to do its utmost to ensure that a proper consultation with the Riksdag can take place. This could involve insisting on procedural provisions being respected by the EU-institutions. It seems natural that the negotiating parties take responsibility for any consultations necessary “at home”, including providing the necessary documentation.

It is difficult to have an opinion on how effective scrutiny procedures are generally. In the Swedish case, the consultation process between the Government and the Riksdag on EU matters in general works well. The combination of consultations of the specialised committees and the EU-Committee enables in principle proper consultation despite the difficulties that the co-decision procedure pose. Introduction of the subsidiarity checks of the Lisbon Treaty would probably facilitate effective scrutiny, since the checks would necessitate a very early start of the scrutiny of the co-decision acts in the specialised committees.

As follows from the above, an effective scrutiny must start early and cover all stages of the procedure.

...

Information could be communicated via IPEX or through communication with the EU institutions by the means of which each parliament’s rules of procedure allow.

17 April 2009

Memorandum by Tapio Raunio, University of Tampere, Finland

Please find below my views on the implications of codecision for national parliamentary scrutiny. I have divided my views into three categories: general remarks on the codecision procedure, scrutiny of codecision procedure, and change in EU governance.

GENERAL REMARKS ON THE CODECISION PROCEDURE

1. The gradual change in codecision procedure in the direction of agreements reached in the first reading (or in “early” second reading) has two negative consequences.
2. First, it makes scrutiny by national parliaments more difficult. Considering that legislation is effectively decided right at the start of the process, national parliaments need to invest resources in acquiring relevant information and in monitoring government behaviour already at the early stages of the legislative process—preferably before the processing of the issue begins in the preparatory organs of the Council, or indeed, even before the Commission formally launches the initiative. Parliaments need also information about the positions of other member states, the European Parliament (EP), and the Commission, as early as possible. Moreover, parliaments need to make sure that their governments keep them updated on any proposed amendments and changes in the positions of the national governments and the EU institutions. It would obviously facilitate parliamentary control if all documents—including national positions—related to the legislative initiative were public and available in a single place.

3. Secondly, the rules and norms governing codecision procedure touch on the character of law making at European level and the nature of EU democracy.¹⁰¹ It is true that EU decision-making is often criticized for its apparent inability to deal in timely fashion with societal problems. And the empirical record indeed shows that the involvement of the EP does slow down decision-making. However, there has to be a trade-off, a normative choice between the claims of efficiency and democracy, as democracy is not primarily about the speed of the decision-making process. If providing access to legislative documents is important, so should be the process by which legislation is made. Public debates in the EP (and perhaps also in the Council in the future) are thus important for EU democracy—and are an aspect of democracy highly valued in the British political culture.

SCRUTINY OF CODECISION PROCEDURE

4. While there is still considerable variation in the level of scrutiny between national parliaments, comparative research shows that most national parliaments are investing more resources in European matters. Domestic legislatures have reformed their scrutiny systems, mainly through upgrading the powers and resources of the European Affairs Committees (EACs) and involving specialized committees more regularly in EU affairs. Whether this amounts to effective control is another matter, but at the very least national MPs are doing more to hold their executives accountable in European affairs.¹⁰²

5. However, recent evidence also illustrates that even parliaments that have rather stringent scrutiny mechanisms, such as the Danish Folketinget, are facing difficulties in exercising control under codecision procedure.¹⁰³ The main problem appears to be that of parliaments becoming involved too late. There are two ways to address this problem:

6. Early involvement: National parliaments should make sure that they become involved in the process as early as possible—preferably before the processing of the issue begins in the preparatory organs of the Council, and indeed, even before the Commission formally publishes the initiative. For example, in Finland an effort is made to formulate the view of the EAC of the Eduskunta before the consideration of the matter begins in the Council's working groups. In order to do this successfully, the parliament needs information from the government also about forthcoming EU legislation. One solution is to have regular hearings with civil servants that participate in the drafting of the legislative proposals. In Finland the specialized committees of the Eduskunta have meetings with civil servants that have a central role in defining initial national positions. Hearings with civil servants enable the Eduskunta to identify key issues and to learn about issues under preparation at the European level and in national ministries.¹⁰⁴ These direct contacts with civil servants are important, for cabinet ministers seldom have a significant impact on the substance of the issues (obviously early hearings with cabinet ministers would force them to become better informed about the matters). Civil servants appreciate these meetings, particularly in politically controversial matters, for they enable the civil servants to hear the MPs' views and to acquire the backing of the relevant Eduskunta committee for their preparatory work. The early involvement of the Eduskunta also enables the parliament to monitor the preferences of the other member states and the Commission and the EP, and to frame its own position accordingly. Furthermore, once the initiative has been published, it is essential that the EAC organises hearings with ministers throughout the processing of the matter at the European level, not just before the final Council meeting.

7. Investing resources in acquiring and processing information: National parliaments should seek information from two sources: their own government and other relevant parties with an interest in the matter. Obviously this already happens in most parliaments, but clearly more could be done in this respect. From a legal perspective, the government should be made to provide the parliament any relevant information on its own account without any specific request from MPs. For example, the Finnish constitution states that "The Parliament has the right to receive from the Government the information it needs in the consideration of matters. The appropriate Minister shall ensure that Committees and other parliamentary organs receive without delay the necessary documents and other information in the possession of the authorities. A Committee has the right to receive information from the Government or the appropriate Ministry on a matter

¹⁰¹ M. Shackleton & T. Raunio (2003): Codecision since Amsterdam: a laboratory for institutional innovation and change. *Journal of European Public Policy* 10:2, 171–187.

¹⁰² See J. O'Brennan & T. Raunio eds. (2007): *National Parliaments within the Enlarged European Union: From "victims" of integration to competitive actors?* (Abingdon: Routledge); O. Tans, C. Zoethout & J. Peters eds. (2007): *National Parliaments and European Democracy: A Bottom-up Approach to European Constitutionalism* (Groningen: Europa Law Publishing); and G. Barrett ed. (2008): *National Parliaments and the European Union: The Constitutional Challenge for the Oireachtas and Other Member State Legislatures* (Dublin: Clarus Press).

¹⁰³ M. Møller Sousa (2008): Learning in Denmark? The Case of Danish Parliamentary Control over European Union Policy. *Scandinavian Political Studies* 31:4, 428–447.

