

**Parliamentary Scrutiny of  
European Union Documents**

**Guidance for Departments**

**August 2016**

**DEPARTMENT FOR EXITING THE EUROPEAN UNION**

# PARLIAMENTARY SCRUTINY OF EUROPEAN UNION DOCUMENTS

## GUIDANCE FOR DEPARTMENTS

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## **SECTION 1**

### **PARLIAMENTARY SCRUTINY: THE ESSENTIALS**

This guidance provides information for officials on scrutiny policy and procedures. It highlights the principles and key stages of the process. For further advice, contact the Department for Exiting the European Union - DEXEU (previously the responsibility of the European & Global Issues Secretariat (EGIS) of the Cabinet Office.)

#### **1.1. PARLIAMENTARY SCRUTINY: OVERVIEW**

##### **What is Parliamentary Scrutiny?**

It is the process by which Parliament examines and expresses views on proposals for EU legislation and other documents that are subject to Scrutiny. The Government is committed to the principle of effective scrutiny, and both Houses have agreed scrutiny reserve resolutions (SRRs) which state that Ministers will not agree to proposals in the Council of Ministers except in certain circumstances until the proposal has been cleared from scrutiny (see Section 6).

##### **Submitting EU documents to Parliament**

The Government is responsible for depositing all documents subject to scrutiny within two days of publication. DEXEU is responsible for the day to day management of the Government's scrutiny procedures and for deciding, in consultation with Departments, and with the Committee clerks where necessary, which EU documents should be deposited in Parliament. DEXEU will take the initiative in most cases, but Departments must be vigilant in identifying documents that may be eligible for scrutiny. There will always be grey areas so it is important that the Government is as flexible as possible in its approach. Details of the procedures concerning the deposit of documents and the different types of documents which are to be deposited are given in **Section 2**.

##### **Government Explanation of EU Document; Explanatory Memorandum (EM)**

The Government provides Parliament with written information on a document's content and implications; known as an EM. An EM is a public document and summarises the deposited document, its legal, policy and financial implications, the likely timetable of its consideration by the Council of Ministers and the Government's view on the proposal. The Government must provide these EMs by 10 days from the date of a document's deposit. See **Section 3**.

#### **1.2. SCRUTINY COMMITTEE PROCEDURE**

##### **House of Commons: European Scrutiny Committee (ESC)**

The ESC normally meets every sitting Wednesday to examine documents and to report on them to the House with recommendations on the importance of each particular document and whether further consideration by the Committee, a Departmental Select Committee or by the House (i.e. debate) is required.

##### **House of Lords European Union Committee (EUC)**

The Chairman of the EUC carries out a sift of EMs and associated documents every sitting Tuesday. Sifts are occasionally held during Recesses. The sift determines which document should be cleared or considered further by one of the Committee's sub-committees which meet usually weekly when the House is in Session and consider proposals in detail. (Further details of both Committees' procedures are given in **Section 4**.)

#### **1.3. DEBATE ARRANGEMENTS**

## **House of Commons**

The ESC can recommend documents for debate either:

- in a European Committee; or
- on the Floor of the House but the debate is held on the Floor only if the Government provides time for it (otherwise it is held in European Committee).

Debates should be held in sufficient time for the House to have the opportunity to influence the Government's stance on the proposal. They must be held before Ministers adopt positions in the Council.

## **House of Lords**

If the EUC reports on a document for debate, time is found for it through liaison between the Government's business managers and the Committee. (See **Section 5.**)

### **1.4. VOTING ON PROPOSALS NOT YET CLEARED**

If an uncleared proposal is expected to come to a Council for any form of agreement, action must be taken to avoid a breach of the SRRs. The Committees can agree the Minister may support a proposal in the Council of Ministers whilst retaining it under scrutiny; this is known as a scrutiny waiver. Ministers must ask for such a waiver to be granted, explaining why this is necessary. Detailed guidance is given in **Section 6.**

### **1.5. COMPLETION OF SCRUTINY**

For scrutiny to be completed it must clear scrutiny by both Committees. For the House of Commons this is when:

- the ESC has cleared the proposal in one of its reports or,
- if for debate, the debate has taken place (but not if a JHA opt-in debate) and the House has agreed a resolution relating to the document (a debate in a European Committee does not on its own clear a document from scrutiny – see Section 5.2).

In the House of Lords (see Section 4.6) a document is cleared when:

- it is cleared by the Chairman at the sift; or
- having been sifted to a Sub-Committee, it is cleared, possibly after correspondence; or
- the Sub-Committee having conducted an inquiry, it is reported for information only; or
- the Sub-Committee having reported on it "for debate", the debate has taken place.

However, where a proposal is modified in the course of negotiation, a further EM may be required; if so, the SRRs apply again and the Committees will re-open their consideration of the proposal.

## **SECTION 2: DEPOSIT OF DOCUMENTS IN PARLIAMENT**

### **KEY COMMITMENTS AND POINTS TO NOTE**

The Government has made two key commitments in terms of the deposit of documents:

- 1) **Depositing Documents:** The Government will deposit – within 2 working days of document's circulation by the Council Secretariat – EU proposals and documents falling under the categories listed further down. DEXEU leads in sifting the Council Secretariat Extranet for depositable documents. Documents for deposit must be public documents - this excludes the deposit of Limited documents (see below) or classified documents. Departments also need to be vigilant to ensure that nothing is missed; if in doubt consult DEXEU on whether a document should be deposited. **FCO** leads on identifying sanctions/CFSP measures as most will be sensitive texts and not in the public domain. **HMT** leads on identifying EU budget documents on which the Council takes decisions. Documents which are consultative in nature e.g. Green and White Papers and some Commission communications should also be sent by the lead department to the Clerk of the appropriate Departmental Select Committee for information. This follows a commitment to do so given by the Government in a response to a request from the European Scrutiny Committee in 2007.
- The **Scrutiny Committees can request documents** be deposited which do not fall within the normal description of a depositable document. Similarly, the Government can choose to deposit a document of interest to the Committees. These are case by case decisions but the key test in any circumstance is that the document is in the public domain; political significance is also a factor. In cases of doubt regarding handling please consult DEXEU.
- The **ToRs of both Scrutiny Committees do not formally restrict the Committees** to consideration of “published” documents, so inquiries/consideration may not be related solely – or indeed at all – to deposited documents. **In 2008 the Government gave an undertaking to alert the House at an early stage of consultation exercises** which are not the subject of Green Papers, White Papers and other published communications to the Council caught by the usual process for deposit.

### **2.1 DEPOSITABLE DOCUMENTS**

The EUC's Terms of Reference were revised on 16 March 2010 to take account of the changes to EU legislative procedures following the Lisbon Treaty (TFEU). Similar changes have yet to be adopted for the ESC. The Government has made it clear to the Committee that until such changes have been approved, the Committee should expect to see no less than they received before the Lisbon Treaty entered into force. The Terms of Reference (ToRs) of the two Scrutiny Committees can be found here:

**Commons:** <http://www.parliament.uk/documents/commons-committees/european-scrutiny/European-Scrutiny-Committee-Guide-May15.pdf>

**Lords:** <http://www.parliament.uk/documents/lords-committees/eu-select/terms-of-reference.pdf>

The ToRs state that they will examine ‘European Union documents’; these can be characterised by two categories:

**A Document on which legislative or non-legislative decisions will be reached.** These include proposals (including amended proposals) for adoption by the Council(acting alone or acting under the ordinary legislative procedure with the European Parliament) from the Commission, Commission proposing jointly with the European External Action Service High Representative and other proposals from the Institutions including the Court of Justice, European Central Bank, European Parliament or Member State initiative, and will include:



- Directives
  - Regulations
  - Decisions; including CFSP decisions under Title V of TEU, and decisions relating to the EU budget
  - Recommendations
  - Resolutions (where they are significant)
  - Commission delegated acts (unless, with the agreement of the clerks, deposit is dispensed with)
  - Commission implementing acts (where they are significant and after consultation with the clerks if necessary)
  - )
- **Other Documents submitted to the Council for information or consultation.** These are characterised as documents submitted by an institution to the Council (and in some cases also to the EP) for information or endorsement – e.g. through Council Conclusions – and will include.
- Commission Communications, Reports, Green or White Papers
  - Inter-institutional documents
  - Action Plans
  - European Court of Auditor reports and opinions
  - European Central Bank opinions

## **2.2 DOCUMENTS ON WHICH TO CONSULT WITH CLERKS**

In the course of formal reviews of the scrutiny arrangements and occasions when the Government has put forward proposals for streamlining scrutiny handling, the Committees have agreed certain categories of documents need not be systematically deposited for scrutiny. Instead, the Committees expect to be consulted on handling on a case by case basis. Either DEXEU or the lead department takes the lead in confirming handling of documents in these categories with the Clerks and documents are not normally deposited in the following categories (If in doubt about handling, please consult DEXEU):

- Community positions on rules of procedure for various Councils and Committees, including those established under Association Agreements; (all Departments)
- Proposals to extend Common Positions (now Council Decisions since the Lisbon Treaty) imposing sanctions (without making substantive changes) in pursuance of UN Security Council resolutions (FCO)
- Proposals for making minor changes to lists of people or organisations subject to restrictive provisions in existing measures (FCO)
- Draft Council Decisions relating to decisions already made in Association Councils or Committees (all Departments)
- Reappointment of members to EU organisations (all Departments)
- Agreements emanating from pre-scrutinised Model and Framework Participation Agreements in respect of CSDP missions where the individual agreements do not depart from the structure of the Model Framework Agreement; Affects FCO only
- ECB Recommendations to the Council on the external auditors of National Central Banks in the Eurozone (HMT) Technical adaptations to third country agreements and other existing EU legislation following the accession of Croatia
- Non-UK indirect tax derogations (e.g. VAT & Excise)
- Proposals for codification of EU legislative acts with no changes of substance or important policy issues arising
- Proposals for routine adaptation of EEA/EFTA Agreements
- Commission of European External Action Service Staff Working Documents which are free-standing and not part of a document submitted for scrutiny

- (if the clerks agree)
- Europol documents

The Government proposed a range of additional categories of documents that could potentially be treated in this way as part of its response to the ESC's November 2013 scrutiny reform inquiry report and further categories of document may be added to this list in due course. In their legacy report on scrutiny reform from March 2015, the ESC indicated they would be content to add e.g. anti-dumping proposals and annual Court of Auditor Reports on EU Agencies to this list for case by case consultation. Any such changes when finalised would have to be formally agreed with the EUC too.

### Commission Legislation

The Committees will not routinely scrutinise Commission measures but can consider particularly important pieces of legislation and will look at trends in the way the Commission has exercised its powers and how powers are conferred to the Commission. Departments should consult with Clerks to determine if the Committees would like to see proposals for Commission acts if deemed politically important or contentious.

Following new procedures introduced by the Lisbon Treaty, the Committees proposed a new approach to considering **Delegated and Implementing Acts**<sup>1</sup>. Departments should follow the principles below:

- Any proposal to **revoke a power** for the Commission to **adopt delegated legislation** should be deposited. The Committees acknowledge that the scrutiny reserve does not apply but HMG should provide the document and EM at an early enough stage to allow the views of the Committees to be taken into account where such an opinion is received at least two weeks before the date when agreement is required.
- **Delegated Acts** are in principle depositable, but deposit may be dispensed with by agreement with the clerks. Deposit and the provision of an EM should be in time for the Committees to provide an opinion. HMG should take this opinion into account if received at least two weeks before agreement is required. The EM should therefore indicate the latest date on which the Council can object to a request that the delegation be revoked.
- Proposals for **implementing Acts** should be brought to the attention of the Clerks if they are considered to be sensitive or have been referred to the Appeal Committee. As above, the EM should be submitted within the usual timescales and indicate the date on which a vote on the proposal is expected. Again, HMG should account for the opinion if received at least two weeks before agreement.

In consulting the Clerks, Departments should send the proposal to them with a summary of the purpose of the proposal, comment on its consistency with the powers conferred in the Basic Act, and draw out any issues or risks associated with the proposal including if the Council is likely to oppose the measure.

### Commission Consultations

Other than those consultative documents deposited as eg Green or White papers or Commission Communications, these consultations can take various formats – e.g. online consultations or questionnaires and some will be specifically targeted to particular interest groups. These early consultations may in turn lead to further consultations or proposals emerging from the Commission and are announced and conducted through the Commission's web-based consultation platform "Your voice in Europe" at: [http://ec.europa.eu/yourvoice/consultations/index\\_en.htm](http://ec.europa.eu/yourvoice/consultations/index_en.htm). Departments should draw the

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<sup>1</sup> Delegated and implementing acts are the names given to two types of instrument the European Commission may adopt in order to ensure the implementation of EU law. Delegated acts are dealt with by Article 290.2 They are defined as non-legislative acts of general application to supplement or amend certain non-essential elements of a legislative act. Implementing acts are dealt with by Article 291.3 These are to be used where uniform conditions for implementing legally binding Union acts are required.

Committees' attention to consultations of particular interest to the Government (i.e. where the Government is expected to provide a response) by engaging with the Clerks of the Committees. They can then work with Departments to decide whether the Committee would want to hear formally from the Minister.

## **2.3 DOCUMENTS NOT FOR FORMAL DEPOSIT**

Documents should not be deposited if they fall into one of the below categories. Where a depositable document refers to a non-depositable document, consideration should be given to providing a copy of the latter to the Scrutiny Committee Clerks.

**Classified documents:** Those bearing the classification "Confidential", or "Restreint" are classified and should **not be deposited or shared** with the Committees. Some documents will remain confidential until adoption (certain financial proposals, CFSP documents or anti-dumping measures). These documents **must be deposited** quickly after adoption and an EM should follow in line with the usual deadlines.

**Limité Documents (See Annex H):** Documents bearing the 'Limité' marking should be handled in the following way:

- Limité documents can be shared "in confidence" with the Committees on the Government's authority through a letter or an OTNYR Explanatory Memorandum. But they cannot be deposited and subject to an EM as this makes their content public.
- The Committees cannot publish or comment directly on any limité document in a way that puts the detail into the public domain but they can use the information to inform their overall scrutiny of a proposal.
- It is for each department to ensure that this handling caveat is clear in any correspondence with the Committee when using a limité text to inform the Committees of developments. The following short statement is an example of standard text that can be used when sending a Limité text to the Committees:
  - "The attached document [add description] is being provided to the Committee under the Government's authority and arrangements agreed between the Government and the Committee for the sharing of EU documents carrying a limité marking. It cannot be published, nor can it be reported on in any way which would bring detail contained in the document into the public domain."
- These principles apply equally whether sending limité documents to the Clerks at official level or to the Committees formally.
- **TO NOTE:** In [response](#) to the House of Lords European Union Committee Inquiry report on "[Codecision and national parliamentary scrutiny](#)" (17<sup>th</sup> Report, 08-09), the Government agreed to share EU documents marked limité (often written as LIMITE) with the scrutiny Committees in confidence where they are judged to be relevant to documents under scrutiny. Chris Bryant MP, then Minister for Europe, confirmed this arrangement in his letter of 23 March 2010 to both Committees.
- **TO NOTE:** In the [Government response](#) to the European Scrutiny Committee Inquiry report on "[Reforming the European System in the House of Commons](#)" (24<sup>th</sup> Report, 13-14, p. 9) the Government set out its commitment to a strong and transparent scrutiny system, including sharing limité documents wherever possible and useful, and agreed to press for these documents to be made public where the limité marking is deemed unnecessary.

**Council Conclusions** are not routinely deposited but may be made available to the Committees in certain circumstances. In many cases they are not publicly available until they are agreed and published by the Council. However, there are **several exceptions**:

- Draft Conclusions that meet a request by the Committees to be kept informed of developments,
- Conclusions that are helpful in responding to specific questions raised by the Committees; they would be shared using the “in confidence” handling arrangements described above.
- Conclusions on a Commission Communication that contain substantive political content and commit the EU to a particular course of action or legislation. It is important to liaise with the Committees closely on this type of Conclusions to ensure scrutiny can be completed before they are adopted by the Council.

**Negotiating Mandates and External Agreements:** The procedure for external agreements with third countries and organisations normally includes the following stages:

1. the Commission submits a draft negotiating mandate to the Council for approval (usually confidential and not subject to scrutiny and Ministers are required to inform the Committees of the mandate approved (see below);
2. the Commission negotiates with the third party and initials the resulting agreement with the approval of member states (not subject to scrutiny);
3. the Commission may submit separate proposals to Council for signature, provisional application and conclusion or a proposal which combines proposals for signature and conclusion.

- **Draft Negotiating Mandates** containing negotiating positions are normally classified Confidential, Restreint or Limité and are not published. They require a Council decision to allow the Commission to negotiate on behalf of the EU. They should **not be deposited** in Parliament since publication could prejudice the EU’s negotiating position. However, Departments should provide the Scrutiny Committees with details (via a letter) of mandates as soon as possible after a Council at which they have been approved. This should include the parties to the negotiation, the subject matter and any special factors – such as the date of expiry of a previous agreement. Where possible, Committees should be kept informed about the scope and development of negotiations prior to signature and/or conclusion of an agreement. Proposals that do not contain sensitive negotiating directives, but simply authorise the Commission to undertake or participate in negotiations, and which are issued as published proposals to the Council, **should be deposited** for scrutiny. In practice, the Commission sometimes secures a broad political agreement that exploratory talks should begin, without a formal mandate but on the basis of clear informal indications of objectives from member states. In these circumstances, it is only after substantive negotiations and on the eve of clinching a deal for initialling that the Commission seeks approval of a mandate. Thus, the first piece of paper available for scrutiny will be the text of the final agreement, which only appears at a stage when Council approval is urgently needed. These procedures create considerable scrutiny problems. Ministers have agreed that the Committees should be informed at the same stage as the European Parliament about prospective Commission external agreements.