¹⁰⁴ T. Raunio (2007): The Finnish Eduskunta: Effective Scrutiny, Partisan Consensus. In O. Tans, C. Zoethout & J. Peters (eds.): *National Parliaments and European Democracy: A Bottom-Up Approach to European Constitutionalism* (Groningen: Europa Law Publishing), 23–45.

within its competence ... The Parliament considers those proposals for acts, agreements and other measures which are to be decided in the European Union and which otherwise, according to the Constitution, would fall within the competence of the Parliament. The Government shall, for the determination of the position of the Parliament, communicate a proposal referred to in paragraph (1) to the Parliament by a communication of the Government, without delay, after receiving notice of the proposal ... The Government shall provide the appropriate Committees with information on the consideration of the matter in the European Union. The Grand Committee or the Foreign Affairs Committee shall also be informed of the position of the Government on the matter.”¹⁰⁵ Such constitutional provisions are potentially very important, for they require the government to provide the parliament information without any specific requests from the MP. In codecision this means that governments should also be made to provide information on the positions of other EU countries and of the EP and the Commission. But for several parliaments, the problem is no longer access to information, it is the amount of it. The problem is worsened by the fact that most European legislatures have quite limited secretarial and research staff.¹⁰⁶ Independent acquisition of information is important, particularly in order to learn about the consequences of the initiative and its linkages with other policy sectors. Parliaments should thus invest money in recruiting more committee and party group staff for dealing with EU matters.

CHANGE IN EU GOVERNANCE

8. While this inquiry focuses on codecision procedure, another development deserving the attention of national parliaments is the gradual change in EU governance. The EU and its member countries have in the new millennium increasingly relied on various forms of intergovernmental policy coordination, or “soft law” instruments as opposed to binding supranational legislation, for achieving their policy objectives. Particularly noteworthy has been the introduction of the Open Method of Coordination (OMC) and its application in a broad range of policy questions. This general change in governance is explained by several factors. First, the successive enlargements make it harder to find solutions that would “fit” all the member countries. Managing diversity is much more difficult among 27 countries than in the old EU15. Secondly, EU citizens have become more sceptical of deeper integration according to public opinion surveys. In an environment where people have concerns about excessive centralization, the Commission has repeatedly emphasized the need to focus on issues that genuinely require supranational regulation (“less but better”). And thirdly, the difficulty of constitutional reform, as illustrated by the fate of the Lisbon Treaty, means that the EU simply must rely on soft law in policy areas where it has no recourse to supranational legislation. National governments want, on the one hand, to achieve highly-valued policy objectives, such as reducing unemployment and making their economies more competitive, while on the other hand, they are not willing to cede formal sovereignty to the Union. The EU, and particularly the Commission, meanwhile sees OMC as a way to expand the EU’s competence in the face of resistance from the member states. While this change in EU governance should not be exaggerated, with binding laws still maintaining their place as primary outputs of the EU’s policy process, the challenge posed by OMC deserves to be taken very seriously by national parliaments.¹⁰⁷

9. The information rights of national parliaments are normally stronger in supranational legislation, as they receive the legislative initiatives from their own government and also from the Commission. As OMC documents are non-legislative items, the information rights of national legislatures are generally weaker (with much variation between individual EU countries). Importantly, if the government is often not obliged to send the documents to the parliaments, then it is up to the national MPs to ask for such documents (provided they are aware of their existence). In OMC and other soft law policy coordination matters, also the lack of binding regulations and the vaguer and more prolonged timeframe may inhibit MPs from seeking relevant information. The empirical record also shows that national parliaments have so far been weakly involved in OMC. Whether this lack of involvement results from voluntary non-participation or from lack of awareness cannot be answered without appropriate data. However, on the whole it appears that national parliaments—that have gradually learned how to more effectively process EU laws—face difficulties in how to deal with various soft law processes. As Armstrong summarizes in the case of the British parliament: “The suspicion that OMC is developing as a mode of governance acting outside the traditional scrutinising structures of representative democracy is, therefore, well illustrated in the UK. There is a sense that while structures and

¹⁰⁵ Sections 47 and 96 of the Finnish Constitution, the full text of which is available at <http://www.finlex.fi/fi/laki/kaannokset/1999/en19990731.pdf>.

¹⁰⁶ W.H. Robinson (2002): *Knowledge and Power: The Essential Connection Between Research and the Work of Legislature* (Brussels: The European Centre for Parliamentary Research and Documentation).

¹⁰⁷ See F. Duina & T. Raunio (2007): The open method of coordination and national parliaments: further marginalization or new opportunities? *Journal of European Public Policy* 14:4, 489–506; and T. Raunio (2008): Ensuring Democratic Control over National Governments in European Affairs. In G. Barrett (ed.): *National Parliaments and the European Union: The Constitutional Challenge for the Oireachtas and Other Member State Legislatures*. (Dublin: Clarus Press), 3–27.

mechanisms for scrutinising “hard law” emanating from the EU have evolved, governance techniques which seek domestic influence by alternative means are slipping through the scrutiny net.”¹⁰⁸

10. There are two main reasons why national parliamentarians should focus more on OMC: it may facilitate better domestic law-making, and it provides (particularly the opposition) with information that can be used to challenge the government. After all, the fundamental function of OMC is to expose officials and politicians from any one member state to ideas, practices, and frameworks from other member countries for the ultimate purpose of policy improvement. OMC produces a wealth of information about the performance of governments. This information is, moreover, comparative: observers in any given country can learn about policies undertaken in the other EU member states. The OMC in effect produces a public report card on the policy performance of any given country. Given that national governments are primarily responsible for a country’s policies, and for initiating and (through their representatives in the parliament) adopting legislation, the OMC gives the opposition parties exceptional (and third-party and thus more “objective”) munitions for attacking the executive branch.

11. However, the potential benefits of OMC depend on whether parliaments monitor such processes. To facilitate parliamentary involvement in OMC (and other non-binding forms of intergovernmental coordination), such matters could be processed by national legislatures using basically the same procedure that is reserved for scrutinizing the Commission’s legislative initiatives (in countries that have more advanced scrutiny mechanisms in EU matters). This would mean that ministers would be forced to explain their actions before parliamentary committees and perhaps even in the plenary, with MPs having the chance to put questions to the ministers or other government representatives travelling to Brussels. This would create “ownership” of OMC among national parliamentarians and would inject much-needed democracy into such processes. While MPs and parliamentary civil servants may object to this by saying that their desks are already full without having to process such non-binding matters, one must keep in mind that OMC (and other forms of policy coordination) is to an increasing extent used in questions that are highly salient for most legislators—including issues such as employment, economic, and social policies and pension reforms. Efficient scrutiny of such matters is thus significant in terms of national legislation too, as the policy choices and recommendations adopted at the European level increasingly influence member states’ domestic policies. This would also enable the national parliaments to become more proactive in EU matters. Currently domestic legislatures are nearly always reacting to developments at the European level. Overall, parliaments are not that used to looking too far into the future, nor to processing broader, non-binding matters. Parliamentarians as legislators focus in their daily work on controlling the government, amending laws, and on looking after the interests of their constituencies. The notable exception is of course the House of Lords, the members of which devote much of their time to producing future-oriented reports on societal questions, including EU governance.

9 April 2009

Memorandum by Dr Christine Reh, University College London

SUMMARY

1. This submission addresses questions one, three and six posed by the Select Committee; it focuses on the potential impact of “first reading deals” (“early agreements”) on parliamentary scrutiny by the UK Parliament. First, the submission outlines the recent developments of the European Union (EU)’s co-decision procedure and describes the informal process through which “early agreements” are reached. Second, the submission identifies three potential challenges to effective parliamentary scrutiny: 1) the crucial negotiation stage is brought forward and takes place before the Council of Ministers reaches its common position and before the European Parliament (EP) issues a formal opinion; 2) this crucial negotiation stage is informal, secluded and not documented; 3) the likely increase in the use of qualified majority voting (QMV) will make parliamentary scrutiny of national governments less effective. Third, the submission concludes that access to public information about the legislative process through the EP is severely curtailed by the trend towards “early agreements”, but that parliamentary scrutiny of UK representatives in the Council remains *de jure* unchallenged. However, in order to exercise their rights effectively, the European Scrutiny Committee (ESC) of the House of Commons and the European Union Select Committee (EUSC) of the House of Lords should be engaged as early as possible in the co-decision procedure and beyond established pre-and post-Council scrutiny: they should a) carefully scrutinise the European Commission’s initial legislative proposal; b) re-think the definition of “agreement” in section 2(c) of the 1998 *Scrutiny Reserve Resolution*; and c) request

¹⁰⁸ K.A. Armstrong (2005): How open is the United Kingdom to the OMC process on social inclusion? In J. Zeitlin & P. Pochet with L. Magnusson (eds.): *The Open Method of Co-ordination in Action: The European Employment and Social Inclusion Strategies* (Brussels: Peter Lang), 302.

information and explanation from responsible government departments—in addition to European Union documents, prior to mandating meetings of the Committee of Permanent Representatives (COREPER), and throughout the negotiation process.

RECENT DEVELOPMENTS IN THE EU'S CO-DECISION PROCEDURE

2. The introduction of the co-decision procedure in the 1993 Maastricht Treaty was arguably one of the most important innovations in EU decision-making: it turned the Council and the EP into equal legislators, extended the use of QMV, and strengthened elements of direct representation and party politics at the European level. In view of effective parliamentary scrutiny, co-decision initially made the legislative process more transparent and offered national opposition parties new information channels via their delegations in the EP. However, in 1999 the Amsterdam Treaty reformed the co-decision procedure in two ways: first, the Council could no longer re-introduce its common position at third reading after failed conciliation; and, second, a legislative act could be adopted by the EU legislators as an “early agreement” at first reading, with the legislative procedure abridged or “fast-tracked” accordingly. Such “early agreements” have become ever more frequent: between 1999 and 2004 28% of successful co-decision dossiers were concluded at first reading; between 2004 and 2006 the number went up to 63%; and of all 635 co-decision dossiers concluded between 1999 and June 2007, 274 (or 43%) were fast-tracked. This trend is unlikely to be reversed: in their 2007 *Joint Declaration on the Practical Arrangements of Co-Decision* the three EU institutions commit to clear the way “where appropriate, for the adoption of the act concerned at an early stage of the procedure”. “Early agreements” require an informal compromise between the EP and the Council: the Parliament includes the Council’s propositions in its own first reading amendments, and the Council commits to accepting the legislative proposal as amended by the Parliament—with the procedure closed and the act adopted accordingly. These compromises are negotiated in so-called “trilogues”—informal, secluded and small-scale settings that bring together representatives from the European Parliament, the Council and the Commission. Trilogues take place *before* the Council has adopted its common position and *before* the Parliament has issued a formal opinion.

THREE CHALLENGES OF “EARLY AGREEMENTS” FOR EFFECTIVE PARLIAMENTARY SCRUTINY

3. The shift of decision-making from public, inclusive to informal, secluded arenas directly impacts on the democratic quality of the EU’s legislative procedure. The recent conduct of co-decision makes it particularly difficult for the public to follow the legislative process in the EP; it is also likely to empower some actors (most importantly, the EP *rapporteur* and the Council Presidency who conduct the informal negotiations) at the expense of others (most importantly, EP committees and rank-and-file parliamentarians from small parties). Parliamentary scrutiny in the UK—applying the scrutiny reserve; assessing the legal and political implications of EU legislation; seeking information and explanation from the government—targets national representatives in the Council. Under fast-track legislation the Council Presidency is mandated by COREPER to negotiate with the EP; formally, parliamentary scrutiny of government representatives thus remains unaffected.

4. Nevertheless, one can identify three potential challenges posed by “first reading deals” to effective parliamentary scrutiny in the UK:

- (i) First, under fast-track legislation, the crucial negotiation stage between the EU legislators is brought forward and takes place before the Council reaches its common position and before the EP issues a formal opinion on its amendments. When scrutinising EU legislation, the UK Parliament exercises its control over UK representatives in the Council of Ministers. For EU legislation passed under Art. 251 TEC, section 2(c) of the 1998 *Scrutiny Reserve Resolution* covers the following types of agreement: “agreement to a common position, to an act in the form of a common position incorporating, amendments by the European Parliament, and to a joint text”. Yet, in the case of “first reading deals” this definition may no longer capture the most important decision-stage and types of agreement: as the Council Presidency negotiates in trilogues on the basis of a mandate from COREPER, the position taken by the UK representative in this—diplomatic rather than top-political—committee as well as the agreement given by the UK representative to the negotiation mandate becomes key. Submitting agreement by a national minister in Council to a scrutiny reserve may be too late.
- (ii) Second, under fast-track legislation the crucial negotiation stage is informal, secluded and not documented. The first stage of the scrutiny procedure in the two Houses requires the European Scrutiny Committee and the European Union Select Committee to consider a European Union document. However, depending on the responsible EP committee, in the case of fast-track legislation

there may be no public European document between the tabling of the Commission's initial legislative proposal and the first reading in the European Parliament.