- **External agreements:** Because of the difficulties of confidentiality described above, EM submission timing on external agreements may vary case to case and will be dependent upon a public document being available to deposit. Departments should consider writing to the Committees at an early stage in the negotiations in order to keep Parliament informed if no document can be deposited. The Committees should be kept informed at the same stage as the Commission informs the European Parliament. It is common for the Commission to brief the European Parliament prior to signature of Agreements with third countries. Formal consultation under Article 218 does not take place until later. You should keep in touch with UKRep to ensure they are alert to any such exchanges in the European Parliament. Where such briefings have been given to the EP, a letter or unnumbered EM should be submitted to the Westminster Parliament.

Whether scrutiny has taken place at an earlier stage through deposit of a document or submission of a Ministerial letter, a **proposal for signature and/or conclusion of an external agreement or proposals which provides for an agreement to be provisionally applied, must be deposited**. This should be done with a copy of the draft agreement as soon as it is available to allow completion of scrutiny before final adoption by the Council.

## **2.4. PROCEDURE FOR DEPOSIT**

### **Depositing a document subject to scrutiny**

Once a document has been identified as suitable for deposit, FCO will electronically and physically deposit the document in Parliament. In cases of doubt DEXEU identifies the Department most likely to have the lead interest in the document and seeks a view on suitability for deposit. If there is doubt where the lead lies, DEXEU must be informed quickly. FCO produces a 'batch list' each time a group of documents is deposited, which confirms the deposit to the DEXEU, Departments and Parliament.

### **Withdrawal of deposited documents**

On occasion documents may need to be withdrawn from scrutiny (e.g. if withdrawn by the publisher, if it was deposited in error, or if the Clerks agree retrospectively the document need not require an EM). In such cases FCO will issue a withdrawal notice to all recipients of the deposited document. (See 3.1 for an EM timetable.)

### **Devolved Administrations**

Documents deposited for scrutiny are sent to the devolved administrations (DAs) at the same time as they are sent to Parliament and they see EM commissioning requests issued by DEXEU. It is important that the devolved administration have the opportunity to comment on the Government's EM before submission on any proposal which directly or indirectly impacts Scotland, Wales or Northern Ireland. Where timing allows, HMG will take account of these views in formulating the UK's negotiating position, which will continue to balance the interests. All EMs are copied to the DAs. However, the scrutiny process and SRR does not apply to the DAs.

## **SECTION 3: EXPLANATORY MEMORANDA (EMs)**

An EM is a formal Government communication to Parliament and it needs the same care as ministerial statements and PQs. They should follow the EM template below. This Section describes the timetable for the production of EMs; and their form and content.

Examples of the types of EM, are described below – see also Annexes A-C. There are no set rules for the length of an EM; it needs to be sufficient to provide the Committees with all the information they need to carry out their scrutiny role. In some cases an EM can be relatively short if it addresses – e.g. proposals consolidating existing legislation which have no policy implications; self-explanatory factual reports raising no policy issues; or documents of a technical or administrative nature.

EMs are public documents and are published by EGIS (See: <http://europeanmemoranda.cabinetoffice.gov.uk/>) with the associated EU document and related Ministerial letters to the Committees.

### **KEY COMMITMENTS AND POINTS TO NOTE**

- DEXEU will **identify the most likely lead Department**. If there is disagreement, Departments should make urgent efforts to agree among themselves who will take responsibility for the preparation of an EM, notifying DEXEU once agreed. Exceptionally, EMs may be signed by more than one Minister but this is not needed as long as the EM is clear about Ministerial responsibility and content is agreed collectively. If Departments cannot reach agreement, they should inform the DEXEU urgently within the 10 day deadline, setting out their views on responsibility for the proposal. DEXEU will then take a decision consulting those with an interest. If it is later decided that the responsibility for the proposal lies with another Minister, DEXEU will notify the Scrutiny Committees, and agree a new deadline for the submission of the EM.
- There are occasions when it may be appropriate to address **more than one document in a single EM**; an approach commonly used where there are e.g. separate proposals to sign/conclude an agreement. DEXEU should be informed when a Department proposes this, and the lead Department should consult the staff of the Scrutiny Committees to agree an approach.
- The Committees have made it clear they are **unlikely to grant extensions** to the deadline for submitting EMs on proposals for legislation where the **National Parliaments' Subsidiarity Protocol (Reasoned Opinion procedure)**<sup>2</sup> and/or the undertakings given to Parliament on **Title V opt-in**<sup>3</sup> scrutiny apply. Both commitments provide a window of 8 weeks in which the Committees have to conduct their scrutiny processes.

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<sup>2</sup> The principle of subsidiarity and the principle of proportionality govern the exercise of the EU's competences. In areas in which the EU does not have exclusive competence, the principle of subsidiarity seeks to protect the capacity of the Member States to take decisions and to take action and authorises intervention by the EU when the objectives of an action cannot be sufficiently achieved by the Member States, but can be better achieved at Union level, 'by reason of the scale and effects of the proposed action'. Any national parliament or any chamber of a national Parliament has eight weeks from the date of forwarding of a draft legislative act to send to the Presidents of the European Parliament, the Council and the Commission a reasoned opinion stating why it considers that the draft in question does not comply with the principle of subsidiarity.

<sup>3</sup> The UK's participation in EU legislation on Justice and Home Affairs (JHA) provides for the UK, to choose, within three months of a proposal being presented to the Council pursuant to Title V of Part Three of the TFEU (the part of the Treaty governing JHA matters), whether it wishes to participate in the adoption and application of any such proposed measure. If the UK does not opt in by the three month point, the UK may, at any stage after a measure has been adopted, indicate its wish to participate, though the Commission has to approve and the Commission and Council can impose conditions.

- EMs should not rely on the reader having extensive knowledge of the subject covered and should not rely heavily on references to other documents.
- The **DAs** should be consulted on all EMs on issues where there is a direct or indirect interest for the DAs, and the DAs interest should be clearly referenced in the EM. If an EM is likely to be delayed beyond the 10 day deadline Departments should keep colleagues in the devolved administrations informed.
- If the UK policy has not been agreed or there are other areas of **uncertainty**, the EM should say so while giving as much information as is available at the time.
- If **Article 352<sup>4</sup>** (formerly Art 308) is the only article proposed as the legal basis for a measure and the Treaties have not provided the necessary powers, the EM must clearly state why the article has been chosen and HMG's position on the use of 352.
- **Ambulatory References**: Where amendments to existing EU directives will be amended in domestic law without any further amendment of the Statutory Instrument (S.I.) implementing the original Directive – and therefore without recourse to any further UK parliamentary procedure (using ambulatory references) – it is important this is stated in the EM.
- When sending electronic copies of EMs to the Committees, **covering emails** should include contact details of an official in the Department who can answer any questions raised by the Clerks or legal advisers.
- It is good practice to copy all draft EMs to the appropriate UKRep Desk Officer.

### **3.1. TIMETABLE**

- EMs must be provided no later than **10 working days** from the date of deposit of the document.
- If an **extension** to an EM deadline is required you should urgently consult the Clerks. If an extension is agreed, the Committees will not record an EM as late if it is submitted by the revised deadline.
- The deadline is **8 working days** for EMs on **JHA proposals** which are subject to the UK's opt-in decision. Here, the Committees have 8 weeks in which to complete scrutiny. (See Annex G on the commitments the Government has made on enhanced scrutiny of JHA opt-in decisions.) Departments cannot expect the Clerks to extend the deadline for EMs in these cases.
- Legislative documents covered by the **Subsidiarity protocol** are expected to be submitted promptly to ensure they have as much time as possible available to consider the subsidiarity implications and if necessary deliver a reasoned opinion. Departments cannot expect the Clerks to extend the deadline for EMs in these cases. It may, however, be possible to submit an initial EM dealing with subsidiarity issues, and follow it by a supplementary EM dealing with wider policy issues, if agreed with the Clerks.
- Where an **Impact Assessment (IA)<sup>5</sup>** is relevant but has yet to be produced, an initial assessment of costs should be given and the IA must follow as soon as possible (see Section 3.2).
- Where a proposal is expected to progress rapidly, you should work to a shorter deadline and should, where possible, start to prepare the EM before deposit and keep the Clerks informed. In respect of re-examined proposals submitted to the Council under the special legislative procedure or new texts that emerge under the ordinary legislative

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4 Article 352 of the TFEU is a legal base for measures that are in line with the objectives set out in the Treaties, but for which the Treaties have not explicitly provided the necessary powers. Under section 8 of the European Union Act 2011, a Minister of the Crown may not support an Article 352 decision unless the draft decision has been first approved by an Act of Parliament.

5 An Impact Assessment is where the Government should set out potential impacts of the Commission proposal on the UK outlining the main groups likely to be affected and whether these are in the public/private/voluntary sector/consumers, whether the costs will be beneficial or adverse, and indicate how costly or difficult the proposed legislation could be to enforce and whether it would be sufficiently flexible.

procedure (see Annex D) the Council must act within a specified timeframe. In these circumstances it is essential that EMs are submitted quickly.

- If an EM needs to be considered **urgently**, it is helpful to send an advance copy to the Clerks. If the final version is to differ significantly, notify the Clerks as soon as possible.

### **3.2. FORM AND CONTENT**

#### **Points to Note**

- When preparing EMs on **amended proposals**, it may be appropriate to delete some of the standard headings (e.g. Ministerial Responsibility, Legal and Procedural Issues) where the information may not have changed since the submission of the EM on the original proposal. It is important that the EM is absolutely clear that the information not included remains the same as that given in the earlier EM.
- For some **non-legislative documents** (e.g. Commission Communications to the Council, Reports), certain parts of the standard form may not be relevant (eg, legal and procedural issues). You should simply confirm that no such issues arise.

#### **Subject Matter**

This section sets the scene and should be as clear and as simple as possible; prior knowledge of the subject area should not be assumed. The description of the subject matter should enable readers to understand broadly what is proposed and why without reference to the EU document.

#### **Scrutiny History**

This section should include the scrutiny history of the issue or any other relevant proposals (details can be obtained from departmental scrutiny co-ordinators or DEXEU on 276 0241). See Annex B for an example of how scrutiny history should be referenced. It may be convenient to annex the scrutiny history if it is long and complex.

#### **Ministerial Responsibility**

The EM should state which Minister is primarily responsible for a proposal (usually the Minister in charge of the Department even if another of the Department's Ministers signs the EM) as well as any other Minister who may have a Departmental interest.

#### **Interest of the Devolved Administrations (DAs)**

The precise nature of the devolution settlements vary between Scotland, Wales and Northern Ireland. Therefore Departments should consult the MoJ and Territorial Departments on the details of the specific devolution settlement in relation to a particular DA if there is any doubt about what the settlements cover or where a reserved matter may impact on the responsibilities of a devolved administration. As a general rule, however, issues **reserved to the Westminster Parliament** include:

- The Constitution
- Foreign Affairs
- Defence
- International Development
- Economic and Financial Policy
- Immigration and Nationality
- Trade
- Aspects of energy regulation (e.g. electricity, coal, oil and gas and nuclear energy)
- Aspects of transport (e.g. regulation of air services, rail and international shipping)

**Devolved matters** include:

- Education and training
- Health and social work
- Local Government and housing



- Agriculture, forestry and fisheries
- The environment
- Tourism, sport and heritage
- Economic development
- Internal transport.

In the EM, reference should be made to the interests of the DAs referring to “Scottish Government Ministers”, “Welsh Government Ministers” and “Northern Ireland Ministers” as appropriate. Whenever an EM indicates that a Minister from one or more DA “have an interest” in the subject matter, this should be taken to mean that they have been consulted about the content of the EM. This should be stated explicitly in the EM. The devolution agreements provide for them to be directly and fully involved in decision making on those EU issues that directly impact on devolved areas, and on those non-devolved matters that have an impact on devolved areas.

These interests can be captured as below:

- For documents on matters that are reserved (listed above) or where the devolved administrations need not be consulted, this should be **clearly stated**. Example language: *[The UK’s Foreign Affairs policy] is a reserved matter under the UK’s devolution settlements and no devolved administration interests arise. The devolved administrations have therefore not been consulted in the preparation of this EM.*
- For documents on matters reserved under the devolution settlements, where there may be a particular impact upon the devolved, the relevant DA(s) has been consulted, and there is a clearly identifiable issue or interest, this should be **clearly stated**. Example language: *[The UK’s Trade policy] is a reserved matter under the UK’s devolution settlements but the devolved administrations [either collectively or singly – insert as appropriate] have an interest in [highlight issue(s)] and have been consulted in the preparation of this EM.*
- For documents on matters devolved under the devolution settlements (directly impacting the responsibilities of the DAs), the EM should be prepared in consultation with the DA and this should be **clearly stated**. Example language: *[Agriculture] is a devolved matter under the UK’s devolution settlements and the devolved administrations [either collectively or singly] have been consulted in the preparation of this EM.*

DEXEU copies all EM commissioning letters to the DAs so they are aware of which department has the lead on an issue and they can use this information to make early representations to the lead department about their interest.

### **Legal and Procedural Issues**

You should consult lawyers on this section. It should contain the following information:

- The **Legal basis** (legislation or Treaty Article) upon which the proposal relies (usually the Treaty Article cited in the preamble) should be referenced in the EM. Occasionally a proposal may not cite any specific legal basis (e.g. it may simply cite “the Treaty”). In such cases, where practicable, the EM should identify any Article(s) on which the proposal could or should have been based. Cross-refer to “policy implications” where there is any doubt about the powers of a draft instrument. EMs commenting on **Article 352** should be cleared with EGIS and FCO given the potential for an Act of Parliament to be required to support such a proposal as provided for in the EU Act 2011. In accepting a legal base, clear justification must be given as to **why it is acceptable** even if it is not the Government’s preferred legal base. It is the Government’s position that the **JHA opt-in** is triggered by the presence of content in a proposal even if no JHA (Title V TFEU) legal base is cited. “JHA content” includes provisions creating obligations in the fields of border control, immigration, asylum, judicial cooperation in civil or criminal matters (including defining criminal offences or specifying penalties) or

police cooperation. If anything of this nature appears in a draft measure, legal advisers, Home Office and MOJ should be consulted. Where the measure includes JHA content but does not cite a JHA (Title V) legal base, the EM should also state whether the JHA content constitutes the entire measure (whole JHA), a substantive part of the measure (partial –non-ancillary JHA), or is incidental to the main purpose of the measure (incidental JHA). You should consult Home Office, MOJ and DEXEU for advice on this point.

(ii) **Legislative procedure:** State whether the ordinary legislative procedure (OLP) (formerly co-decision) or special legislative procedure (SLP) procedures are applicable. This can be found by consulting the text of the Article on which the proposal is based in the Treaty. In the case of SLP or other procedures, it will be necessary to describe the type of SLP or other procedure which applies e.g.SLP (Council after consulting the European Parliament).

(iii) State the **voting procedure** applicable (eg QMV, unanimity).

(iv) State the **impact on United Kingdom law:**

- If there is an impact on UK law, to give as much detail as possible of the **existing provisions or the area of existing law** (including both enacted and common law) likely to be affected, regardless of whether new or amending legislation will be required. Where the position differs in different parts of the UK, this should be explained. If there is no impact, or if the instrument is unlikely to have any implication in this country, it is sufficient to state this with a brief explanation of whether legislative action may be required to implement or supplement the instrument (and any relevant domestic enabling powers should this be the case). This section should include a best assessment, on the basis of the proposal as it stands, of HMG's plans to implement the legislation either by primary or secondary legislation. The Committees must be updated when the position becomes clearer.
- This section (or under policy implications if more appropriate) should include any relevant information about particular **difficulties in implementing the legislation** as appropriate. The BIS Transposition Guide on how to implement European Directives effectively should be consulted. It provides detailed information on how to handle a Commission proposal and the options available to implement the legislation: <https://www.gov.uk/government/publications/implementing-eu-directives-into-uk-law>.
- Where amendments to existing EU Directives will be amended in domestic law without any further amendment of the S.I. implementing the original EC Directive (and without recourse to any further parliamentary procedure using **Ambulatory References**), state this clearly:

(v) Application to **Gibraltar:** The UK is responsible for Gibraltar's external relations and ensuring compliance with EU obligations. EC legislation (with some exceptions) applies in Gibraltar. CFSP instruments generally apply to Gibraltar. The territorial application of Justice and Home Affairs instruments is dealt with on a case by case basis. DEXEU legal advisers can advise further.

(vi) **Fundamental rights analysis:** In March 2007, the Government undertook to provide an analysis of the compliance with fundamental rights of every draft legislative proposal submitted for scrutiny. Article 6(1) TEU states that: *"The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg on 12 December 2007 which shall have the same legal value as the Treaties"* Article 6(3) TEU states *"Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law"*.

The lead Government Department must therefore provide not just a statement but an analysis of whether, and why, in its view, the proposal respects those fundamental rights. The Committees interpret the term “legislative proposal” in the widest sense (though as to CFSP instruments – see below). For consultative documents (e.g. Green and White Papers and other Commission communications) that may lead to legislation, it may be appropriate to draw attention to fundamental rights issues if they are likely to arise. The analysis should be provided along the following lines:

- Details on the most **significant fundamental rights issues** thought to arise in the proposal, together with the Minister's conclusions on whether the proposal respects those rights. For many proposals, no fundamental rights issues arise, in which case this should be stated.
- Explain fundamental rights issues, **identifying which provisions of the proposal may engage fundamental rights and explaining what rights are potentially engaged, and whether (in the opinion of the Minister) they are respected**. In some cases, where the issue is not particularly complex, it may be sufficient to state that an issue has been considered, and that a particular conclusion has been reached. For example, the proposal may record the Minister's conclusion that a provision should not be regarded as affecting the right to respect for private and family life and give a brief explanation how that conclusion has been reached. However, where a fundamental right is likely to be engaged, Departments should analyse both whether it is engaged, and, in the case of qualified rights, whether any potential interference with the rights is justified within the human rights framework. Legal advice should not be disclosed.
- For proposals that **do not (or have a minimum) impact on the UK or UK citizens in Europe**, there is flexibility on the length/depth of the analysis. For example, in the case of Title V TFEU or Schengen measures to which the UK has not opted in, a less detailed analysis may be appropriate. However, if the lead Department is aware that HMG is likely at a later stage to opt in to the EU measure under scrutiny, a more thorough analysis is needed to explain this. In all cases the Committees expect analysis appropriate to the content of the proposal whether or not HMG has decided to opt in.
- Proposals for **CFSP measures** differ from the legislative proposals referred to above, but fundamental rights analysis should continue to be provided as a matter of best practice insofar as such issues arise (or should simply state if no issues arise).