- (iii) Third, the co-decision procedure turns the EP and the Council into co-legislators and allows the latter to decide by QMV. The use of QMV does not undermine parliamentary scrutiny *de jure*; yet, where a government can be outvoted in Brussels scrutiny at the national level will be less powerful. Academic research has demonstrated that so far the Council of Ministers has tended to decide by consensus even if it could have decided by majority vote. One can, however, assume that QMV will be used more frequently where the Council formalises an informal "first reading deal" with the EP. This assumption is based on the following reasoning. The political pressure on the EP and the Council to rubberstamp informally agreed "deals" is, indeed, upped by two semi-formal rules. First, in the *Joint Declaration* the EU legislators *de facto* commit to rubberstamping; they stipulate that "[w]here an agreement is reached through informal negotiations in trilogues, the chair of Coreper shall forward, in a letter to the chair of the relevant parliamentary committee, details of the substance of the agreement, in the form of amendments to the Commission proposal. That letter shall indicate the Council's willingness to accept that outcome, subject to legal-linguistic verification, should it be confirmed by the vote in plenary". Second, the EP's *Conciliations and Codecision: A Guide to How Parliament Co-Legislates* foresees that any amendments of the Commission proposal agreed informally with the Council "should be subject to written information to all committee members. If they cannot be approved by the committee for submission to plenary, they should be co-signed by the *rapporteur* or coordinators of their political groups to demonstrate that the amendments enjoy broad support". Without introducing formal sanctions, such rules clearly create behavioural expectations for Euro-parliamentarians, Permanent Representatives and national ministers.

CONCLUSIONS AND RECOMMENDATIONS

5. The above analysis suggests that parliamentary scrutiny rights remain unchallenged *de jure* under fast-track legislation but that the Parliament could exercise these rights more effectively:

- (i) First, following an eventual entry into force of the Lisbon Treaty, the UK Parliament should make full use of its right to scrutinise the Commission's legislative proposal under the *Protocol on the Role of National Parliaments* and the *Protocol on the Application of the Principles of Subsidiarity and Proportionality*. Given the thresholds for review of the legislative proposal, the Houses may already want to consider how they can cooperate most effectively with other national parliaments in doing so. However, national parliaments should remain aware that the Council and the EP can fundamentally amend the initial proposal in their informal negotiations—often sidelining the Commission in the process. On its own, even the most careful assessment of the initial legislative proposal would thus be insufficient to ensure effective parliamentary scrutiny.
- (ii) Second, in the 1990s the ESC and the EUSC reacted to developments in the co-decision procedure by extending their scrutiny reserve to the conciliation stage. Similarly, the Committees may now consider revising the 1998 *Scrutiny Reserve Resolution* in order to broaden the definition of "agreement" and thereby the remit of the scrutiny reserve for legislative decision-making under Art 251 TEC.
- (iii) Third, in order to exercise their rights effectively, the ESC and the EUSC should be engaged as early as possible in scrutinising government representatives under the co-decision procedure. The Committees should seek information and explanations from the responsible government department, including answers to oral and written questions as well as explanatory memoranda on major developments in the negotiations between Council and EP. As these negotiations are often led by the Council Presidency, in turn mandated by COREPER, information should be requested beyond established pre—and post-Council scrutiny; as these negotiations are not publicly documented, the ESC and the EUSC cannot wait for the submission of European Union documents by the government.

In sum, effective parliamentary scrutiny requires a) careful analysis of the initial Commission proposal, and b) oversight of national representatives from the early stages of the co-decision procedure onwards.

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14 April 2009

Memorandum by the European Affairs Committee, Romanian Parliament

THE CODECISION PROCEDURE ITSELF

1) *Are there aspects of the codecision procedure which make it particularly difficult to achieve effective parliamentary scrutiny?*

We believe that the major factor making difficult to achieve effective or even a slight parliamentary scrutiny, is not a particular decision making procedure, but the great number of proposals issued at EU level. This difficulty is most probably felt harder by national parliaments which are set to examine all proposals. As many other national parliaments, ours, makes a selection of proposals to be examined, thus avoiding the mentioned difficulty. In other words if there is not enough time to complete the scrutiny procedure on a certain proposal, let it be (giving credit to the national government and the EU institutions good will and expertise).

In the same time we bear in mind that the decision making procedure has been established by the “Treaty” itself which makes any attempt of modifying it to turn into a Treaty revision. From a very pragmatic point of view it would seem far more difficult to start, let alone succeed a Treaty revision, than make amendments to the own national scrutiny system.

a) *What effects have “first reading deals” and “early second reading deals” had on the ability of national parliaments to conduct effective scrutiny?*

Effects, either positive or negative, of the “first reading deals” and “early second reading deals” on the ability of national parliaments to conduct effective scrutiny may occur, but they regard only the respective national parliament, its administrative capacity, its resources, its will to adapt to given conditions. We should not forget the discrepancies between national parliaments in the available resources. The lesser the resources the harder to keep the pace with the Brussels apparatus even on the “slow track”.

In two years of EU membership we did not notice any occasion where any of the EU institutions made wrong use of the powers conferred by the Treaties, in the decision making. Under these circumstances we have no option but to give full credit to their work, including the “fast track”.

b) *Does the confidential nature of some negotiating documents hinder national parliamentary scrutiny of codecision legislation? If so, how can this problem be resolved?*

This can happen. The solution resides in the relation between the national parliament and the national government, as the government has access to EU confidential information. Full access to the government's database, at least for the few chosen, would help.

2) *Are there any examples of legislative proposals negotiated under codecision which have been particularly difficult or complex to scrutinise effectively in national parliaments?*

The REACH directive, the postal services directive, the services directive; we blame the difficulty on their complexity solely.

GOVERNMENTS AND THE EU INSTITUTIONS

3) *What role is there for governments and the EU's Institutions in ensuring that national parliaments can conduct effective scrutiny of proposals negotiated under codecision? What information should be provided, when and by whom? Is this role being performed satisfactorily?*

When examining EU proposals, the Romanian Parliament does not distinguish between proposals negotiated under codecision and those employing other procedure.

The EU institutions maintain well designed and reliable web pages, allowing access to a great part of the necessary information.

The EU institutions organize stages/study visits to help the staff having scrutiny tasks in comprehending the relevant activities of the institutions.

Besides the immediate direct transmission to the national parliaments of new proposals, the European Commission has set in place the dialogue, in fact an early consultation mechanism, with the national parliaments. This truly helps, mostly where complex proposals are concerned. The dialogue should be made public, together with briefings on how the inputs were used by the European Commission.