The complexity or length of some proposals may make it difficult for Departments to complete the fundamental rights analysis within the current 10-day deadline for EMs (or earlier in respect of opt-in decisions). In these cases, the missing information should follow as soon as it is available, usually via a supplementary EM.

### **European Economic Area**

The EEA Agreement extends the principles of the Single Market to three of the European Free Trade Association (EFTA) countries (Norway, Iceland and Liechtenstein – Switzerland rejected membership of the EEA in 1992). It covers the “four freedoms” (free movement of goods, capital, services and persons), competition rules and additional co-operation intended to strengthen the internal market (such as research and development, consumer protection etc), but does not include the Common Agriculture Policy or the Common Fisheries Policy. EMs should therefore refer to a measure's **application to the EEA**.

### **Subsidiarity**

- EMs must include an assessment of whether HMG believes that the proposal in question is **justified in accordance with the principle of subsidiarity** as set out in Article 5 TFEU (see also Protocol No.2 annexed to the Treaty on the application of the principles of subsidiarity and proportionality):

[http://www.cvce.eu/en/obj/protocol\\_no\\_2\\_on\\_the\\_application\\_of\\_the\\_principles\\_of\\_subsidiarity](http://www.cvce.eu/en/obj/protocol_no_2_on_the_application_of_the_principles_of_subsidiarity)

[diarity\\_and\\_proportionality\\_lisbon\\_13\\_december\\_2007-en-ce113c75-4521-47f6-a471-cc2467007197.html](http://diarity_and_proportionality_lisbon_13_december_2007-en-ce113c75-4521-47f6-a471-cc2467007197.html)). These may be proposals from the Commission, initiatives from a group of member states, initiatives from the EP, requests from the Court of Justice, recommendations from the European Central Bank and requests from the European Investment Bank for the adoption of a legislative act. The protocol will not apply to CFSP instruments, nor will it apply to matters within exclusive competence of the EU. It will not apply to non-legislative documents (e.g. Commission communications and reports). But in the case of a consultation paper for future legislation it may be appropriate to draw out any subsidiarity issues to inform the scrutiny committees' early thinking on future legislation.

- The Commission (or whoever initiates) should provide a justification of any proposal against the principle of subsidiarity in the EM which forms part of their document. Where HMG reaches the same conclusion as the Commission, you should explain the reasons from the UK perspective. **Where HMG disagrees with the Commission's conclusions**, the reasons for doing so should be set out fully enough to allow the Committee to assess them. It should not be assumed that proposals to which the UK objects on policy grounds are defective in subsidiarity terms or that those which match UK policy are necessarily acceptable on subsidiarity grounds. In making this assessment you should consider:
  - *Is action by the EU needed to achieve the objective? Can the objective of the proposed action only be achieved, or only achieved to a sufficient extent, at EU level?*
  - *Would the objective be better achieved at EU level – i.e. would action at EU level provide greater benefits than action by the Member States?*
  - *Is action proportionate?*
  - *Can Member States solve the problem by acting individually? Can Member States, acting individually, fulfil the objectives of the Treaties? Would action by Member States damage the collective interest?*
- **Do not confuse subsidiarity with other legal and procedural issues, such as Treaty base, which should be covered elsewhere in the EM.** Where the proposal in question is a **draft legislative act** (as defined by the EU Treaties), certain procedures apply under the Subsidiarity Protocol which enable either House to issue a reasoned opinion. Such an opinion needs to be agreed by the relevant House within 8 weeks of a document's official transmission.

### **Policy Implications**

This section should present a clear account of the principal issues from a UK viewpoint, taking account of the Commission's EM, but providing HMG's own analysis and position. The implications of policies may be different in Scotland, Wales and Northern Ireland to the UK as a whole. It is therefore important that all implications are considered as necessary, in consultation with officials from the devolved bodies. It may be helpful to give some **factual background on the situation** in the rest of the EU if this bears on the nature of the proposal or its origin. If there are no policy implications you should explain why this is so. If it is intended to pursue a point on the vires of a proposal, you should indicate this here (with a cross-reference under "legal basis") and provide an explanation of the concerns and arguments relied upon. This section should also highlight any questions relating to compatibility with the UK's international obligations. This section should be used to comment on the factors the Government will take into account when considering whether or not to **opt in to a JHA proposal**, and should also be used to provide a clear commentary on the Government's view on powers to be conferred on the Commission **Delegated or Implementing Acts** (see section 2.1). The Government has also undertaken to draw on the evidence in the reports published following the Balance of Competences Review where it is helpful to inform the content of EMs and subsequent correspondence with the Committees. The reports can be found at: <https://www.gov.uk/review-of-the-balance-of-competences>.

## **Impact Assessment Checklists**

Departments should analyse the likely impacts of different negotiating options to help Ministers make evidence-based decisions. The analysis should be proportionate to the proposal and time available. An Impact Assessment Checklist (see template: <https://www.gov.uk/government/publications/checklist-for-impact-assessments-on-eu-policies>) for EU proposals should capture the information and enable Ministers and Parliament understand the potential impacts and take an informed view. Key factors on the level of detail for a Checklist include:

- The level of interest and sensitivity surrounding the policy
- The degree to which the policy is novel, contentious or irreversible
- The stage of policy development
- The scale, duration and distribution of expected impact
- The level of uncertainty around likely impacts
- The data already available and resources required to gather further data
- The time available for policy development

Other points:

- An **IA Checklist must accompany an EM** wherever possible. Where an initial assessment of risks, costs and benefits is provided, a more comprehensive Checklist with a robust assessment should follow as soon as possible.
- Where the Checklist **follows after an EM** it should normally be submitted under cover of a signed supplementary EM though the Clerks may agree that it be submitted under a Ministerial letter.
- If an existing EU proposal is modified such that a **new EM** is required, an updated Checklist should also be submitted.
- Some legislation does not require an IA. This includes regulations which **amend an existing regulatory regime** without imposing any additional costs or savings or have a **negligible impact** on business, charities or voluntary bodies. The EM should make this clear.
- If an impact assessment has been prepared by the Commission it would be helpful to refer to it here and give HMG's views.

## **Financial Implications**

This section should cover **financial implications** for the EU, and the UK. Where relevant information has been made available by the Commission, this should be given. If there is uncertainty about the Commission's figures it should be noted that the estimates may be subject to revision. In some cases it will be clear that no financial implications arise but it is helpful to the Committees if the reasons for this are spelt out clearly.

## **Euros**

Where figures are in euros, they should also be shown in sterling. As a general rule the rate of exchange for the last working day of the month preceding submission of an EM should be used. This rate can either be obtained from Departmental Scrutiny Co-ordinators or DEXEU.

## **Consultation by HMG**

This should cover consultation past, current or planned where appropriate with outside bodies. This section of the EM should not normally refer to routine consultation with other Government Departments.

## **Timetable**

In the case of a document requiring a Council decision at key stages in the legislative process or where Council conclusions may be adopted), you should be as informative as possible about the timetable for decision as this will assist Committee Clerks to prioritise business before the Committee. If the timetable changes between the submission of an EM and consideration by the Committees, the Clerks should be informed immediately.

## **Official Contact**

The email covering the submission of the EM should contain a contact point in the lead Department with name, telephone and email details.

## **3.3. UNNUMBERED EMs**

An unnumbered EM is a memorandum which describes a proposal to be considered by the Council for which no depositable or numbered text yet exists. Examples of when one should be prepared include:

- (i) A document which is fast moving and likely to come to the Council for decision before a formal public text is available. This is a particular feature of scrutiny of CFSP/CSDP instruments where unnumbered EMs are submitted to which texts are attached (where available). These EMs would normally carry the heading “**Official Text not yet received**”. When the text is eventually issued, **an addendum** should be provided to complete the scrutiny process.
- (ii) When a document has been deposited but it does not carry a unique reference number to identify it. This may, for example, be a Published Report where the document only has a title, or where an EM is being produced on a measure which has already been adopted (e.g. when a decision to impose sanctions has been adopted by the Council and a text or EM could not be provided before adoption due to classification). These EMs are usually titled “**Unnumbered Document**”.

## **Addenda to Unnumbered Explanatory Memoranda and Corrections**

When an official text becomes available for deposit you should confirm this with DEXEU and quickly prepare an addendum stating which reference number should be added. This need not be signed by a Minister. A corrigendum may also be submitted to correct minor errors in an EM. An example of the format of an addendum/corrigendum is given in Annex A)

## **3.4. SUPPLEMENTARY EMs, AND UPDATING THE COMMITTEES**

Supplementary (or updating) EMs can be prepared if **further information needs to be provided to the Committees** – e.g. if the first EM was incomplete in a significant way or a request for further information has been received from the Committees. However, the usual approach is to provide this information or update through a Ministerial letter. If in doubt, consult with the Clerks or DEXEU. Supplementary EMs should follow the normal format and carry the reference number and title of the original EM, as well as the scrutiny history. Where a supplementary EM is to be submitted solely to cover information not previously available (e.g. an IA Checklist), it need only take the form of a “cover note” making it clear why the further EM is being provided, stating clearly that all other information provided in the original EM remains. A similar approach should be taken where a supplementary EM answers specific questions raised by the Committees. If a revised text is expected in the absence of a formal depositable text, an unnumbered EM must be prepared in preference to a supplementary EM.

## **3.5 SCRUTINY OF PROPOSALS UNDER THE ORDINARY LEGISLATIVE PROCEDURE (OLP)<sup>6</sup>**

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<sup>6</sup> The legislative procedure consisting of the joint adoption by the EP and the Council of a regulation, directive or decision on a proposal from the Commission. The Council can generally

In the Government's response to the Lords European Union Committee's report on "Co-decision and national parliamentary scrutiny" (17<sup>th</sup> report 08-09, HL251) which was debated in the House of Lords on 28 January 2010, the Government agreed several points:

- to update the Committees when there have been developments which **impact upon policy implications**, and the Government will provide relevant documents in the process, including those that are distributed as **Limité documents under the arrangements described earlier**.
- HMG retains **flexibility in providing updates at both official and Ministerial level**, as well as recognising that whilst a range of documents may ordinarily be depositable (e.g. Commission amended texts in the light of EP first reading amendments, Commission Opinions on EP second reading amendments and joint texts) some are best handled on a case by case basis in consultation with the Clerks.
- Scrutiny clearance has to be obtained before decisions are taken in the Council to agree **partial or full general approaches, first reading, second reading or joint texts** emerging from the conciliation process.
- **Departments must use their discretion** to decide points in the negotiation process to update the Committees on significant progress towards agreement (i.e. those developments which have policy implications). This includes deciding when to share **trilogue or other texts** with the Committees on an "in confidence" basis where the text is marked limité.
- The Committees should be informed **when Coreper<sup>7</sup> agrees to send a letter from the Presidency to the EP**, indicating the Council's agreement to amendments being proposed by the EP.
- The system provides **flexibility for departments** to agree with the Clerks whether certain texts emerging in the process (e.g. EP outcomes, Commission opinions) should be deposited with an EM or covered by a Ministerial letter. DEXEU will draw these texts to the attention of Departments requesting they consult the Clerks on handling.

The OLP applies to most EU legislation. **Scrutiny clearance must be obtained at each legislative stage** to avoid a breach of the SRRs. Departments must ensure that the Committees are provided with information at the key stages of the process to allow for effective scrutiny; provide information on changes and proposed changes to proposals, to allow the Committees time to comment before UK Ministers agree to them; and in fast-moving situations to use the scrutiny reserve, within practical limits, to delay a decision at Council. There are several points in the OLP where a positive vote in Council can lead to the adoption of Council positions; each of these stages is covered by the scrutiny reserve resolutions in each House, which applies whenever a Minister is invited to agree to something in Council (see Annex D for fuller examples):

- i. **at the first reading** – if the Minister is invited to agree any Council position;

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act by qualified majority voting. This is the most common procedure for adopting regulations, directives and decisions. The relevant legal base in TFEU will determine whether this procedure applies [Articles 289(1) and 294 TFEU].

<sup>7</sup> Coreper stands for the 'Committee of the Permanent Representatives of the Governments of the Member States to the European Union' and is the Council's main preparatory body. All items to be included into the Council's agenda (except for some agricultural matters) must first be examined by Coreper, unless the Council decides otherwise. It is not an EU decision-making body. Coreper: coordinates and prepares the work of the different Council configurations

- ensures consistency of the EU's policies
- works out agreements and compromises which are then submitted for adoption by the Council

Coreper is composed of the 'permanent representatives' from each member state, who, in effect, are their country's ambassadors to the EU. They express the position of their government. The two configurations of Coreper (Coreper I and II) meet every week.

- 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** (a “Joint Text”).

Committees can be updated in several ways after the deposit of the original document and initial EM:

- by depositing further documents/EMs or updates in Ministerial letters or at official level at specific points in the process (e.g. when Coreper agrees a mandate for trilogue negotiations);
- by providing details of amendments with policy implications made or proposed in the Council, Coreper, Council working group or informal trilogue meetings;
- sending a letter when Coreper agrees write from the Presidency to the EP indicating the Council’s agreement to amendments to be proposed by the EP; and
- when either Committee requests further information or an update. If no update has been provided for some time, consideration should be given to updating the Committees without specific request.

An EM at any stage of the process re-imposes the Scrutiny Committees’ scrutiny reserve whereas a letter does not. Departments should consult the Clerks on which approach is most appropriate for a given case.

### **Scrutiny at the various stages**

- i. **Commission proposal:** The proposal is deposited and a numbered EM should be submitted.
- ii. **First Reading deal:** If there is a prospect of a First Reading deal, Departments must make this clear in the original EM, or if this as soon as it becomes clear as negotiations develop (including informal trilogue negotiations) using a Ministerial letter with a copy of the trilogue text (under the arrangements for handling limité documents). A Ministerial vote on a General Approach or Partial General Approach is in any event subject to the SRR.
- iii. **EP first reading: EP Opinion**
  - The result of the EP’s First Reading must be promptly communicated to the Committees. This is usually by means of a Ministerial letter unless the clerks advise that the report should be deposited. This should detail:
    - a) HMG’s view on the amendments and the prospects of them being accepted by the Council; and
    - b) The Commission’s response (this is normally given orally by the responsible Commissioner at the appropriate EP plenary session).
  - On occasion, the Commission formally amends its proposal as a result of the EP’s first reading. Such an amended proposal should be deposited with a new EM unless the Clerks advise that this is unnecessary.
  - To ensure that EP first reading reports and amended proposals are handled effectively, DEXEU will consult Departments on handling who in turn should consult the clerks urgently to agree the most appropriate way forward for these documents to avoid documents being deposited unnecessarily and having to be withdrawn.

### **iv. Council first reading: Common Position**



- A Ministerial vote on a Common Position by the Council is subject to the SRR. The Committees should be informed promptly by Ministerial letter when Council adopts a Common Position. This should:
  - a) detail HMG's view on the Common Position and prospects for second reading negotiations; and
  - b) include the text of the Common Position as an annex.

**iv. Commission response to the Common Position**

- Sometime 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 Clerks for information.

**v. EP second reading: adoption, rejection or amendment of the Common Position**

- If the EP **approves or rejects** the Council's common position Departments should inform the Clerks immediately in writing, copying the letter to DEXEU.
- If the EP proposes **amendments to the Common Position**, the EP report should be deposited promptly and an EM produced unless the Clerks advise that a letter is advisable. DEXEU will liaise with Departments on handling of such documents urgently. The Minister's letter or EM should:
  - a) Explain the policy differences between Council and EP.
  - b) Detail HMG's view.
  - c) Examine whether agreement at second reading is a prospect.
- Commission opinions on EP second reading amendments will not normally be deposited unless the Committees have not been updated fully in Ministerial correspondence. You should consult Clerks on handling. If it is agreed this document should not be deposited, it should be sent to the Clerks for information.

**vi. Council second reading**

- A Ministerial vote on the Council approval of the EP position at second reading is subject to the SRR. If the Council **approves** all the amendments proposed by the EP in its second reading report, the Committees should be informed by Ministerial letter, copied to EGIS.
- If Council **does not approve** the EP's second reading amendments, the Clerks should be informed immediately in writing that a conciliation committee will be convened, copied to DEXEU.

**vii. Conciliation: approval of a joint text or no agreement**

- The timescales at this stage are very short. It is therefore important that information is sent immediately to the Committees. It may help to speak to the Clerks in advance. In practice, the Committees acknowledge that time constraints mean it is not possible to apply the scrutiny reserve between the publication of a Joint text and its agreement in Council.
- 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 HMG's reaction. The approved Joint Text is likely not to emerge before the text is formally adopted by the Council, so the letter can be sent without the text itself. The Minister's letter should offer to deposit a copy of the Joint Text (with an EM) if the Committees would find it helpful.
- If the Conciliation Committee **fails to approve a joint text**, the Clerks should be informed immediately in writing, copying the letter to DEXEU.

**viii. Presidency compromise texts**

- If these aim to restart stalled negotiations on a proposal or introduce changes with policy implications and should always be made promptly available to the Committees (if this is a limited text see limited handling procedures – Annex H).

### **3.6. SPECIAL LEGISLATIVE PROCEDURE (ARTICLE 289(2))**

The special legislative procedure (SLP) replaces the former consultative, cooperation and assent procedures. As their name indicates, these procedures derogate from the OLP and therefore constitute exceptions. In the SLP, the Council of the EU is, in practice, the sole legislator. The EP is simply associated with the procedure. Its role is thus limited to consultation or approval depending on the case. Unlike the OLP, TFEU does not give a precise description of SLP. The rules of SLP are therefore defined on an ad hoc basis by the Articles of the Treaty that provide for their implementation. The **EM must make it clear that this procedure is being used**. Scrutiny must be completed before Council position is reached (e.g. subject to the assent of the EP).

### **3.7. CIRCULATION OF EMs**

The full circulation lists for EMs and corrigenda/addenda are given in Annex C as a guide only and details are subject to change so you must use the circulation list included with the DEXEU request for EMs. **EMs are public documents** so can be provided following requests from members of the public. EMs submitted from 2012 can be found on the Government's website at <http://europeanmemoranda.cabinetoffice.gov.uk/>. Earlier EMs back to 2003-4 are stored by DEXEU and can be obtained on request.

### **3.8. WITHDRAWAL OF EMs**

EMs may occasionally need to be withdrawn (e.g. to correct a significant error or make some substantial changes) where neither a corrigendum nor supplementary EM would be appropriate. If withdrawal is required, you should notify DEXEU and Clerks in advance to discuss handling. Depending on how soon the replacement EM will be available; either a withdrawal notice should be issued to all recipients of the original EM or the new EM submitted with a cover note drawing attention to the withdrawal of the original EM.

## **SECTION 4: THE SCRUTINY PROCESS**

This Section describes the composition and operation of the Committees and arrangements for liaison with the Government. It explains how the Committees consider and report on EU documents and defines what is meant by “clearing scrutiny”, and also advises on giving evidence to the Committees.

### **4.1. THE COMMONS EUROPEAN SCRUTINY COMMITTEE (ESC)**

The ESC is appointed for the whole of each Parliament and comprises sixteen members. Details of the Committee’s membership can be found on the Committee’s website at <http://www.parliament.uk/business/committees/committees-a-z/commons-select/european-scrutiny-committee/>. It examines the EU documents deposited in Parliament and the associated EMs, and reports on them to the House with its assessment of the legal and political importance of each proposal, including recommending debates where appropriate. The Committee’s Orders of Reference are contained in House of Commons Standing Order No.143. It meets every Wednesday while the House is sitting. The Committee is supported by Clerks, lawyers and Advisers who brief the Committee on deposited documents and HMG’s EMs. It may also conduct inquiries. The Committee may refer matters to other Departmental Select Committees for opinions.

### **4.2. THE LORDS EUROPEAN UNION COMMITTEE (EUC)**

The EUC is reappointed each Session and consists of 19 members. Its Chairman, by convention the Principal Deputy Chairman of Committees, conducts an initial “sift” of all deposited documents (see Section 4.5), clearing some and remitting others to one of 6 Sub-Committees, responsible for considering documents within particular policy areas. The Sub-Committees conduct scrutiny of documents by correspondence, by one-off hearings, and sometimes by full inquiry. Information about the committee can be found at their website <http://www.parliament.uk/business/committees/committees-a-z/lords-select/eu-select-committee-/>.

### **4.3. LIAISON WITH THE COMMITTEES**

DEXEU acts as the central link between the Committees and Departments on day to day process. FCO lead on strategic scrutiny issues supporting the Minister for Europe who has overall responsibility for HMG’s relationship with the Scrutiny Committees. The Leaders of both Houses have overall responsibility for Parliamentary procedures. The FCO/Leaders or the DEXEU should be consulted on any sensitive issues.

### **4.4. PREPARATION FOR COMMITTEE MEETINGS**

- The week before each meeting of the **Commons ESC**, DEXEU circulates to departmental scrutiny coordinators a list of items on which EMs have yet to be submitted. Departments will provide DEXEU with information on the progress towards the production of EMs who in turn pass this to the Scrutiny Committee by Friday, and the Committee’s final agenda is drawn up.
- Departments should consider and inform DEXEU and Clerks if there are any proposals on which urgent consideration is needed from the Committee, and which, in their view, should be included on the final agenda.
- **It is important that the signed EM is received by the Clerk by midday on the Thursday preceding the meeting;** otherwise the document will be deferred to the following meeting unless the Clerk has exceptionally agreed to retain the item on the agenda.

- Last minute items for the weekly **Lords sift** also need to be with the Lords Committee staff by midday on the **Thursday preceding the weekly sift unless later submission is agreed by the Committee staff.**
- The **Lords** Sub-Committees usually meet weekly when the House is sitting. If you are aware of a document requiring urgent clearance you should contact the relevant Sub-Committee Clerk at the earliest possible date. **At least 10 working days should be allowed in normal circumstances** to ensure that an item is placed on the agenda of a Sub-Committee. Details of when Sub-Committee meet can be found in the Lords Weekly Bulletin at <http://www.parliament.uk/business/committees/lordscommitteebulletin/>.

#### **4.5. CONSIDERATION BY COMMITTEES AND RESPONDING TO REPORTS**

Departmental Scrutiny Co-ordinators are informed by DEXEU and the Committee teams of the decisions taken, and are sent copies of reports and correspondence published by the Committees after each meeting so that Departments can begin follow-up action quickly.

##### **Commons**

The Committee reports after each meetings on documents that:

- Raise questions of legal and/or political importance and require further consideration by the House (i.e. debate either in European Committee or on the Floor). These documents have not cleared scrutiny until the motion relating to them has been agreed on the Floor of the House;
- Raise questions of legal and/or political importance, but are not cleared. In these cases the Committee will request more information, or ask to be kept informed of developments.
- Raise questions of legal and/or political importance but are cleared. However, in some cases the Committee requests further information or asks to be kept informed of developments.
- Raise no such questions and are cleared.
- The Committee may also recommend that a particular document need not be debated in its own right but is “relevant” to a debate on a related topic (in which case it will be “tagged” – see Section 4.6).

##### **Lords**

EMs are sifted by the Chairman (normally each Tuesday morning whilst the House is sitting and occasionally during recesses) into those not requiring special attention (cleared) and those remitted to Sub-Committees either for information or for further consideration (retained under scrutiny). The results of the weekly sift is circulated to all Departments. Documents which are retained under scrutiny are then considered by the Sub-Committees, which meet weekly: when a Sub-Committee clears a document from scrutiny, the Chairman normally informs the Minister by letter. You can monitor the progress of documents by reference to the Progress of Scrutiny document which is published regularly by the Lords Committee listing the decisions taken (see below). In cases of urgency, confirmation of the scrutiny position can be obtained from the Committee staff. The Progress of Scrutiny document can be found at <http://www.parliament.uk/business/committees/committees-a-z/lords-select/eu-select-committee-/publications/>

##### **Committee Reports from the Commons ESC**

The Committee reports to the House following each meeting. Reports contain the Committee’s decisions, analysis, requests for further information, and matters upon which the Committee suggests that a debate should focus. They are sent directly to the departments concerned immediately after each meeting. The Committee also circulates to Departmental Scrutiny Co-ordinators a weekly list of items (known as ‘Remaining Business’) which lists items not cleared from scrutiny, and also those items which have cleared but on which further information has been requested. The list should be reviewed regularly (ideally

on a monthly basis) and Departments should keep the Committee staff informed of progress towards responding to the Committee's reports. **Reports and Remaining Business** document can be consulted at <http://www.parliament.uk/escom>.

### **Committee Reports from the Lords EUC**

The decisions of the Committee are included in its **Progress of Scrutiny** document. The document contains 5 sections and each Section lists matters in Departmental order. They are:

- Documents under scrutiny or awaiting correspondence from Ministers. The history of correspondence with Ministers is included with a description of information requested from Ministers.
- Inquiries and Reports with dates when Committee reports were published and the dates of HMG responses submitted or due.
- Documents cleared from scrutiny since the last edition of the document was published.
- Scrutiny Overrides.
- Details of Committee members and staff.

It is important that the list is regularly reviewed to ensure that responses to correspondence and Reports are not overlooked or submitted late. The information on overrides should also be reviewed to ensure it is correct. The Committee also publishes a monthly newsletter (EU Committee Digest) at <http://www.parliament.uk/business/committees/committees-a-z/lords-select/eu-select-committee-/eu-committee-newsletter/>

### **Replying to Reports**

The Government must reply formally in writing to Inquiry reports published by the Committee.

- **Responses to reports** that reach substantive conclusions or recommendations should issue by no later than **two months after publication** or **within six weeks** where this is possible (i.e. where the reports are short and where the issues are not complex).
- If a response is likely to take longer you must consult the Clerk of the Committee to agree an approach. If a new deadline is agreed with the Committee and the reply is submitted by that new deadline the Committee will not record the reply as late.
- A **written response should be available by no later than a week before a debate** (where this is urgent) and is to be held **within two months of publication**. However, those reports prepared by the Committee that simply publish the transcript of evidence sessions would not require a reply; if in doubt, consult the Clerk.
- **Written responses** are normally submitted in the form of a Memorandum by the Department (which may be published as a Command Paper) accompanied by a Ministerial letter, or by Ministerial letter alone to the Chairman of the Select Committee copied to the Chairman of the Sub-Committee which conducted the inquiry and to the Clerks of the Select and Sub-Committee.
- The reply must in all circumstances be **delivered to Parliament first**. A written response is regarded as evidence submitted to the Committee, which the Committee may publish if it so decides, with its own further comments on HMG's reply.
- Ministerial correspondence with the Committee is **published in compendium reports** under the title "Correspondence with Ministers" on the Committee's website. Publicity is thus in the Committee's hands but the Committee may, on request, agree to earlier publication by a Department. This is usually done by the Department placing a copy in the House Library and drawing attention to it by means of a written Ministerial Statement. This procedure can, in particular, be followed in those cases when the Committee's report is to be debated, to ensure that all Peers wishing to take part in the debate are aware of HMG's response.
- Departments should ensure, in advance of a debate on a Report, that where HMG's response has not been published by the Committee, **copies are made available to the Printed Paper Office in the House of Lords** so that it may be obtained by Peers who

have an interest in the debate. Ideally copies should be made available a week before the date of the debate unless it is clear that the response will be published by the Committee. The Clerk can advise if that is likely to be the case. Details of the options available and advice on possible responses can be found in the Government Guidance for Officials Appearing before Select Committees:

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/364600/Osmotherly\\_Rules\\_October\\_2014.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/364600/Osmotherly_Rules_October_2014.pdf)

- **Response to Reports which are not focussed on document scrutiny may be made by Command Paper or by letter or memorandum. If made by letter or memorandum they should be sent to the Committee concerned,; and should not be copied to other Members of either House** (internal government circulation for the purposes of clearance and departmental coordination is acceptable), It is for the Committee concerned to decide on the publication of such reports.

#### **4.6 SCRUTINY CLEARANCE**

##### **Commons**

Scrutiny has cleared when the ESC issues a report explicitly stating that the document or proposal has been 'cleared' or the document has been debated on a recommendation from the Committee and the House has agreed to any subsequent motion.. On rare occasions a document/proposal can be referred for debate without needing to delay adoption – this will be explicitly stated.

##### **Lords**

Scrutiny is cleared by the Chairman at the sift or having been sifted to a Sub-Committee, it is cleared by a Sub-Committee explicitly in a report they send out after each meeting. If cleared there is then no further Parliamentary obstacle to a Minister agreeing to a position in the Council of Ministers, unless the proposal undergoes substantial amendment which may reopen scrutiny.

#### **4.7. FURTHER SCRUTINY**

Scrutiny is an on-going process. A further round of scrutiny is required when a proposal undergoes significant amendments (see Section 3.4). See also Sections 3.5 and 3.6 for scrutiny of amended proposals under the OLP or SLP.

#### **4.8. WITHDRAWAL OF DEBATE RECOMMENDATIONS**

The **Commons ESC** may withdraw a recommendation for a document to be debated if circumstances change (e.g. where the document in question has been amended so as to remove those features which the Scrutiny Committee identified as giving rise to the need for debate. If you believe this to be the case you should alert DEXEU and the Chief Whip's Office and discuss with the relevant Clerk so they can advise on how the information should be sent to the Committee to reconsider the position.

Withdrawal of recommendations for debate in the **Lords EUC** requires a decision of the Select Committee and is rare. Its recommendations for debate are reports published for debate. These are substantial documents, usually raising wider issues, and will therefore almost always be debated even if the proposal has been adopted, withdrawn or the scrutiny reserve overridden. If you feel a debate recommendation by the Lords EUC may have been overtaken by events, you should consult DEXEU and Committee Clerk.

#### **4.9. DEXEU RECORDS**

DEXEU maintains a database of all deposited documents which details each document's progress through scrutiny. This can assist particularly with previous scrutiny history and handling precedent. They also upload all Government EMs and correspondence from Ministers to the Committees onto the Government's EMs website at: <http://europeanmemoranda.cabinetoffice.gov.uk/>.

#### **4.10. GIVING EVIDENCE TO THE COMMITTEES**

Both Committees take evidence in writing and orally from a variety of sources including Ministers and Officials from Departments, representatives of professional organisations, trade associations, pressure groups, academic experts and other individuals, the European Commission and MEPs following a written request from the Committees.

##### **Written evidence**

You should meet specific requests by either Committee for supplementary information on proposals under scrutiny. The Commons ESC generally makes such requests in its reports. You should assume that once information has been supplied to one of the Committees, even by means of information to the Clerk, it becomes evidence and may be published. However, limited documents which may have been attached to correspondence may not be published. If you provide information to the Committees in confidence that should not be published, you must make this clear in correspondence. Where appropriate, you should clear written evidence in draft with other interested Departments as appropriate. This must comply with FOI provisions.

##### **Ministerial correspondence with the Lords**

The Committee sends letters to Ministers to express their view on proposals under scrutiny; signed by the Chairman of the Select Committee. All such letters require a substantive reply from the relevant Minister; the Chairman will make it clear when a reply is required urgently or will ask for an update in due course. The letters make it clear whether scrutiny clearance is being granted. The Committee's Progress of Scrutiny document shows clearly where correspondence has been sent and where Ministers' responses are outstanding. See 4.11 for instructions on ministerial correspondence with the Committees. If there is any doubt about when a reply is expected by the Committee or if a Department needs to agree an extension to the deadline set by the Committee, you should contact the relevant Sub-Committee Clerk as soon as possible before a deadline has been reached. Where a deadline is changed, the Committee will amend their records so a response will not be recorded as late if the letter is submitted by the agreed revised deadline.

##### **Oral evidence**

The usual rules apply when Ministers and/or Officials are asked to appear before the Committees to give evidence. The Clerks will usually give as much notice as they can of the need for oral evidence. Officials invited to give oral evidence should refer to the Guidance for Officials Appearing before Select Committees (see paragraph 4.5 for more information). You should inform the DEXEU of any difficulties experienced in giving oral evidence. The Committees may, exceptionally, agree to treat information as confidential. The Lords Committee occasionally takes evidence in private at an early stage of an inquiry, or when considering whether to undertake an inquiry on a particular subject, or on more detailed technical aspects of a proposal or issue, as a means of avoiding lengthy exchanges of correspondence between the Committee and Ministers.

##### **Pre- and Post-Council Information**

- The Government should provide Ministerial Written Statements no later than 1 day before a formal EU Council, and no later than 5 days after each formal and informal Council.

- An annotated agenda should be provided to the clerks before each formal Council meeting setting out the implications for scrutiny of items on the agenda.
- Written Ministerial Statements should set out why the items are on the agenda and HMG's position on them.
- Reporting after each Council, the Statement should include the position taken by the UK on items discussed.
- Statements after informal Councils should be general in nature and not provide details of positions taken by Member States in informal discussions.
- During Parliamentary Recesses when Statements cannot be tabled, Ministers should write to the Chairmen of the two Committees and arrange for copies of the correspondence to be copied to the Libraries of each House.
- See Annex E for more details.

#### **4.11. CORRESPONDENCE WITH THE COMMITTEES**

##### **Points to Note:**

- We must respond within **10 working days** to Lords EUC Chairman's letters if stated in the Chairman's letter.
- We must respond within **2 months to Lords EUC inquiry reports and Commons inquiry reports.**
- All **letters and reports** from both Committees require a reply unless otherwise stated.
- If deadlines for response are likely to be missed it is important to consult the Clerks to agree when a response should be sent. If new **deadlines** are agreed and responses are received by the agreed dates the Committees will not treat the responses as late.
- Departments must have systems in place to regularly review the "**Progress of Scrutiny**" and "**Remaining Business**" documents. Departments should pay particular attention to those outstanding items which may be the subject of progress over the long summer parliamentary recess when the Committees are not sitting.
- **Correspondence** with the Committees should be sent electronically both in PDF and Word formats. Hard copies are not required.

Whenever a Minister writes to the Committee(s), the letter must state clearly:

- The subject matter and relevant Council document number in the title
- Where appropriate, reference to correspondence or reports from either Committee being responded to; it is helpful to the ESC if the letter also refers to the Committee's agenda number (shown in brackets on their reports e.g. 12345)
- Where appropriate, the name of the EUC Sub-Committee that considered the proposal
- If a limited document is being attached it should be made clear that the information is being provided in confidence
- Standard last paragraph: "*I am writing in similar terms/copying this letter to [Name of ESC/EUC Chair] and am copying this letter to the Clerks of both Committees [Name of Clerk] (Commons)/[Name of Clerk] (Lords), to Les Saunders, Department for Exiting the European Union, and [name], departmental scrutiny co-ordinator.*"

Both Committees must be treated with equal importance when corresponding at both official and Ministerial level. When responding to correspondence from either Committee you must copy the response to the other Committee. But when a Department takes the initiative to write on an issue relevant to both Committees, it is important that separate letters are sent to both Committees and not addressed to one and copied to the other. In cases where the issues relate to wider policy or business management matters, it may be appropriate to copy the correspondence to the Leader and Chief Whip of each House and to FCO's Minister for Europe. Letters to the Chairmen of both Committees should be signed personally by a Minister. Addresses are:

<b>Commons</b>	<b>Lords</b>
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<p>[Name] Chair, European Scrutiny Committee House of Commons, 14 Tothill Street London SW1H 9NB <b>Email letters in PDF and Word to:</b> <a href="mailto:escom@parliament.uk">escom@parliament.uk</a></p>	<p>[Name] Chair, European Union Committee House of Lords Committee Office Millbank House, London Sw1A 0PW <b>Email letters in PDF and Word format to:</b> <a href="mailto:euclords@parliament.uk">euclords@parliament.uk</a></p>
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## **SECTION 5: SCRUTINY DEBATES**

This Section describes the responsibilities of Departments for arranging debates recommended by the Commons ESC; procedures for debates in European Committees in the House of Commons; and responsibilities of Departments for debates in the Lords.