Proposals initiated by member states should be made public in a particular list and a dialogue similar to that with the European Commission should be organized.

The European Parliament supports several activities as part of the interparliamentary cooperation, thus contributing to the quality of scrutiny by national parliaments.

Most of the national parliaments have permanent representatives in the European Parliament. They are well placed to collect first hand information from the EU institutions, including new information and not available on the web sites.

The national government has the most important role in support of the efficiency of the parliamentary scrutiny, since the scrutiny itself concerns the initial negotiation position of the government. The explanatory memoranda generally satisfy this particular request. Supplementary information, such as impact assessments, surveys, statistics, expert opinions, etc. may be delivered on demand. In case of scrutiny systems running in the rhythm of COREPER (mandate based), information on the negotiations (from representatives present to the meetings) is critical. Access to the government's data base would make the parliamentary scrutiny faster and more accurate.

4) *What role is there for parliaments to address the results of their scrutiny to those beyond their own government: for example, the European Parliament, Commission or other national parliaments?*

Some have been mentioned above.

A further deepening of the cooperation and exchange of best practices between national parliaments would be necessary to take full advantage of enhanced role for the national parliaments provided by the Treaty of Lisbon.

All agree that an early involvement of the national parliaments in scrutinising European proposals is crucial to keep an effective influence over the European matters. Thus, the exchange between national parliaments should also take place at an early stage, before a final opinion on a certain European proposal was already agreed by a specific national parliament.

Cooperation between national parliaments, mainly at staff level, could be complemented by a “forum” type exchange of ideas, a brainstorming exercise, where simple concerns or non-elaborated views may be expressed even before well documenting the matter. COSAC or IPEX web page could host such a forum, allowing others to comment or merely draw attention to other national parliaments.

Most of the national parliaments make a selection of the European proposals of high relevance for them. The list of draft acts selected for a thorough scrutiny by every national parliament could also be made available.

SCRUTINY PROCEDURES IN PARLIAMENTS

5) How effective are the scrutiny procedures in national parliaments (or your own parliament) at ensuring effective scrutiny of proposals subject to codecision? Which particular aspects of the parliamentary scrutiny procedure are key to effective scrutiny?

As already mentioned, even national parliaments in the biggest countries cannot equal the main European institutions in terms of human resources. This makes improbable that a better scrutiny than the own “quality check” in the EU institutional triangle could ever be achieved. This paradigm applies to the relation national parliament-national government, as well.

As long as the European institutions, acting in full respect of the Treaties, will enjoy the present level of trust, the national parliaments’ scrutiny mission will be made easier. A way to establish to what degree this statement is valid, would be to draw up a list of observations or “disagreements” on proposed initiatives, resulted from the scrutiny at national level in all member states, in the last 12 months. Such a list could be subject to a debate in all parliaments in the member states, with a view to establish the “error pattern” in the work of the EU institutions and procedures to correct the respective errors. Same method could be used in the national parliament-national government relation. Admitting the “lists” will reflect low risks, both at national executive and EU levels, not scrutinising some proposals to make the scrutiny of other more important proposals, more efficient, would seem acceptable.

The “good definition” and balance of the EU affairs legal framework is always the starting condition to a good scrutiny system.

Any classification of other aspects needed for effective scrutiny depends on the scrutiny system (mandating or document based).

At the political level the resemblance degree of national and EU objectives is of essence. At the institutional level the quality of parliament-government relation is highly important.

For all types of scrutiny systems, the accurate, timely and complete information is a must.

Resources as general requirement, can be directly linked to performance, provided they are well employed.

The EU knowledge and level of interest of MPs and staff, including the staff of sectoral committees is also relevant.

A specialised data base can increase scrutiny effectiveness.

6) At which points in the codecision procedure should parliaments seek to scrutinise the proposals? Should they maintain oversight throughout the negotiations or should they scrutinise only the initial legislative proposal from the Commission?

There could be “starting point” differences depending on the content of the proposal.

So, the content could be shaped to the request of the national parliament, following the dialogue with the European Commission, or could simply raise no problems. In these cases, the scrutiny could start later, maybe as late as an agreement was reached at the end of the preparatory phase in the Council.

If the national delegation is likely to seek to amend the proposal, the scrutiny should start at least 30 days before the first debate in the working groups of the Council. In case of important proposals, parliamentary reserve could be employed, to allow a effective scrutiny.

The Romanian Parliament adopted the standard procedure of mandating systems: selection of proposals to be submitted to parliamentary scrutiny, consultation/talks with government representatives, recommendation of the specialised committees, opinion of the European Affairs Committee, possible request of debate and decision in the plenary sitting of the Parliament, issue of the mandate to the Government, amending the initial mandate following negotiations in the EU Council, report by the government representatives on the outcome of the negotiations.

15 April 2009

Memorandum by Dr Klára Szalay

This paper is a submission to the inquiry on implications of the codecision legislative procedure for parliamentary scrutiny conducted by the House of Lords, particularly with regard to the scrutiny procedures in other parliaments. The author is Dr. Klára Szalay, senior legal adviser at the Hungarian National Assembly, author of the comparative analysis on the Scrutiny Systems of the New Member States.¹⁰⁹ The evidence provided reflects solely the views of the author and cannot in any way be interpreted to reflect the views of the institution.

1. INTRODUCTION

1.1 The study is in four parts. The Introduction sets out the three major documents which define the role of national parliaments in the EU decision-making process in order to set the Community context of scrutiny. Then, relying on detailed studies of a number scrutiny systems in the Member States account is taken of the variety of control mechanisms these systems apply to carry out effective scrutiny. National parliaments have developed a variety of control mechanisms, yet the effect of scrutiny is widely acknowledged to be limited. Therefore, the third part of the study focuses on locating the controversies inherent in the scrutiny process. Finally, the fourth section intends to look at the effectiveness of the scrutiny procedure to draw attention to a different aspect of effectiveness than parliamentary control.¹¹⁰

1.2 The partial transfer of decision-making powers to Community level put national parliaments into a different context of parliamentary control over Government activities. In order to compensate for the loss of national parliamentary powers, the EU has sought to facilitate a deeper involvement of national parliaments in the EU legislative process. Three documents of major importance were adopted on the issue over the years.