### **KEY COMMITMENTS AND POINTS TO NOTE**

- The Government is committed to holding debates **well in advance of when a decision is needed** in the Council, and where a debate has been recommended on a Title V opt-in proposal, to use its best endeavours to ensure the debate can be held before the Government notifies the Council of its opt-in decision.
- For Commons ESC recommendations **contact should be made as soon as possible with the Chief Whip's Office (CWO)** and briefing should be provided to the CWO within two working days of the debate recommendation on timing and handling of the debate.
- If a **floor debate recommendation is not to be taken up**, the Department should arrange a letter to go to the Chairman of the ESC (copying to the CWO) to set out HMG's reasons and proposed handling intentions.
- The Department should **clear the text of the proposed motion for debate with the Committee's second Clerk** to ensure the motion includes accurate references to the documents listed in the motion.

### **5.1. ARRANGING COMMONS DEBATES**

#### **Timing**

HMG is committed to arranging debates recommended by the Committees well in advance of the Council meeting at which the proposal is likely to be agreed. Agreement means; a formal Council position prior to adoption of the measure, which includes a partial or full general approach<sup>8</sup>, or a political agreement that might be reached prior to a formal Council position.

Departments should alert the CWO of any urgent deadlines for debate eg where a proposal may be adopted soon. Debates may be postponed, particularly where there is clear evidence that the proposal stands no chance of being accepted in its present form and is likely to be superseded by amended proposals from the Commission. **In such cases you should advise CWO and consult the DEXEU before drafting a letter to the Scrutiny Committee.** The lead Minister should update the Scrutiny Committee if there are reasons to defer a debate for some time. Even in cases where the Committee has said that debate need not delay adoption, an early debate should still be held where possible.

#### **Choice between debate on Floor or European Committee**

All documents recommended for debate stand referred to a European Committee established under House of Commons Standing Order No.119 unless the Government facilitates for the document to be debated on the Floor of the House. The Scrutiny Committee, however, may recommend a proposal be debated on the Floor of the House. It is for the Government to decide whether to accept such a recommendation.

**Where a recommendation for debate on the Floor is not to be taken up, the Minister should notify the Committee**, subject to any difficulties caused by last minute changes in

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<sup>8</sup> A General approach (in the Council of Ministers) is an informal agreement within the Council, sometimes by qualified majority, before the European Parliament has given its opinion on first reading. Such an agreement speeds up work, or even facilitates an agreement on first reading. Once the Council has received Parliament's opinion, the Council prepares a political agreement.

business. This allows the Committee to make further representations about handling. Reasons for accepting or rejecting requests for Floor debates should be fully set out in the letter to the CWO so as to enable the Business Managers to reach an informed decision on handling.

### **The Role of the Chief Whip's Office**

Arrangements for debates are settled in consultation between Departments and the CWO. The papers are copied to the Chairman and members of the Parliamentary Business and Legislation Committee which has formal responsibility for the matter. Where the handling of a document raises business management considerations on the Floor of the House, it will be addressed by the Leader of the House (who is Chairman of this Committee) in the context of the weekly Business Statement. The initial correspondence on such matters should follow the standard arrangements set out below.

**It is important that Departments contact the CWO within two days of a debate recommendation being received.** This should ordinarily be done through your Parliamentary Branch so you will need to alert them to the need for a debate and discuss possible timings with them. They will then liaise with the CWO to find a suitable date and make arrangements for the Government motion to be cleared and tabled. Early contact will allow for discussion of the handling of urgent cases, as the need for a debate may impact upon other debates that may already have been scheduled to meet other Departments' needs.

Very occasionally, the Committee may recommend documents for debate in the knowledge that an updated document is likely to be produced. In such cases, the Committee usually asks the Department to keep them informed of developments in Brussels, and may eventually recommend that only the later document be debated. Where this situation occurs, the CWO should be advised. You should review the position on a regular basis and keep the CWO and DEXEU informed of the latest state of play. Briefing to the CWO should give only such details of the substance of the document as are necessary to inform decisions on Parliamentary handling. Unless there are strong reasons for proposing that the debate be deferred, it should always include a motion for debate. The wording of this should be agreed by the Clerk (paragraph 5.4 and Annex F). It should cover the following points:

- i) **the recommendation** made by the Scrutiny Committee;
- ii) **the tactical considerations.** In particular, the state of negotiations in Brussels, including an estimate of the timing of Council consideration, and implications for the timing of a debate. If there are special factors to delay a debate, these should be explained. Such cases should be rare, and it is likely to be appropriate for the letter to recommend that the Chairman of the ESC should be informed;
- iii) **the exact wording of the Motion agreed, where necessary, between interested Departments.** The letter should confirm that the terms of the motion have been cleared with the Clerk whose role is to ensure that the motion is framed correctly and references accurately the documents for debate. (see paragraph 5.4 for further info);
- iv) **the proposed line**, including the line to be taken on likely amendments to the Government motion;
- v) **where** the debate should take place. The letter should refer to any views expressed by the Committee and any known Opposition view that the debate should be held on the Floor. If it is proposed that a document should be debated on the House Floor or that a recommendation by the Committee for a debate on the House Floor should be rejected, the letter should explain your reasons;

- vi) **the preferred date** for the debate, taking account of the tactical considerations discussed at (ii) above;
- vii) **the Minister** who will lead in the debate.

You should keep under review the Government's debate requirements and keep the CWO advised of any change in requirements or provision of new information.

## **5.2. DEBATES IN EUROPEAN COMMITTEES**

The areas of responsibility of the three European Committees are:

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

Standing Order 119 governs the operation of the European Committees.

### **Timing of Debates and Motion for debate**

The volume of business to be debated puts pressure on timing of Committee debates and you should not assume you will have flexibility to choose your preferred date. This reinforces the need to state the required timing early. Exceptionally, Committees may meet at relatively short notice. You should liaise closely with the CWO over the timing of the tabling of the Motion for debate (or the de-referral Motion) and the preferred timing for the debate itself; the CWO will arrange for the motion to be tabled after receiving final clearance from the Clerk (see paragraph 5.4). **The dates of future debates should be treated as confidential until they are publicly announced.**

The Motion, prefaced by the words "That the Committee takes note of European Union Document(s) Nos ....." is vetted by the Clerk of the Scrutiny Committee but the Chief Whip's Office and Public Bill Office deal with physical tabling and appearance on the Notice Paper. The Motion is the responsibility of the Minister in whose name it stands, so it should be checked when it first appears. It will be circulated again should an Amendment be tabled. If the debate is to be taken on the Floor, the Motion will appear in Remaining Orders. In either case, it is essential that the Vote Bundle is checked every day for any Amendments to the Government's Motion on which Ministers may need to be briefed. Amendments may be tabled up to the rising of the House the night before the debate. The European Community Documents list (published with the Vote Bundle every Monday) shows all documents recommended by the Committee for debate during the Session, which are awaiting debate, or upon which a European Committee or the House has come to a Resolution. The list of outstanding debates and details of debates held can be found on the Parliament website <http://www.parliament.uk/business/publications/business-papers/commons/european-business/#session=28&year=2016&month=6&day=21> Transcripts of European Committee (in the section on General Committees) debates can be found at: <http://www.parliament.uk/business/publications/hansard/commons/gc-debates/european->

[committee1/](#) or from 2016-17 the transcripts can be found by searching Hansard on the [www.parliament.uk](http://www.parliament.uk) website.

### **Provision of papers for the Committees**

Responsibility for preparing the packs of papers ('the document pack') and for making the packs available on time for the debate rests with the lead Department, but is carried out in consultation with the Clerk of the ESC (see Annex F). Packs are prepared electronically. At least two weeks before a debate you should first submit to the Clerk for checking a cover page listing the documents to be included; see Annex F. Once this is agreed, the final set of papers should be emailed, as pdf documents, to the Clerk who will transmit the pack to the Vote Office for copying and circulation.

The following documents are **always** relevant if they relate to the debate:

- the ESC final (not uncorrected) report(s);
- the EU document(s) recommended by the ESC for debate; and
- associated EMs.

You may provide further material relevant to the debate – e.g. Ministers' letters to the ESC, or other documents not recommended for debate may be relevant – e.g. tagged documents. If you intend to do this you should discuss this first with the Clerk. No reference should be made to other EU documents unless they have been included in the document pack with the agreement of the Clerk. **Documents which are not publicly available should not be provided.** If there is any doubt about the status of a particular document, DEXEU should be consulted. **Failure to observe the procedures for the provision of papers and the inclusion of relevant material can give rise to difficult points of order for the Minister to address and possibly a motion to adjourn the debate.**

The Vote Office circulates copies of the document pack to the 13 members of the European Committee concerned, the Department (for the Minister), the Public Bill Office (for Chairman and Committee Clerk), the CWO and the Opposition Whip's Office, and to any other Members who request them. Departments should not make copies themselves; centralising copying within the Vote Office ensures that everyone uses the same set of papers.

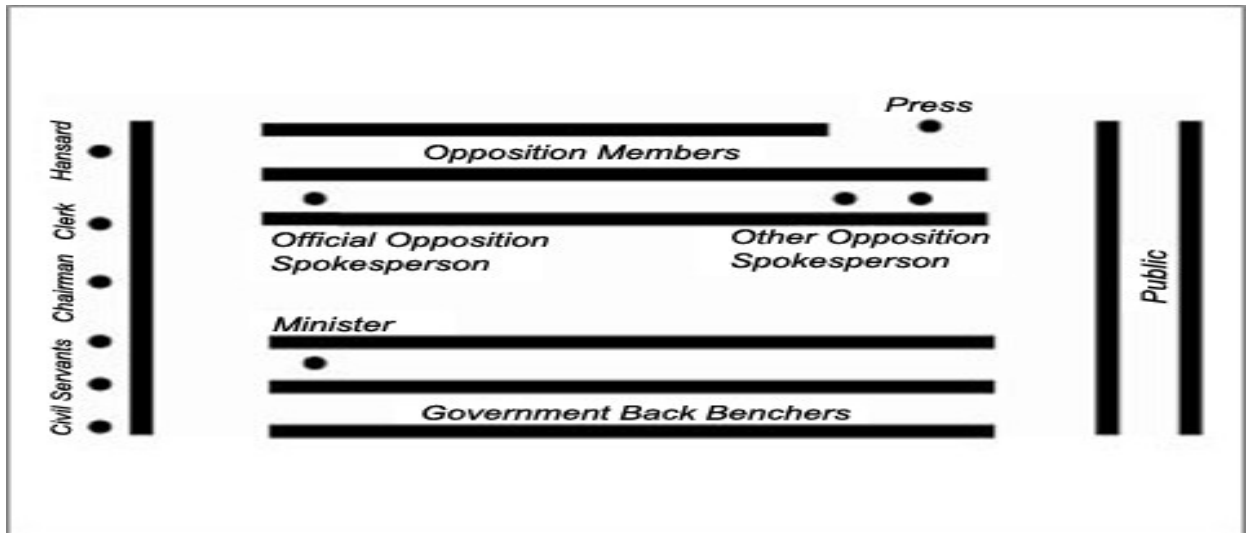
Documents should reach the Clerk as early as possible, **and not later than two weeks before the debate. Failure to do this may result in the Minister being criticised and/or a debate being adjourned.** If relevant papers are expected to become available (or emerge unexpectedly) later than this, you must forewarn the Clerk and ensure that papers are made available as soon as possible.

### **Operation of the Committees**

#### Membership

- Each Committee has a membership of 13, not including the Chairman. In nominating the Members, the Committee of Selection may appoint up to two members of the ESC and two members of the most appropriate DSC. Any MP may attend the meeting, speak and move amendments but only Committee members may move or vote on Motions.

Lay-out of Committee Room (see diagram)



### Opening

- A member of the European Scrutiny Committee may make a brief statement about the decision to recommend a debate on the document. (up to 5 minutes)
- The Chairman calls on **the lead Minister** to follow with a statement on the proposal. (up to 10 minutes)

### Questioning and Answer Session

- Next **the Minister is asked questions** by Committee members/other MPs.
- (Up to one hour from the start of proceedings, but the Chairman can extend this for up to a further half hour).
- The Chairman will usually give priority to the Opposition spokesman and members of the Committee.
- The Chairman expects questions to be as brief as possible and will not normally allow either the question or answer to be interrupted. The Chairman will normally alternate in calling questioners from the Government and Opposition benches.

### Debate

- At the end of the period for questions, or sooner if there are no further questions, the Chair announces his or her selection of any **amendments** that have been proposed and will ask the lead Minister to move the motion. The normal practice is for amendments to the motion to be tabled before the rising of the House on the previous day. The Chair may use discretion exceptionally to select manuscript amendments (ie, without notice).
- The Minister may intervene during the course of the debate and will be invited to wind up at the end.
- The Minister may undertake to respond in writing to points made during the debate.

### Resolution of the Committee

- The Chairman will put the question (the motion) to the Committee. Only the Standing Committee members can vote.
- The Chairman reports to the House any Resolution to which the Committee has come, or that the Committee has come to no Resolution.

- The Government Whip's office will then table the motion to be voted on without debate on the floor of the House.

In normal circumstances each sitting of the Committees considers only one document (or set of documents) which the Committee has agreed should be linked in a single debate. After each debate, the relevant Department should immediately report the outcome of the Committee's proceedings to the CWO, (commenting particularly on any complaints or procedural difficulties that have arisen and which may be raised as points of order in the House), who will arrange for a motion to be tabled on the Floor of the House on the document(s) reported from the Committee.

The Government has undertaken (7 February 2008 col 1181) that the motion tabled will be the same as the one agreed by the Committee. If the Government does not then table any amendment this motion will be taken and, if necessary voted on, without debate, normally on the Monday following the Committee debate. If the forthwith motion is needed more urgently to clear scrutiny, the CWO must be advised as soon as this becomes clear. Scrutiny is not formally complete until the motion has been approved by the House. If the Government cannot accept the motion agreed in Committee, the Government will need to table amendments to it to enable a motion to be agreed with which it can proceed. **The undertaking given by the Government provides that this would be made outside the requirements of the standing orders in order for this to be the subject of up to one and a half hours of debate on the House Floor. The motion would be voted on by the Committee before the Government amendment.**

If it is proposed to table amendments to the motion agreed by the Committee, Departments should first consult DEXEU and the CWO to discuss handling before making a recommendation to Ministers. The Minister should normally write to the Chairman and members of the Committee with copies to the Chairman and Clerks of both EU Scrutiny Committees to explain in some detail how the Government intends to proceed.

The Committee's Resolution is reported immediately after it rises. In normal circumstances the Forthwith motion will be tabled after the Official Report of the debate in the Committee has been published, usually several days after the debate. These reports can be found at <http://www.parliament.uk/business/publications/hansard/commons/gc-debates/european-committee1/> . But in cases of urgency (and these will normally be known in advance of the debate), the CWO can arrange for the motion to be tabled earlier. Further information on tabling motions and HMG amendments to the motion can be obtained from the CWO.

### **5.3. DEBATES ON THE FLOOR OF THE HOUSE**

Prime time may be provided for the most important debates. But generally, debates are held after the main business of the day (10AM on Monday or Tuesday, 7PM on Wednesday or 6PM on Thursday) and last up to 1.5 hours; occasionally that time may be extended. The Minister or Ministers responsible open and wind up the debate. The Minister's opening speech should explain the contents of the documents and any relevant scrutiny points.

The Leader of the House will normally announce each forthcoming Floor debate its date and the documents to be taken in the Thursday Business Statement in the House in the week immediately prior to the debate or the week before that. The Motion will be tabled on the Remaining Orders. The documents and EMs included in the motion may be referred to in the Business Statement but will more usually be printed in Hansard and not read out in the House. **It is your responsibility to ensure that copies of all these documents are available in the Vote Office by lunchtime on the day of the statement.** A document pack is subsequently produced in the same way as for European Committee debates (see 5.2).

#### **5.4. FORM OF GOVERNMENT MOTION AND AMENDMENTS**

Debates on EU documents are generally held on an expanded take note motion. Whilst it is desirable to indicate HMG's general position on proposals in motions for debate, it may not necessarily be appropriate to seek to simplify the UK's attitude on all aspects of what might be a complex document (see Annex F).

The Motion should:

- 1) Cite the relevant documents by their Council numbers (or refer to the Department's unnumbered EM if no depositable text is available);
- 2) Ensure that any relevant documents not recommended for debate (see paragraph 4.6) are 'tagged' to the motion as being relevant to the debate.

**Before approaching the CWO**, you should seek the advice of the staff of the ESC on the description of the documents in the motion's wording and, if a debate after main business (5.2) is being sought, seek views on whether the motion as a whole falls within Standing Order No.16 (whose effect is that if non-EC matters are not included in the motion for debate the time for that debate is no longer limited to 90 minutes). This is to ensure that all the relevant references to documents are correct before the motion is printed in the Order Paper. For all debates, the CWO should receive the agreed terms of the motion, at the latest by Tuesday evening preceding the Thursday deadline for circulation of papers (assuming a Wednesday debate in the following week – adjust according for debates planned for other days). The CWO will confirm with the Clerk that the Department has cleared the terms of the motion with the Clerk. The motion is then tabled by the CWO. Later additions should only be made where they are unavoidable, particularly bearing in mind the timetable for approval described elsewhere.