1.3 The protocol on the role of national parliaments in the European Union annexed to the Treaty of Amsterdam refers to the importance of parliamentary receipt of legislative documents in due time for examination. Therefore, it stipulates at least a six-week period available for national parliaments to examine the legislative proposals of the Commission in certain fields.¹¹¹

1.4 The Conference of Community and European Affairs Committees (COSAC) in January 2003 adopted the Copenhagen guidelines outlining the relationship between Parliament and Government. It stated that:

1.4.1 “A member country’s government should ensure, in consultation with the Community’s institutions, that the national Parliament receives all Community documents regarding legislation and other Community initiatives as soon as they become available.

1.4.2 The government should prepare easily accessible, clearly worded material on Community legislation, etc., for the national Parliaments.

1.4.3 Opportunities should be provided for meeting with ministers in the national Parliaments well in advance of Community meetings. The government should give an account of its attitude to Community proposals at such meetings.

1.4.4 The national Parliament should be informed by the government well in advance as regards decisions to be made in the EU and concerning the government’s proposals regarding decisions. This concerns ordinary meetings of the Council, summit meetings, and inter-governmental conferences. The national Parliaments should also subsequently be informed of the decisions made.

1.4.5 Concerning administrative assistance in the national Parliament, it is the responsibility of each national Parliament to ensure maximum benefit from the guidelines, inter alia by strengthening the administrative and expert assistance to the Parliament in EU matters and adapting this assistance to Parliament’s real needs”.

1.5 The fact that national assemblies contribute to the legitimacy of the European project had clearly been acknowledged in the Laeken Declaration in December 2001. The European Convention, among others, set up a working group examining the role of national parliaments. It had the task of analysing feasible ways of parliamentary participation in the European architecture. As a result, two protocols were attached to the draft European Constitution: the protocol on the role of national parliaments in the European Union and the

¹⁰⁹ Szalay, Klára dr.: Scrutiny of EU Affairs in the National Parliaments of the New Member States—Comparative Analysis—Hungarian National Assembly, 2005.

¹¹⁰ There are deliberately no concluding remarks at the end of the paper, as it is intended to serve as an input to the final report put together by the House of Lords Select Committee on the European Union.

¹¹¹ Treaty of Amsterdam; Protocol on the role of national parliaments in the European Union; 3. A six-week period shall elapse between a legislative proposal or a proposal for a measure to be adopted under Title VI of the Treaty on European Union being made available in all languages to the European Parliament and the Council by the Commission and the date when it is placed on a Council agenda for decision either for the adoption of an act or for adoption of a common position pursuant to Article 189b or 189c of the Treaty establishing the European Community, subject to exceptions on grounds of urgency, the reasons for which shall be stated in the act or common position.

protocol on the application of the principles of subsidiarity and proportionality. The protocol on the role of national parliaments in the European Union ensured a deeper involvement in decision-making particularly by strengthening national parliaments' rights of consultation and control on European legislation, as well as by enhancing inter-parliamentary co-operation.

1.6 Pursuant to the protocol, all Commission consultation documents (green and white papers and communications) are forwarded directly by the Commission to Member States' parliaments upon publication. The Commission shall also send Member States' parliaments the annual legislative programme as well as any other instrument of legislative planning or policy strategy that it submits to the European Parliament and to the Council of Ministers, at the same time as to those Institutions. All legislative proposals sent to the European Parliament and to the Council of Ministers shall simultaneously be sent to Member States' national assemblies.

2. SCRUTINY—THE VARIETY OF CONTROL MECHANISMS

2.1 The common approach in much of the literature seems to be centered around acknowledging the fact that national parliaments have suffered from European integration, in as much as this strengthened domestic governments vis-a-vis their national parliaments. This power shift to the executive at the expense of parliaments has consequently weakened traditional mechanisms of parliamentary accountability. Scrutiny is a response to compensate for this shift of power, which, from a Community point of view, can be expressed as a form of substitute sovereignty with an objective to control and influence the executive, not the European institutions.¹¹² However, the conclusion much of the literature reaches tends to remain the same: constitutionally parliament plays a redundant role in the EU decision-making process, and there still is a constant deficit in parliament's ability to influence national deputies in the Brussels decision-making cycle.¹¹³

2.2 The following statements are based on generalisations about the contextual setting of scrutiny based on the study of a number of scrutiny systems. All of the scrutiny systems are governed by the constitutional principle of ministerial responsibility. A government depends on parliamentary support and so must explain and justify its actions in parliament. National parliaments operate in the plenary—committee system, where standing committees of EU affairs have a considerable task in organising the scrutiny process. Parliamentary committees individually have no formal working relationship with the European Parliament or its committees. Although, for committees of EU Affairs there is a loose framework of cooperation called COSAC. However, beyond COSAC, there is no institutionalised working relationship between the European Parliament and national parliaments. Some national parliaments do have a national representation in the European Parliament.¹¹⁴

2.3 The scrutiny process itself does not offer parliament any opportunity to amend the substance of the legislative proposals. However, the quality of the process largely depends on information rights granted to national parliaments. The informational value of accompanying legislative documents significantly affects the impact of scrutiny.

2.4 Drawing on the systematic study of a number of scrutiny systems of Member States a considerable variety of control mechanisms may be identified at the service of national parliaments to aid the scrutiny process.

2.4.1 *Informational Rights:*

Under the title informational rights official documents directly forwarded by the EU and documents deposited by the government are categorized together. Accompanying explanatory memoranda take different form and content in the Member States.¹¹⁵ We also consider EU databases as a valuable informational asset in the scrutiny process. Written information may further be elaborated by oral information provided during discussions at committee meetings. The greatest challenge with regard to information is the overwhelming number of proposals, the criteria for a successful sift of documents and getting relevant information in good time for decision-making.

¹¹² Cygan, Adam: EU Affairs before the United Kingdom Parliament; a Case of Scrutiny or Substitute Sovereignty?, In: National Parliaments and European Democracy, ed. by Tans, Zoethout, Peters, Europa Law Publishing, Groningen, 2007.

¹¹³ Duina, Francesco and Raunio, Tapio: The Open Method of Coordination and National Parliaments: Further Marginalization or New Opportunities?, In: Journal of European Public Policy, Volume 14, Issue 4 June 2007.

¹¹⁴ Tans, Olaf: Conclusion: National Parliaments and the European Union, Coping with the Limits of Democracy, In: National Parliaments and European Democracy, ed. by Tans, Zoethout, Peters, Europa Law Publishing, Groningen, 2007.

¹¹⁵ See Table 1 in the Annex.

2.4.2 *Ex ante review of legislative proposals:*

A majority of Member States have rules that give parliaments the right to influence their governments prior to decision-making in the Council. The aim of ex ante review is channelling in local information on the possible effects of the EU proposal scrutinised in the hope of influencing the minister before his final vote in Council. In order to do this, most rules also specify an obligation for attendance for ministers or state secretaries in front of the committee.