#### **5.5. REFERENCE TO NEW DOCUMENTS**

Exceptionally, the Minister might wish to include in the motion a document not seen or recommended for debate by the ESC, or to refer to a new document which has not been included in the motion; in such cases DEXEU, CWO and the ESC Clerk should be consulted in advance.

#### **5.6. DEBATES IN THE LORDS**

Debates on EU documents normally take place on the basis of either a 'take note' motion or a "question for short debate" referring to the relevant report of the Committee. Very occasionally, a debate may be linked to another motion on a related topic. When a date for the debate has been agreed, the motion is tabled for that day in House of Lords Business. When a document has been recommended for debate in the House of Lords, the Government's business managers need to be consulted only if particular problems are likely to arise. The motion is customarily moved by the Chairman of the relevant Sub-Committee and the Government spokesman responds to points made in debate. The arrangements for these debates are not wholly in the hands of the Government but liaison between the Government Whip's Office and the Clerk of the Committee ensures that debates are arranged at a time of mutual convenience and most importantly at a time to ensure, if the scrutiny reserve resolution applies, that the debate takes place before any decisions on proposals need to be taken in the Council of Ministers. It is important that the Government's response is available no later than one week before any debate on a Lords report (see Section 4.5).



## **SECTION 6: UNCLEARED PROPOSALS: ACTION TO BE TAKEN**

This section explains the undertaking given by HMG not to vote (or in some cases to abstain from voting on) on proposals in the Council that have not cleared scrutiny; and it describes the action for Departments where uncleared proposals come before the Council for a vote.

### **KEY COMMITMENTS AND POINTS TO NOTE**

- The Government is committed to avoiding the need for scrutiny overrides
- The Scrutiny Reserve applies to texts reaching the stage of:
  - Final adoption;
  - Positions under the OLP at first reading, second reading, or to joint texts emerging from conciliation;
  - Political agreement: a term relating to a decision stating a position on a text or part of a text before fulfilment of procedural preconditions for voting (delivery of the required opinions or consents as provided for by the legal base concerned) but before finalisation by legal/linguistic experts;
  - Partial or full General Approach: whilst a partial or full general approach does not constitute a definitive point of agreement in the legislative process in the same way as other forms of agreement captured by the SRRs are, the Government recognises that a substantive stage of consensus will have been reached and that it is a vital negotiating tool in the passage of legislation. If a general approach is reopened even if the scrutiny process has been completed, the Committees must be informed; it may be necessary to reintroduce a scrutiny reserve.;
  - Certain pre-legislative documents; eg where substantive conclusions are adopted and based on a Commission communication under scrutiny which sets a policy framework, direction or travel for the EU or is a pre-cursor to an EU legislative proposal;
  - Political endorsement of documents or proposals at a European Council where formal decisions will be taken at a subsequent Council.
- Where there is any doubt on handling potential override situations, Departments should consult DEXEU/UKRep. On occasion it may be possible to arrange for an item to be **deferred to a later Council** to allow completion of parliamentary scrutiny.
- A UK **abstention or vote against** a proposal under **QMV** is not considered to breach the scrutiny reserve.
- A **UK abstention** in the case of a proposal under **unanimity** equates to giving agreement and would be treated as a scrutiny override.
- All scrutiny overrides must be justified by Ministers in writing to the Committee concerned. Ministers must write as soon as it is clear that a scrutiny override may be a possibility, giving the Committee(s) every chance to clear a proposal and avoid an override occurring.
- **Decisions taken by Coreper are not technically covered by the SRRs** because the SRRs are about Ministerial accountability, but they are important stages eg where they relate to positions for trilogue negotiations and such developments should be communicated to the Committees as part of updating on the progress of legislation where proposals remain under scrutiny.

### **6.1. SCRUTINY RESERVE RESOLUTIONS (SRRs)**

The SRRs (last updated on 17 November 1998 (Commons) and 16 March 2010 (Lords)) are the cornerstone of the scrutiny procedures and provide the assurance to Parliament that Ministers will not agree to measures in the Council unless scrutiny has been completed (except in certain exceptional circumstances).

**The full text of both Resolutions are at:**

Commons: <http://www.parliament.uk/documents/commons-committees/european-scrutiny/European-Scrutiny-Committee-Guide-May15.pdf>

Lords: <http://www.parliament.uk/documents/lords-committees/eu-select/scrutiny-reserve-resolution.pdf>

In cases where unanimity applies, the Resolutions equate abstention to giving agreement. Where acts are adopted by majority vote, abstention is equivalent to voting against. Accordingly, references in the remainder of this section to “giving agreement” or “voting in favour”, include abstention in relation to an act whose adoption requires unanimity; references to “opposing” or “voting against” include abstention when the act in question is adopted by majority vote.

## **6.2. ACTION REQUIRED ON UNCLEARED PROPOSALS**

Scrutiny difficulties arise when Departments fail to identify soon enough that an uncleared proposal is reaching the decision stage. This is particularly important for proposals under the co-decision procedure, where the latter stages of the process can move quickly. **You must therefore monitor the progress of proposals closely and keep the clerks informed of any important developments**; draft Council agendas circulated at the beginning of each Presidency can help identify potential difficulties early. Exceptionally, for instance during the Parliamentary Recess or when a proposal makes rapid progress, a proposal may come before the Council for decision before the scrutiny procedures have been completed.

### **As preventative action:**

- Ministers in each Department should write to the Committees before the **start of each Presidency to alert the Committees** to the Presidency’s programme and priorities the Presidency might attach to concluding a negotiation. These letters should set out the Government’s stance on each priority and the letters should be copied to the relevant Departmental Select Committee in the House of Commons.
- Departments must keep under review all outstanding items in the ESC’s Remaining Business and the EUC’s Progress of Scrutiny documents to identify any proposals that may move to a conclusion particularly during the summer Parliamentary recess (see Annex E).

### **What to do if the proposal is not cleared prior to adoption:**

- 1) The first step is to examine whether the proposal, or the step to be taken, is **covered by the Scrutiny Reserve Resolutions (SRRs)**. The remit is set out in paragraphs (1) and (2) of the SRRs.
- 2) The second question is whether the **Minister intends to agree**. See 6.1 above for a description of how the SRR is engaged in cases where **QMV or unanimity** applies. Voting against a proposal and abstaining on a proposal requiring qualified majority are accepted by the Committees as not a breach of HMG’s scrutiny obligations and no preparatory action is required. However, the Committees will expect to be informed of HMG’s intended handling of uncleared proposals as far ahead of a Council as is possible so they make further representations to HMG before the Council. Ministers should also be prepared to write after the Council to report on the outcome. If in doubt whether a letter may be required, consult the Clerks.
- 3) If the Resolutions apply and the Minister intends to agree, then the third question is whether either of the provisions of paragraph (3) of the SRR applies. These provide that Ministerial agreement in the Council may be given before the scrutiny process has been completed if:

- a) the Minister considers that the proposal is confidential, routine or trivial in nature or is substantially the same as a proposal on which scrutiny has been completed; or
- b) the Committees have indicated that agreement need not be withheld.

You should arrange for your Minister to write to the Committees as far ahead of the decision to be taken as possible and in the case of confidential proposals e.g. financial proposals or CFSP restrictive measures, you should write as far in advance of the Council as is possible and then follow up with the deposit of the proposal immediately after the decision is publicly available and an EM within the usual timescales thereafter.

- 4) Establish whether the **Committees may waive the scrutiny reserve**. A request for a waiver must be made in advance by Ministerial letter, with reasons. The reasons must be properly justified, not merely to obviate administrative failings (e.g. late submission of an EM or reply to Committee questions). Departments are advised to consult the Clerk(s) before Ministers make a request; **such a waiver may only be granted by the ESC at a formal Committee meeting**, whereas the EUC Chairman may issue a waiver on behalf of the EUC.
- 5) A request for a waiver should:
  - 1. Specify the outcome the Government wishes to negotiate;
  - 2. Be clear about the stage of the process the waiver is to cover;
  - 3. Include a commitment to update the Committee on future progress.

The waiver will cover only the stage of negotiations specified and may include conditions: it is not an alternative way to lift the scrutiny reserve.

- 6) If paragraph (3) does not apply, the final step is to consider whether the **Minister may wish to give agreement to the proposal nonetheless**, in accordance with paragraph (4). If he or she may wish to do so, the following action must be taken to ensure that the Government's undertaking is not breached.
  - 1. Where the UK spokesperson is asked to indicate the UK's position on a proposal or common position in COREPER or the Special Committee for Agriculture (SCA) before it goes to Council for adoption or agreement (including political agreement or a partial/full general approach), a **Parliamentary Scrutiny reserve must be placed** on all uncleared proposals, including those that might be regarded as routine or trivial etc.
  - 2. In such cases you should review the situation urgently, if necessary in consultation with DEXEU and Clerk(s), and **consider whether scrutiny clearance is likely to be obtained** before the proposal goes to the Council, or if the Minister should write to the Committee Chairman accordingly.
  - 3. A scrutiny reserve should be to **prevent the Presidency putting the item to the Council as an 'A' point**. ('A' points are items on which agreement has been reached at a previous Council meeting, or which have been agreed in advance at COREPER or SCA, but require formal Council approval.) The Council's rules of procedure make it clear that only items for which approval is possible without discussion shall be included as 'A' points. (There have, however, been occasions when the Council Secretariat has put an item on the Council agenda despite the imposition of a scrutiny reserve in COREPER, in the expectation that it would have been lifted by the time of the Council. This is acceptable, but must be handled with considerable care and in close co-operation, through UKRep, with the Council Secretariat.) The Rules of Procedure do allow the Presidency to place an item on a Council agenda as a 'B' point (items that require substantive treatment by a Council.) However, insisting on a formal 'B' point because there is a parliamentary scrutiny reserve in place is not recommended. Doing so would likely irritate the Presidency or embarrass Ministers. Instead, make every effort to complete

parliamentary scrutiny in advance of the Council or to abstain in the vote on an 'A' point (if the vote is by qualified majority).

4. Where an uncleared proposal is expected to come before the Council itself as a 'B' **point for agreement, the Minister must write to the Committee(s) if the UK intends to vote in favour.** (If it is put on the agenda as an 'A' point we have the formal right to insist on its withdrawal). Under the Resolutions, a Minister may decide that for '**special reasons**' agreement may be given to a proposal that has not cleared Scrutiny. In those cases where a Minister writes at the point of **political agreement or general approach** on a proposal, the Minister need not subsequently write to the Committee(s) again at the adoption/common position stage unless (for some unforeseen reason) the proposal has been amended substantively between political agreement and adoption/common position. The Resolutions do not define 'special reasons'.

Factors which could influence a Minister's decision in such circumstances include:

- i) to avoid a legal vacuum which might arise if an existing measure were to expire without agreement to an extension or adoption of a successor measure;
- ii) a measure of benefit to the UK should come into operation as soon as possible;
- iii) the difficulty, particularly if negotiations have themselves been difficult or protracted, of putting a late reserve on a measure which is beneficial or neutral from the UK viewpoint;
- iv) to achieve an advantageous package deal with other measures;
- v) to prevent the adoption of a measure disadvantageous to the UK: i.e. in the case of a measure subject to majority voting, the risk that voting against would result in a less advantageous measure. The vote of other Member States would have to be secured in place of the UK's and this might require changes contrary to our interest;
- vi) to secure negotiated improvements in the measure;
- vii) to avoid the risk that the Presidency might override a Parliamentary Scrutiny reserve in order to avoid delay in transmission of a Council position to the European Parliament or to allow the Presidency to include the measure in their tally of achievements (see 6.3). UKRep should advise on such risks;
- viii) where negotiations on a proposal under the ordinary legislative procedure have been concluded by the Conciliation Committee and an agreed joint text is expected to go to a Council quickly for formal adoption – see 3.5.

This list is not exhaustive and gives an idea of some factors which might be considered. Whilst there may be "special reasons" for agreeing to items before the completion of scrutiny, **the presumption must be that scrutiny should be completed before agreement is given in Council.** Successive Governments have reaffirmed their commitment to avoiding breaches of the SRRs. The Committees have made it clear that they will call Ministers to account for their actions if they are not satisfied with the reasons provided for overriding the SRR. It is therefore vital that DEXEU is alerted at the earliest possibility of a potential scrutiny override so that handling options may be considered. HMG provides a twice-yearly report to the Committees on the occasions during each six-month period that the SRR has been breached. Where a Minister decides that for 'special reasons' agreement should be given, the reasons must be explained to the Committees **as soon as possible.** Therefore a letter must be sent **as far as possible in advance of the relevant Council, describing fully the circumstances and justification for agreement.** It may include a request for waiver (see point 4 above).

**When Ministers agree to an uncleared proposal:**

Voting in favour of an uncleared proposal at any stage in the legislative process (because it is unexpectedly put to the vote or because it is amended at the last minute to meet our negotiating aims) requires the Minister to write to the Chairmen of the Committees **as soon as possible** after the Council with an explanation. In the event of a scrutiny override, the Committee(s) may request the Minister make an oral or written statement to the House. The Minister's letter should therefore offer such a statement. Departments must alert the DEXEU at an early stage if a proposal may be agreed before the completion of scrutiny to consider handling. **Neither Committee will accept overrides where they could have been prevented by earlier action and this can result in the Minister being called before the Committee(s) to explain the override.**

#### **When Ministers agree to a proposal awaiting debate:**

If agreement is given to a proposal which is awaiting debate in the Commons, the Resolution requires the Minister to write to the Committee Chairman **and make a statement to the House**. The statement should reference the scrutiny position, noting when the debate recommendation had been made, explaining the reasons why the Minister decided not to withhold agreement and confirming HMG's intention to arrange a debate within one month of agreement being given. An expression of regret at the impracticability of arranging a prior debate will normally be appropriate. Departments should consult the Clerks on whether a statement is likely to be requested. Where agreement is given to any proposal on which a debate recommendation is outstanding in the Commons, every effort should be made to arrange the debate within one month of agreement being given. Where a proposal is agreed before the ESC's assessment is complete and a debate is subsequently recommended, HMG should similarly try to arrange the debate within a month of the recommendation. Recess can be disregarded when calculating this one month period.

#### **When the SRRs apply**

The SRRs apply where scrutiny has been **re-activated by a new EM on a formal Commission amendment** to a proposal or a supplementary EM on a proposal which has been modified in discussion (see 3.4/4.7). If proposals are amended in the course of the final Council discussion, Ministers are not required either to place a reserve or write to the Chairman on the grounds that the Committees have not had the chance to consider such amendments. Parliament recognises that such action would place an unacceptable constraint on Ministers' negotiating freedom. However, it is helpful for Ministers to write to advise the Committee of the final outcome and the reason for supporting final amendments. This should rarely arise; particularly if the Committees have been kept fully updated with HMG's position during negotiations and objectives for the Council decision.

### **6.3. PARLIAMENTARY SCRUTINY RESERVES AND OVERRIDES**

The expression "Parliamentary scrutiny reserve" has two meanings:

- 1) The reserve embodied in the Resolutions of both Houses;
- 2) The reserve as used in the Council.

The first is in the control of the Scrutiny Committees. The second is in the hands of HMG and is the subject of this section. Departments should ensure that UKRep places a Parliamentary reserve on a document which has not completed the scrutiny procedures and should inform UKRep when the reserve can be lifted. At levels below the Council it is acceptable for HMG, if content with the proposal, to indicate general agreement subject to the Parliamentary reserve.

The Parliamentary scrutiny reserve as such has no place in EU Law or procedure and its use is dependent upon the co-operation of other Member States and the Council Legal Services. In order to maintain its integrity, **you should consult UKRep and DEXEU** (who will consult the Clerks as necessary) before deciding whether to maintain a scrutiny reserve

at a Council or to advise their Minister that the reserve be lifted and an override letter be sent to the Committee(s).

### **Protocol on the role of national Parliaments:**

The protocol agreed at Amsterdam and updated under the Lisbon Treaty (<http://www.lisbon-treaty.org/wcm/the-lisbon-treaty/protocols-annexed-to-the-treaties/656-protocol-on-the-role-of-national-parliaments-in-the-european-union.html>) sets a minimum 8 week period between the tabling (in all languages) of a legislative proposal and its adoption (subject to exceptions on grounds of urgency). This is interpreted to mean original proposals from the Commission or other initiator but not to any subsequent or revised proposals whether formal or informal. Our domestic scrutiny process will continue to be triggered either by DEXEU or lead department through identifying documents for deposit (as described in section 2) and not by the process of documents sent by the institutions to our Parliament.

Article 289(3) TFEU defines “legislative acts” as any act adopted by the OLP or SLP. These may be proposals from the Commission, initiatives from a group of Member States, initiatives from the European Parliament, requests from the Court of Justice, recommendations from the European Central bank and requests from the European Investment Bank for the adoption of a legislative act. They must be proposals that are adopted as acts jointly by the Council and EP, or by one with the involvement of the other in the legislative process. The protocol will not apply to e.g. CFSP instruments, as these do not constitute legislative acts. Nor will it apply to matters within exclusive competence of the EU (to which the principle of subsidiarity does not apply). It does not apply to non-legislative documents e.g. Commission communications and reports.

The Government attaches importance to ensuring that this minimum scrutiny period is respected. When clearing business coming before COREPER and the Council (through the A & I point clearance procedure), clearance represents UK agreement that the text concerned is correct in substance and that Parliamentary scrutiny has been completed. UKRep will check with Departments whether the required eight-week period has elapsed and, if not, whether there are exceptional grounds for urgently agreeing. The eight-week period is counted from the date of receipt of the proposal by the Council Secretariat; this is given on the document issued by the Secretariat circulating the proposal. The eight-week period ends when the act is scheduled for formal adoption. For any case where the minimum scrutiny period is not being respected, Departments should inform DEXEU of the details (copied to UKRep), propose whether we can or cannot accept the adoption of the point, and seek DEXEU agreement. The Committees should be kept informed if agreement is to be reached before scrutiny can be completed.