2.4.3 *Ex-post ministerial accountability:*

Effectiveness of scrutiny also depends on how successful the committee is in following up Council meetings. This may take the form of ministers' hearings after Council sessions or a written report given by the government. It seems that all countries place emphasis on some form of organised hearing before and/or after the European Council meetings. In Hungary a special committee meeting is organised before the European Council meeting, while the Prime Minister gives an account in plenary after the European Council meeting.

2.4.4 *Scrutiny reserve:*

A significant tool applied in some countries, the scrutiny reserve provides control over ministerial action. Though it cannot place a complete break on the overall legislative process, but it may stop the process until thorough scrutiny in parliament is conducted.

2.4.5 *Binding Mandate:*

In some countries the position adopted by the parliament is politically binding on governments. This basically means that if the position is not considered and represented by the government in EU decision-making, this divergence shall be reported and justified in front of a designated body of the parliament.

2.4.6 *Members of the European Parliament (MEPs):*

MEPs are directly elected in each Member State and are stationed both in Brussels and in their home countries. Taken from a domestic point of view MEPs take a very passive role in discussion of EU affairs. In some countries (eg: Hungary) they have the legal right to participate and speak up at committee and plenary meetings, but they rarely use this opportunity to brief MPs on a certain issue under scrutiny.¹¹⁶ On the other hand, national parliaments and committees of EU affairs themselves are not active enough to use the field knowledge of their MEPs, to invite them and/or informally exercise control over them.

2.4.7 *National Parliamentary representation in the EP:*

Some countries station a national parliamentary representative in the European Parliament to gather on the ground information. They send regular reports to national parliaments, maintain direct contact with other national parliamentary representatives, possibility to take part in EP meetings, meet country MEPs on a regular basis and, perhaps try to channel in informal information.

2.4.8 *COSAC:*

The institutionalised structure of COSAC is a form of maintaining regular contacts among chairpersons of committees of European Affairs without much real impact. Like all institutionalised structures, with time this too, may become stiff, the agenda of meetings is set far too well in advance so that it becomes more of a reactive body rather than a proactive one.

2.4.9 *Decentralised treatment of legislative proposals to sectoral committees:*

A mechanism often applied to channel in specialised information is involving specialised committees in the scrutiny process. However, the unpredictable pace of EU decision-making may be challenging to follow especially when more committees are involved with a dossier, the effectiveness of discussions is hindered by lack of documents in the local language, and the procedural differences compared to domestic decision-making, eg no right to make amendments, must be understood and appreciated by MPs.

¹¹⁶ See Table 2 and 3 in the Annex for statistics from the Hungarian National Assembly.

2.4.10 *Decision-making capacity:*

In some parliaments committees of EU Affairs take decisions in the name of the entire parliament, while in some countries they do the excessive organisational and preparational activity. On the one hand, committees are smaller and can react faster which is a strong advantage in the EU decision-making process. On the other hand, an issue may pass unnoticed by the rest of parliamentarians.

2.4.11 *Joint European Affairs committees:*

Countries with bicameral systems often assess the advantages of establishing joint committees in order to maximise resources, to avoid duplicating information, and to save time. Challenges may arise when dealing with procedural differences between the two chambers, or focal differences in the treatment of an EU issue.

2.4.12 *Expressing direct opinion on White and Green Papers:*

It certainly may be an opportunity for parliament, but practice does not seem to follow.

2.4.13 *Traditional parliamentary tools:*

According to the constitutional principle of ministerial responsibility there are a number of traditional parliamentary tools that may be applied in plenary to initiate discussion not only on domestic, but on EU issues. Questions, interpellations and written questions may be put to Ministers and so discussion may be facilitated in this manner.

2.4.14 *Output of the scrutiny process:*

The result of scrutiny may be a short resolution, a mandate, and a detailed written report. The main question is whether the process and the end result established a better communication about the EU issue in the parliament, in the country.

2.5 The variety of control mechanisms at the service of the parliament is impressive, so why does the conclusion remain unfavourable on the impact of scrutiny? In the following section we attempt to unfold the controversies inherent in the scrutiny process.

3. CONTROVERSIES IN THE PROCESS

3.1 Discussion on EU affairs falls outside the logic of domestic politics. Scrutiny itself, from a constitutional perspective, is a complete reversal of traditional law making procedures. It does not offer parliament any opportunity to amend the legislative proposal, it rather informs parliament of the European intent that—once adopted—needs to be transferred into national legislation, national policies. Parliaments at the decision-making stage can express their view and hope to build ministerial support without weakening the country's negotiating position in Council. Scrutiny therefore, is more a lobbying process than a real decision-making on EU affairs, without the traditional effect of the voting process.

3.2 Domestic politics builds on the government side and the opposition side representing marked differences on most issues, as this remains the mobilising factor for electoral votes at the next election. Politics is supposed to divide in order to keep the voters interested, loyal and divided. EU affairs, however, are supposed to unite as it represents the national interest, the common ground; and consequentially, there is no place for a marked difference in approach.

3.3 Unlike domestic issues that can be presented in the media to have an immediate effect, attracting the press is challenging when it comes to dealing with EU issues that have a likelihood of effect once adopted and transposed into national legislation sometime in the future. From an informational value point of view bad news is good news, so writing about common grounds in EU affairs does not sell well. Consequentially, politicians dealing with EU affairs do not receive the media attention they need to stay players in domestic politics which therefore, leads to considerable disinterest from their side, manifesting in low levels of attendance at committee meetings and less involvement in European affairs.

3.4 The nature of the EU decision-making process has changed over time. There has been a natural shift from consensual voting to majority voting parallel to the enlargement of the Community. Striking a deal among 27 Member States is a challenge itself, let alone to deal with another 30 or so national parliamentary bodies. The decision-making process gives the most opportunity in first reading as there is no time-frame identified in the Treaty. This makes the process rather unpredictable to calculate. It seems that dossiers where ground-work has been very thoroughly done, or those that really strive for the minimum of harmonization go through faster, giving little chance for national parliaments to react. In other cases, the process becomes too lengthy, the dossier goes beyond elections and sometimes the process of negotiation ends without success.

3.5 Quite often, because of timing, an EU proposal that one government has negotiated while in power shall be the task of the opposition to implement once in power. This, too, may lead to some caution and perhaps less criticism from the opposition. The distribution of seats in EU affairs committees in most countries follows parliamentary logic; seats are assigned according to mandate. Even if MPs recognise that their influence would be far greater as a committee rather than being split along party lines, they cannot reach beyond the domestic political context. Therefore, quite often the style of debates on EU issues follows strict party lines where coalition parties tend to turn into supportive rather than critical scrutinisers.