## **6.4. STATEMENTS TO THE HOUSE**

As mentioned in section 6.2, a statement to the House will be required under the SRRs if agreement is given to a proposal awaiting debate in either House. Both Committees may request that Ministers make a statement where their reserve has been overridden. Ministers have an obligation to accept such requests. Subject to any wishes expressed by the Committee, statements may be either written or oral but are usually written. Where Ministers make a more general statement on the outcome of the Council concerned, it may be appropriate to include a passage on scrutiny aspects even if the Committees have not had time to request a statement (see also Section 7.1).

## **SECTION 7: PROCEDURE TO BE FOLLOWED DURING RECESSES AND BETWEEN PARLIAMENTS**

### **7.1. PROCEDURE DURING RECESSES**

In general the **normal scrutiny rules apply** during a Parliamentary Recess (ie deposit of documents, commissioning of EMs, the rules applying to overriding the SRRs, and generally updating the Committees on negotiating developments), although there can be some relaxation in the timetable within which DEXEU and Departments operate subject to agreement with the Clerks. Over the summer, the ESC meets in September; the Lords Sub-Committees may or may not meet but the practice has been for the Chairman to conduct occasional sifts.

Where documents are deposited **towards the end of the Recess** (i.e. within two weeks of the first day on which either House sits) the normal deadline for the submission of EMs will apply, adjusted accordingly for JHA opt-in decisions.

During Recesses, Ministers **cannot issue pre-or post-Council statements**, so Ministers should write to each Committee with this information. These letters should be copied to the Libraries of both Houses to ensure that information on Council meetings is accessible to all members of both Houses (see also Annex E). This procedure should also apply during periods of dissolution between Parliaments (with letters addressed to “Dear Chairman”).

You should continue to liaise or correspond as normal with the Clerks on day to day scrutiny matters, consulting DEXEU if you are in any doubt about the procedures to be operated during a Recess.

### **7.2. PROCEDURE TO BE FOLLOWED BETWEEN PARLIAMENTS**

DEXEU will issue additional guidance on procedure as necessary when a General Election is called but the procedures below applied for the 2015 General Election and are reproduced here as a guide.

#### **Dissolution of Parliament:**

Normal scrutiny procedures should apply until the dissolution of Parliament. When the date of the General Election is announced, Parliament will be dissolved automatically 25 working days before the Election (although it may be adjourned earlier). At this point the Scrutiny Committees will cease to exist and interim scrutiny arrangements will come into effect.

#### **Deposit of Documents:**

EU documents cannot be formally deposited during the dissolution. But FCO will continue to supply the Clerks of both Committees and other recipients with documents as soon as they become available during the dissolution. DEXEU will continue to request that EMs to be prepared on them. Documents distributed by FCO during the dissolution will be formally deposited on the day of the State Opening of Parliament.

#### **Explanatory Memoranda:**

During the dissolution, Departments should continue to prepare EMs as normal except in two respects:

- i. the EM should not make any comments about policy implications i.e. The section dealing with policy implications should be left blank. Nor should the EM comment on any other policy consideration (e.g. concerns about legal base – JHA opt-in factors, fundamental rights concerns or Subsidiarity);
- ii. they should not be signed by a Minister.

These elements of the EM should await the incoming Government before completion. EMs should be prepared in accordance with the normal timetable as far as possible but are circulated to usual recipients and are published as draft EMs on the Government's EMs website. It is important that Dissolution EMs be submitted in their final form with policy input and Ministerial signature as soon as possible after the State Opening of Parliament, to coincide with the formal deposit of the documents. They should be sent as normal to all regular recipients of EMs.

### **Adoption of Proposals before completion of Scrutiny:**

HMG's undertakings under the SRRs will still apply during the Election/Dissolution Period, and the period before the Committees can be reappointed in the new Parliament. But until Chairs of the Committees have been appointed, all letters should be addressed "Dear Chair" and copied in the usual way. It will be for the newly appointed committees to decide whether to continue with their predecessors' inquiries, and for the incoming administration to review the approach to reports on which responses are outstanding, including those where agreement may have been reached in the Council of Ministers. Departments should continue to liaise with the Clerks on handling such business.

### **Commencement of Committee Business:**

The following procedures apply:

#### **Commons**

- (i) The ESC is appointed under Standing Order No. 143 of the House of Commons; although it cannot meet until Members have been nominated by the House. It is for the Committee to elect a Chairman from among its Members at its first meeting.
- (ii) The European Committees are appointed under Standing Order No. 119. The Committees will resume business once the Committee of Selection has been appointed. The ESC when reappointed can be expected to reconfirm outstanding debate recommendations from the previous Parliament.

#### **Lords**

- (i) The EUC has to be reappointed in the new Parliament. It cannot meet until its members have been nominated by the Committee of Selection and appointed by the House;
- (ii) The Sub-Committees are appointed by the Select Committee, and any document currently under scrutiny by a Sub-Committee cannot be cleared until that Sub-Committee has met.

### **Debate recommendations carried over from previous Parliament:**

The newly appointed Commons Committee will reconsider all debate recommendations carried over from the previous Parliament and may rescind or confirm the recommendations of the previous Committee. Any reports presented for debate by the Lords EUC in the last Parliament will stand to be debated in the new Parliament.

### **Pre and Post-Council Statements:**

Departments should continue to provide written information to the Clerks of both Committees about business coming forward to meetings of the Council of Ministers during the period of the dissolution. The arrangements for reporting on the outcome of Councils should follow that of recesses with information in letters addressed "Dear Chair" until the opening of Parliament when written Ministerial Statements can resume.

### **Change of Government:**

Commitments and undertaking under the scrutiny process remain in place until any decisions are made to change them. So it is business as usual at the start of a new Parliament.



**EXAMPLE FORMAT FOR A CORRIGENDUM/ADDENDUM TO  
AN EXPLANATORY MEMORANDUM**

CORRIGENDUM/ADDENDUM\*

[document reference]

**EXPLANATORY MEMORANDUM ON EUROPEAN UNION  
DOCUMENTS/LEGISLATION\***

[Title of document]

[EM submitted on date .....]

[Scrutiny history: add a passage about consideration of the original EM by both Committees  
(if appropriate)]

[details of amendment]

[Department]

[Date]

\* delete as appropriate

Note

It is important that all the information given above is included in each addendum or corrigendum submitted. The above is simply an example and need not be followed exactly; a number of Departments have developed different styles of Corrigenda/Addenda which are acceptable to the Scrutiny Committees.

**EXAMPLE FORMAT FOR REFERENCE TO SCRUTINY HISTORY IN EMs**

Explanatory Memorandum [number] of [date] was considered by the European Scrutiny Committee on [date] under Committee reference no [add ref]. The Committee recommended [eg legal and or political importance/cleared/further consideration by the House] [Report number and Session] [If debated refer to date and venue of debate].

The House of Lords European Union Committee [eg cleared the EM/ referred the EM to [Name of Sub-Committee]who subsequently cleared the EM/produced a report for information/debate [reference number of report]] the EM was debated on [date] [Progress of Scrutiny dated .....].

(If the proposal had been the subject of Correspondence with Ministers the appropriate details should be given).

**Note**

It is important that as much detail is given when referring to previous scrutiny history. The above is simply an example and need not be followed exactly; it is more appropriate to use this approach in the main body of the EM when only one previous document is being summarised. But a number of Departments have developed different approaches to the presentation of scrutiny histories that are acceptable to the Scrutiny Committees e.g. tabular form. If the scrutiny history is lengthy or involves more than one previous document it may be more appropriate to include it in an Annex to the EM. The Committees have indicated that they like to receive the information in a tabular form. But format is not as important as ensuring the history is included to assist the Committees with their scrutiny.

## CIRCULATION LIST FOR EXPLANATORY MEMORANDA

### CIRCULATION LIST FOR EXPLANATORY MEMORANDA

### Email Address

#### HANDLING NOTE

For all email circulation a PDF version of the signed EM should be sent.

For those recipients underlined below a word version should be also sent together with the details of the departmental policy lead official who can be contacted if there are initial follow up questions from the Committees.

Vote Office, House of Commons,

[euvoteoffice@parliament.uk](mailto:euvoteoffice@parliament.uk)

European Union Committee

[euclords@parliament.uk](mailto:euclords@parliament.uk)

Mrs E Lawrence DEXEU

[Ellen.lawrence@cabinetoffice.gov.uk](mailto:Ellen.lawrence@cabinetoffice.gov.uk)

House of Commons Library

[hcliads@parliament.uk](mailto:hcliads@parliament.uk)

European Scrutiny Committee

[escom@parliament.uk](mailto:escom@parliament.uk)

Ms D Malloy Scottish Executive

[em.scotexec@scotland.gsi.gov.uk](mailto:em.scotexec@scotland.gsi.gov.uk)

Department for Constitutional Affairs  
Crown Dependencies Jersey,  
Guernsey  
Isle of Man

[international@gov.je](mailto:international@gov.je)

[dca.docs@gov.im](mailto:dca.docs@gov.im)

FCO Gibraltar Desk

[GibraltarEMs@fco.gov.uk](mailto:GibraltarEMs@fco.gov.uk)

Ms L Connolly, National Assembly For Wales

[Correspondence.european@wales.gsi.gov.uk](mailto:Correspondence.european@wales.gsi.gov.uk)

Damien Montgomery, Economic Policy Unit,  
ofmdfm, Northern Ireland Executive,

[Info.europe@ofmdfmni.gov.uk](mailto:Info.europe@ofmdfmni.gov.uk)

\*Commission of the European Communities,

[Jeffrey.LAMB@ec.europa.eu](mailto:Jeffrey.LAMB@ec.europa.eu)

**CIRCULATION LIST FOR EXPLANATORY  
MEMORANDA**

**Email Address**

Political Affairs Unit, 8 Storey's Gate, London  
SW1P 3AT

\*Ian McGill Director, Advisory Council,  
Liverpool and District Scientific and Research  
Library

[stb.central.library@liverpool.gov.uk](mailto:stb.central.library@liverpool.gov.uk)

Bruce Hunt, Senior Parliamentary Affairs  
Office, Parliamentary Agency to the City of  
London

[Bruce.hunt@cityoflondon.gov.uk](mailto:Bruce.hunt@cityoflondon.gov.uk)

Serafin Pazos-Videl –Convention of Scottish  
Local Authorities

[Serafin@cosla.gov.uk](mailto:Serafin@cosla.gov.uk)

Rachael Donaldson- Local government  
Association

[E&i@local.gov.uk](mailto:E&i@local.gov.uk)

Note:

Asterisked copy recipients receive numbered EMs, OTNA EMs and amended EMs (with the numbers inserted, ie: they do not receive OTNYR EMs when they are initially circulated)

All Government EMs are published on the Government's EMs website at:  
<http://europeanmemoranda.cabinetoffice.gov.uk/>

For

This phase lasts for 8 months on average – can be much longer on complicated dossiers. EP amendments submitted for scrutiny with a letter and comment

If Council & EP agree the act is passed 1st Reading in plenary

If EP and Council do not agree Council adopts a common position

This phase lasts for 3 months extendable by one month. Clerks of Council and EP meet to discuss differences

If EP agree Council Common Position the act is passed.

If EP do not agree Council Common Position

This phase lasts for 3 months extendable by one month. Conciliation Committee (12 MEPs and 12 Council members) meet to discuss differences

If Council agree EP amendments the act is passed.

If Council do not agree EP amendments Conciliation fails

This phase lasts for 6 weeks

If Conciliation reaches agreement the act is passed via a parallel 3rd reading in EP and Council

## WHEN TO ENGAGE THE EUROPEAN SCRUTINY COMMITTEES DURING THE OLP (CODECISION) PROCESS

During the course of your draft proposal, it is essential to keep the European Scrutiny Committees fully informed of progress through the stages of co-decision. The below table highlights when you formally / informally engage the Committees. These commitments correspond to responses given by the Government to the House of Lords 2009 report on scrutiny of co-decided proposals.

Informing the Committees occurs:

- Through the deposit of the original proposal and submission of an initial EM
- Through the deposit of further documents/EMs or updates in Ministerial letters or at official level at specific points in the process
- Through providing details of amendments with policy implications made or proposed in the Council, Coreper, Council working group or trilogue meetings
- When Coreper agrees to send a letter from the Presidency to the EP indicating the Council's agreement to a text or amendments to be proposed by the EP
- Where either Committee requests further information or an update. However the Government should be proactive. If no update has been provided for some time, consideration should be given to updating the Committees without waiting for a specific request from the Committees.

**Note: It is important that when you update the Committees at Ministerial or official level you provide texts to support the update where these are available; if the only text you have is a limité text not in the public domain it can be provided under the arrangements we have agreed with the Committees for sharing these texts in confidence.**

EU Stage	Held under scrutiny	Cleared scrutiny	Action
Commission proposal			Commission proposal deposited. EM provided in the usual way. Whilst drafting EM consider whether draft proposal will be subject to First Reading Deal. If so, please state under 'timetable'.
EP 1 <sup>st</sup> Reading Deal <sup>9</sup>	✓	✓	As soon as known, update Committees via a <b>Ministerial</b> letter
Pre EP 1 <sup>st</sup> Reading including where a partial or full General Approach is to be	✓		A <b>Ministerial</b> letter must be sent to the Committees in advance of the EP's vote outlining the direction

<sup>9</sup> No need to send a Ministerial letter prior to EP Reading if stated in original EM

EU Stage	Held under scrutiny	Cleared scrutiny	Action
adopted by the Copuncil			of the proposal; the Govt's position; the likelihood of a 'deal' being agreed. You should consider sharing, in confidence with the committees, the latest text or trilogue document to support the letter
Post EP 1 <sup>st</sup> Reading / amendments	✓	✓	A <b>Ministerial</b> letter is required on the outcome of EP's 1 <sup>st</sup> Reading (if applicable) the prospects of amendments being accepted in Council. EP report should be attached to the letter, unless the Clerks advise that the report should be deposited
Commission opinion	✓	✓	On occasion, the Commission may revise its proposal. If so, this may warrant a new EM. Check with <b>Clerks</b> who will advise whether or not to deposit document in the House.
Council agreed Common Position text	Scrutiny override	✓	A <b>Ministerial</b> letter is required when a common position has been reached with a copy of the text.
Commission opinion on common position	✓	✓	Send to <b>Clerks</b> for information
EP 2 <sup>nd</sup> Reading Deal	✓	✓	As soon as known, update Committees via a <b>Ministerial</b> letter with copy of available text.
Pre EP 2 <sup>nd</sup> Reading	✓		A <b>Ministerial</b> letter must be sent to the Committees in advance of the EP's vote outlining the direction of the proposal and the Government's position and the likelihood of a 'deal' being agreed with available text.
EP 2 <sup>nd</sup> Reading	✓	✓	Inform <b>Committees'</b>

EU Stage	Held under scrutiny	Cleared scrutiny	Action
approves/rejects Council common position			<b>Clerks</b> immediately via email copying in DEXEU
Post EP 2 <sup>nd</sup> Reading amendments	✓	✓	Consult the Clerks on handling who will usually agree that a <b>Ministerial</b> letter is required on the outcome of the EP's 2nd Reading; (if applicable) the prospects of amendments being accepted in Council or whether Conciliation is likely to take place plus differences in substance between Council's and EP's positions. Note: EP amended text should be sent with the letter. If Clerks want text deposited then an EM will be required.
Commission opinion	✓	✓	On occasion, the Commission may revise its proposal. This may warrant a new EM. Check with <b>Clerks</b> who will advise whether or not to deposit document in the House.
Council 2 <sup>nd</sup> Reading, approval	Scrutiny override	✓	<b>Ministerial</b> letter unless clerks advise that previous updates have been sufficient and no further update required
Council 2 <sup>nd</sup> Reading, rejected	✓	✓	Issue referred to the <i>Conciliation Committee</i> . Inform <b>Committees' Clerks</b> immediately via email and copying to DEXEU
Conciliation Committee approves joint text	✓	✓	<b>Ministerial</b> letter is required outlining the results and the Government's view on the agreed text. This should be done before it is formally adopted by the Council. The letter should



EU Stage	Held under scrutiny	Cleared scrutiny	Action
			also offer to deposit a copy of the Joint Text.
<b>Conciliation Committee rejects</b>	✓	✓	Inform the <b>Committees' Clerks</b> immediately via email copying to.

## PRE AND POST-COUNCIL SCRUTINY; PROVIDING INFORMATION TO THE SCRUTINY COMMITTEES

### Background

This process allows the Committees to have a dialogue with Departments on forthcoming Council business; to track the progress of business during each Presidency; and to enable issues to be identified at an early stage on which it would be appropriate for the Committees to seek further information either by written or oral evidence. The essential elements of the system are:

- provision of information (up to 3 weeks before a Council) to the Committees focussing on the scrutiny position of items on the agenda of forthcoming Councils – see pro-forma below.
- liaison between the Committee staff and Departments on agenda details which may result in a request for further information, including calling the lead Minister to give evidence to the Committee on a particular issue.
- a written Ministerial statement in both Houses shortly (no later than a day) before each formal Council meeting setting out why the items are on the agenda and the Government's general position on the items.
- written Ministerial statements in both Houses setting out what happened at the meeting and what role the UK played. The statements should also record any votes taken. Similar statements should be made after informal Councils but these should be general in nature and not provide details of Member States' positions.
- the possibility that Ministers may be called to give further evidence after a Council meeting.
- During recesses (and a dissolution), Ministerial letters to the Chairmen of the Committees in place of Statements. These letters should be copied in the usual way (see Section 4.12) plus be copied to the Libraries of both Houses to ensure that information on Council meetings is accessible to all members of both Houses.