3.6 Explanatory memoranda provided by the government are a key in focusing MPs attention. The content of the memoranda often concentrate on the thematic review of the EU proposal rather than on assessing the positions of other Member States and/or describing the scope of action that the country would have in implementation. This is more convenient for government as it does not fall into the trap of domestic politics on the one hand, but it may overlook the possibility of channelling in local information that might have importance in future implementation.

3.7 Having set out some of the controversies in the scrutiny process that mainly derive from the fact that parliaments operate in the context of domestic politics, let us turn to investigate issues of effectiveness.

4. EFFECTIVENESS OF SCRUTINY

4.1 There have been a number of studies dealing with the effectiveness of parliamentary control; some researchers argue that the 'executive-legislative relationship' is the key in explaining the strength of parliamentary scrutiny. Yet, others explain the variation in the level of scrutiny with two factors: the role of the parliament in the domestic political system, and the EU related public and party opinion.¹¹⁷

4.2 There is a simple categorisation provided by Kiiver¹¹⁸ dividing national parliamentary scrutiny systems into three groups that I prefer to enlarge to the following four. There are:

4.2.1 *Mandate givers:*

Countries that put an emphasis on controlling ministers, eg: Denmark.

4.2.2 *Politically binding systems:*

Where a parliamentary position is adopted, but deviation from the position is allowed. In this case, the divergence is reported and should be justified, eg: Estonia, Hungary, Latvia, Lithuania, Slovakia.

4.2.3 *Systematic scrutinisers:*

Focusing primarily on sifting all incoming EU documents and on passing resolutions with regard to these documents, eg: Germany, UK.

4.2.4 *Informal influencers:*

Focusing on establishing an informal dialogue with the government with regard to European affairs, eg: Belgium, Cyprus, Malta, Netherlands.

4.3 As far as the control side of scrutiny is concerned, mandate givers seem to be the most effective, especially if there is a minority government in place. The fact that government depends on parliamentary support in its conduct together with ministerial responsibility combined with the rule of confidence assures a very strong say for parliaments in EU decision-making.

4.4 Focusing on the influencing aspect of scrutiny all of the other three systems may be successful if using their tools wisely.

4.5 A third possible aspect to view effectiveness from is the side of facilitating open discussion. Should we accept that national parliaments are increasingly viewed as a means to redress the democratic deficit identified within the European Communities, then making EU affairs digestible for the public and openly debated is key to effective scrutiny. However, it seems that most of national parliaments focus on regaining their lost control functions instead of producing a discourse that makes sense to the public, a discourse in which European affairs are fundamentally and critically discussed.

¹¹⁷ Tans, Olaf: Introduction: National Parliaments and the European Union, In: National Parliaments and European Democracy, ed. by Tans, Zoethout, Peters, Europa Law Publishing, Groningen, 2007.

¹¹⁸ Kiiver, Philipp: Conclusion: The National Parliaments in the European Union, A Critical View on EU Constitution-Building, Kluwer Law International, 2006.

Table 1
ELEMENTS OF THE GOVERNMENT POSITION OR EXPLANATORY MEMORANDUM¹

Legal basis	Type of procedure	Summary, aim of EU draft	Envisaged schedule of adoption	Voting procedure in Council	Position of Government	Impact (without specification)	Impact on economy	Impact on national legislation	Impact on environment	Impact on social administration	Impact on public administration	List of effective national legislation	List of effective EU legislation	Opinion of other MS	Positions of EU institutions	Consultation	Subsidiarity
Czech Republic	x	x	x	x	x	x	x	x	x					x ²	x ³		
Estonia	x	x	x	x	x	x											
Hungary ⁴	a	a	a	a	a		b	a		b		b			b		
Latvia			x		x			x				x			x		x
Lithuania		x	x		x	x		x				x			x		
Malta ⁵	x	x	x		x	x	x	x	x								x
Poland	x	x	x	x	x	x	x	x	x								
Slovakia	x	x	x		x	x	x	x	x	x							x
Slovenia	x	x	x		x	x	x	x	x		x						

Notes:

- 1 Cyprus is not included in this table as legal background documents do not specify elements of the government position and practice has not yet worked them out.
- 2 Usually this piece of information is also given.
- 3 Usually this piece of information is also given.
- 4 Mark “a” refers to each government position, while “b” refers to additional information provided in the extended government position.
- 5 Elements of the explanatory memorandum are not regulated by the Standing Orders.

Table 2

ATTENDANCE OF MEMBERS OF THE EUROPEAN PARLIAMENT AT MEETINGS OF STANDING COMMITTEES IN THE PRESENT PARLIAMENTARY CYCLE IN HUNGARY

Name of Committee	2006		2007		2008	
	No of meetings	MEPs present	No of meetings	MEPs present	No of meetings	MEPs present
1. Committee on Constitutional Affairs	0	—	1	1	1	—
2. Committee on Youth and Social Affairs	0	—	1	6	1	—
3. Committee on Local Governance and Community Development	0	—	1	1	0	—
4. Committee on European Affairs	4	10	3	5	2	2
5. Committee on Employment and Labour	0	—	0	—	3	3
6. Committee on Environmental Protection	0	—	0	—	3	—

Table 3

**CONTRIBUTION OF MEMBERS OF THE EUROPEAN PARLIAMENT AT MEETINGS OF THE
PLENARY IN HUNGARY (2004–09)**

2004		2005		2006	
<i>Date of meeting</i>	<i>No of MEPs contributing</i>	<i>Date of meeting</i>	<i>No of MEPs contributing</i>	<i>Date of meeting</i>	<i>No of MEPs contributing</i>
05.10.2004	3	20.04.2005	2	08.06.2006	2
04.11.2004	1	20.09.2005	2	17.10.2006	1
01.12.2004	2	02.11.2005	3	16.11.2006	1
		03.11.2005	3	17.11.2006	3
				18.11.2006	3
2007		2008		2009	
<i>Date of meeting</i>	<i>No of MEPs contributing</i>	<i>Date of meeting</i>	<i>No of MEPs contributing</i>	<i>Date of meeting</i>	<i>No of MEPs contributing</i>
09.05.2007	1	04.11.2008	1	12.05.2009	1
26.10.2007	2	05.11.2008	1		
27.10.2007	3	06.11.2008	1		