### Items on forthcoming Council agendas

The Committees should be informed three weeks before a forthcoming Council (or as soon as the information becomes available) of items expected to appear on the Agenda, using the annotated agenda pro-forma below. This should include detail of previous relevant scrutiny by both Scrutiny Committees. Significant changes to the agenda should be notified to the relevant Committee clerks who can indicate whether further information is required in writing. Copies of annotated agenda should also be placed in the House libraries.

No later than a day before the Council a written Ministerial statement should be provided to both Houses confirming the final Council agenda, the reason why each item is on the agenda and the Government's general position on each item. They should be sent to the Chairmen and Clerks of both Committees, to Mr L Saunders at DEXEU and to the Departmental scrutiny co-ordinator.

### Post-Council Reporting

Written Ministerial statements **should be provided within 5 working days of both formal and informal Councils unless Parliament has gone into recess** – see below. For formal Councils they should give a full account of business taken at the Council and what stance the UK took in discussions. But when reporting on informal Councils the reports should be more general in nature and should not record the positions taken by individual Member

States. When reporting to Parliament the statements should be circulated in the same way as pre-Council statements.

**Post Council Evidence**

The Committees can call Ministers to give evidence after Council Meetings to follow up particular items of business. Departments should consider therefore whether a reporting letter, in addition to the statements and containing greater detail, might be useful in updating the Committees more fully of the outcome of a Council, and so possibly avoiding the need for an oral evidence session. This may be important for items that have been the subject of particular Committee interest.

**Recesses**

During recesses (and dissolutions) Ministers should provide pre- and post-Council statements in the form of letters to the Chairmen of both Committees.

<b>[TITLE OF COUNCIL AND DATE]: ANNOTATED AGENDA – See also attached Agenda</b>			
<b>Document Ref:</b>	<b>Subject</b>	<b>Scrutiny History</b>	<b>Comment</b>
As shown on Agenda	As shown on Agenda	To include details of previous documents/ Ministerial correspondence considered by Committee, including reference to any points of concern raised by Committee etc. Should also include reference to Lords Scrutiny position.	To note latest developments in negotiations and prospects for the Council, with particular emphasis on concerns expressed by the Committee previously, or outstanding problems for the UK, eg on points of substance, legal base etc.

**Presidency Updates**

Departments should also send letters to each Committee at the start of each Presidency and preferably before the start of the Presidency and should ideally set out:

- The Council timetable in the lead department’s area of business
- Expected progress on items under scrutiny by the Committees
- New proposals or initiatives expected under the Presidency
- The Government’s policy stance on items to be progressed under the presidency
- Copy of the Presidency programme where available

## (1) Provision of Papers for European Debates in Committee and on the Floor and Examples of Motions

The key steps in the process are:

1. The Department draws up as soon as possible a list of the documents to be included in the document pack for the debate. This can be done well in advance of the debate, but not later than the time when the debate is being set up and the motion prepared: see [5.4.1](#) and 5.4.2 above).
2. The Department assembles a cover sheet listing those papers it intends to include in the debate pack. As soon as possible, and in any event ***not later than two weeks*** before the debate is to take place, the Department sends to the ESC Second Clerk a draft contents sheet listing all the documents and including a hyperlink for each where one is available. **The Department is responsible for ensuring that all the papers required for the Debate are included in the document pack and that the pack is made available to the ESC Second Clerk on time so that it can be distributed to recipients via the Vote Office (see below).** The papers should be listed under three headings:
  - Motion Documents: documents recommended by the European Scrutiny Committee for debate
  - Other Relevant Documents: document(s) considered by the European Scrutiny Committee as relevant to the debate (i.e. tagged)
  - Other Relevant Documents: document(s) considered by the Department as relevant to the debate

The papers should be in the following order:

- (a) ESC report extract. This should be the published version, not the uncorrected electronic version sent to Departments immediately after the ESC meeting: the correct version of the Report can be supplied by the ESC if still unpublished at the time of debate. The hyperlink should go to the html chapter of the Report on the ESC website; the electronic copy included in the pack should be an extract of the pdf report. **Do not attach the entire pdf Report;**
- (b) EU document (this should be the text as deposited and not an advance electronic copy);
- (c) EU document addenda;
- (d) Explanatory memorandum (signed and dated);
- (e) Any other documents 'tagged' by the Committee, such as a relevant Report chapter on another document;
- (f) Any other document(s) regarded by the Department as relevant (drafts should not be used); when considering what to add, the aim is to supply sufficient material to inform the debate but not overwhelm MPs with unnecessary additional paperwork.

3. Appendices/Addenda to European documents will now not be included in printed copies of the pack but should be listed, with hyperlinks given. The Second Clerk will check that the links work when the original draft document list is emailed to the Committee.
4. Once these papers have been agreed, save the pdfs with helpful titles. The title should start with the order the document will be in followed by a short descriptor (e.g. 1. Extract from 3<sup>rd</sup> Report; 2. EU doc 1556/13). The order number is critical as it tells the Vote Office what order to compile the papers in. The final set of papers, together with contents sheet, should be emailed as pdf documents (in a zip file if lengthy) to the ESC's Second Clerk for approval. When agreed, ESC staff will send the papers to the Vote Office. They will consolidate the documents and page number them. They will then distribute them electronically and ensure hard copies are available on request.
5. The Vote Office compiles the papers electronically, page numbers them and sends copies to:
  - The 13 members of the European Committee concerned;
  - The Department (for the Minister – these will be sent to the official in the Department who sent the pack of papers to the ESC Second Clerk unless otherwise named);
  - The Public Bill Office (two copies);
  - The Chief Whip's Office
  - The Opposition Whip's Office; and
  - The ESC Second Clerk.

The Vote Office will make hardcopies available to those Members who request them.

6. No papers should be copied or circulated other than by the Vote Office. Only the original set sent to the Vote Office should be further copied. Departments should not send copies to Members or to the Clerk of European Committees themselves.
7. Papers should be added only if they become available after the original circulation. If it is necessary to add papers, they should be dealt with in the same way, passing via the ESC Second Clerk to the Vote Office. A new contents sheet should be provided for the additional documents, marked "Addendum".

Example document list:

**FINANCIAL SERVICES: RESIDENTIAL MORTGAGES  
DEBATE IN EUROPEAN COMMITTEE B  
(DATE AND TIME)**

Any Member wishing to receive document packs for European debates in electronic format, please contact the Vote Office on x 3631

	<b>Motion documents</b>	<b>Page No.</b>
1.	Extract from the Committee's First Report, HC 86-i, Chapter 2 <a href="http://www.publications.parliament.uk/pa/cm201213/cmselect/cmeuleg/86i/8604.htm">http://www.publications.parliament.uk/pa/cm201213/cmselect/cmeuleg/86i/8604.htm</a>	
2.	EU Document No.8680/11: Financial Services: Residential mortgages <a href="http://register.consilium.europa.eu/pdf/en/11/st08/st08680.en11.pdf">http://register.consilium.europa.eu/pdf/en/11/st08/st08680.en11.pdf</a>	
3.	EU Document 8680/11, ADD 1: <a href="http://register.consilium.europa.eu/pdf/en/11/st08/st08680-ad01.en11.pdf">http://register.consilium.europa.eu/pdf/en/11/st08/st08680-ad01.en11.pdf</a>	Available on request from the Vote Office
4.	EU Document No. 8680/11, ADD 2: <span style="background-color: yellow;"> </span> <a href="http://register.consilium.europa.eu/pdf/en/11/st08/st08680-ad02.en11.pdf">http://register.consilium.europa.eu/pdf/en/11/st08/st08680-ad02.en11.pdf</a>	Available on request from Vote Office
5.	EU Document No. 8680/11, ADD 3: <span style="background-color: yellow;"> </span> <a href="http://register.consilium.europa.eu/pdf/en/11/st08/st08680-ad03.en11.pdf">http://register.consilium.europa.eu/pdf/en/11/st08/st08680-ad03.en11.pdf</a>	Available on request from Vote Office
6.	EU Document No. 8680/11, ADD 4 <a href="http://register.consilium.europa.eu/pdf/en/11/st08/st08680-ad04.en11.pdf">http://register.consilium.europa.eu/pdf/en/11/st08/st08680-ad04.en11.pdf</a>	Available on request from Vote Office
7.	Explanatory Memorandum from Mark Hoban, Financial Secretary to the Treasury dated 30 April: <hr/> <a href="http://europeanmemorandum.cabinetoffice.gov.uk/files/Numbered%20EMs%2011/12001-13000/12891-11">http://europeanmemorandum.cabinetoffice.gov.uk/files/Numbered EMs 11/12001-13000/12891-11</a> - PDF <hr/>	
	<b>Documents tagged by the Committee</b>	
8.	EU Document x or Extract from the Committee's report Y (The title and a weblink would be inserted if there were a tagged document)	If tagged — Available on request from the Vote Office
	<b>Other documents: documents the department considers relevant to the debate</b>	
9.	Letter from the Rt Hon Joe Bloggs to the Chairman of the European Scrutiny Committee dated 6 June 2012 <i>(the department would need to insert the necessary weblink at this point – if available)</i>	

**Website addresses to locate documents**

European Documents can be located through the Consilium website:

[http://register.consilium.europa.eu/servlet/driver?page=Advanced&typ=&lang=EN&fc=REGAISEN&srm=25&md=100&ssf=DATE\\_DOCUMENT+DESC&cmsid=639](http://register.consilium.europa.eu/servlet/driver?page=Advanced&typ=&lang=EN&fc=REGAISEN&srm=25&md=100&ssf=DATE_DOCUMENT+DESC&cmsid=639)

Explanatory Memoranda through the Government's website:

<http://europeanmemoranda.cabinetoffice.gov.uk/>

If an EM has not been uploaded please contact the DEXEU who will ensure that the EM is uploaded to the EMs website with associated documents and Ministerial letters so that the appropriate link can be added to the Document Pack.

Committee Reports through the ESC website:

<http://www.parliament.uk/business/committees/committees-a-z/commons-select/european-scrutiny-committee/publications/>

## **(2) Motions for European Committees**

1. Only the documents recommended for debate by the ESC should be included.
2. Documents should be given their Council Number (e.g. No. 6580/02) and description (e.g. draft Directive on tobacco advertising). 'A proposal for' should be changed to 'draft'. The title should match the way in which the document is listed in European Business.
3. Where a debate covers more than one document, numbers and descriptions should be given for each.
4. For unnumbered EMs (OTNAs and OTNYRs), a debate takes place on the unnumbered Explanatory Memorandum; the motion should indicate the Department that submitted it and the date of the submission. If an official text becomes available before the debate, consult the ESC Clerks on how to handle reference to this.
5. It is normal for the motion to give an indication of the Government's view of the document.
6. When the ESC has indicated that a document is relevant to the debate, i.e. that it should be tagged, that document does not appear in the motion itself but in an italic note underneath it. Examples of motions and tags are shown below.

### **Example Motions**

**For debate in European Committee A, B or C:** That the Committee takes note

**For debate on the floor of the House:** That this House takes note

#### **1. *Single Document***

That the Committee takes note of European Union Document No. 8680/11 and Addenda 1 to 4, relating to a draft Directive of the European Parliament and of the Council on credit agreements relating to residential property; notes the success that the UK has achieved against its key negotiating priorities in Council negotiations on this Directive; further notes that the Government recognises the importance of a sustainable mortgage market to support a stable housing market; and supports the Government's view that the proposed Directive should recognise differences that exist between national mortgage markets.

## **2. *More than one Document***

That the Committee takes note of European Union Documents No. 17322/12 and Addenda 1 to 2, a draft Regulation adjusting with effect from 1 July 2012 the remuneration and pensions of the officials and other servants of the European Union and the correction coefficients applied thereto, No. 17360/12 and Addendum, a draft Regulation adjusting from 1 July 2012, the rate of contribution to the pension scheme of officials and other servants of the European Union, No. 11964/12, Opinion No. 5/2012 of the European Court of Auditors on the draft Regulation amending the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Union, No. 13327/12, Commission Report on the Exception Clause (Article 10 of Annex XI of the Staff regulations), and No. 13270/12, Special Report No. 10/2012 of the European Court of Auditors: The effectiveness of staff development in the European Commission; questions the European Commission's conclusion that recent and challenging economic conditions do no warrant the application of the Exception Clause; regrets that the Commission has not modified the salary adjustment method this year; stresses that consequent increases in EU staff pay, proposed by the Commission, are completely unacceptable; welcomes the findings and recommendation of the two reports from the European Court of Auditors; encourages the Commission to act upon these reports; rejects the Commission's proposals on salary and pension adjustments and pension contribution rates; and emphasises the continuing need for genuine reform both to the Salary Adjustment Method and to the Staff regulations in general in the context of the UK's overarching goal to achieve real budgetary restraint in the EU institutions.

## **3. *Documents and a Tag or Tags***

That the Committee takes note of European Union Document No. 8552/12, a Commission Communication on the External Dimension of European Union Social Security Co-ordination; supports the Government's view that the organisation and financing of national social security systems is exclusively the competence of Member States; and shares the Government's concerns that the extension of European Union competence in the area of social security co-ordination, through developing case law and regulations, will further undermine Member States' ability to protect their social security systems.

For a Committee debate:

11<sup>th</sup> Report of Session 2012\_13, HC 86-xi, Chapter 28

Or

For a Floor debate:



*The Thirty-fifth Report of Session 2012-13 from the European Scrutiny Committee, HC 86-xxxiii, and the First Report of Session 2013-14 from the European Scrutiny Committee, HC 83-i.*

#### **4. Unnumbered EM**

Commission Communication

That the Committee takes note of Unnumbered Explanatory Memorandum dated 15 August 2012, submitted by the Foreign and Commonwealth Office, XXXX; supports the Government's view that XXXX; and shares the Government's XXX.

#### **5. Opt-in debates**

##### **Title V opt-in or Schengen Opt-out Protocols**

Lidington debates (where the Government has committed to giving an indication of their intention to opt-in or not)

To opt in

That the Committee takes note of European Union Documents No. 11720/12, a draft Council Decision concerning the signing of the Agreement between the European Union and Turkey on the readmission of persons residing without authorisation, and No. 11743/12, a draft Council Decision concerning the conclusion of the Agreement between the European Union and Turkey on the readmission of persons residing without authorisation; and supports the Government's recommendation to opt in to the draft Council Decision on conclusion.

Not to opt out

That this Committee takes note of European Union Documents No. 5754/6/12, an amended draft Regulation of the European Parliament and of the Council on the establishment of an evaluation and monitoring mechanism to verify the application of the Schengen acquis, and No. 11846/11, a draft Council Regulation on the establishment of an evaluation mechanism to verify the application of the Schengen acquis; and supports the Government's intention not to opt out of the draft Council Regulation under Protocol (No. 19) of the Treaty on the Functioning of the European Union.

Not to opt in at this stage (but may opt-in later)

That this House takes note of European Union Document No. 7641/12 and Addenda 1 and 2, a draft Directive of the European Parliament and of the Council on the freezing and confiscation of proceeds of crime in the European Union; and supports the Government's intention to not opt-in under Protocol (No. 21) to the European Union Treaties at this stage.

Ashton - opt-in debate

When the government doesn't want to show its hand (for negotiating purposes)

That this Committee takes note of European Union Documents No. 10610/11 and Addenda 1 and 2, the Draft Directive establishing minimum standards on the rights, support and protection of victims of crime, No. 10613/11 and Addenda 1 and 2 relating to the Draft Regulation on mutual recognition of protection measures in civil matters, No. 10612/11 and Addenda 1 and 2, a Commission Communication — strengthening victims' rights in the EU, and the unnumbered Explanatory Memorandum dated 16 May 2011 relating to a Council Resolution on a Roadmap for strengthening the rights and protection of victims, in particular in criminal proceedings; and welcomes the opportunity to consider views on whether the UK should opt in to the draft Directive establishing minimum standards on the rights, support and protection of victims and the Draft Regulation on mutual recognition of protection measures in civil matters.

## **6. Debate on a draft Reasoned Opinion**

### Reasoned Opinion

That this House considers that the draft Directive of the European Parliament and of the Council on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures (European Union Document No. 16433/12 and Addenda 1 to 3) does not comply with the principle of subsidiarity for the reasons set out in Chapter 1 of the Twenty-third Report of the European Scrutiny Committee (HC 86-xxiii); and, in accordance with Article 6 of Protocol No. 2 of the Treaty on the Functioning of the European Union on the application of the principles of subsidiarity and proportionality, instructs the Clerk of the House to forward this reasoned opinion to the Presidents of the European Institutions.

## **Code of Practice on Scrutiny of Opt-In and Schengen Opt-Out Decisions in Justice and Home Affairs Matters (JHA)**

**Following Implementation of the Lisbon Treaty on 1 December 2009 and further enhanced during 2011 and 2012.**

This Annex outlines the actions Government Departments will take to ensure opt-in and Schengen opt-out decisions take into account the views of Parliament. Its publication emphasises Departments' commitment to existing DEXEU (formerly Cabinet Office) scrutiny guidelines and to the scrutiny procedures on the opt-in first outlined on 9 June 2008 by Baroness Ashton

(<http://www.publications.parliament.uk/pa/ld200910/ldselect/ldcom/6/605.htm>) and further enhanced by the undertakings set out in the Written Ministerial Statement (WMS) to Parliament made by David Lidington, the Minister for Europe (MfE) on 20 January 2011

(<http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm110120/wmstext/110120m0001.htm#11012057000015>), and following the first Lidington debates in 2012.

Departments must continue to follow standard procedures for consulting Business Managers on all Government decisions which are taken as part of the scrutiny process.

1. Article 3(1) of Protocol 21 to the EU Treaties on the position of the United Kingdom and Ireland allows the Government three months to decide whether to opt in to a proposed measure falling within Title V of Part Three of the Treaty on the Functioning of the European Union – Justice and Home Affairs (JHA) matters. The Government has undertaken to give special treatment to legislation requiring an opt-in decision (see the Statement by Baroness Ashton of Upholland, the Resolution of the House of Lords of 30 March 2010 ([www.theyworkforyou.com/lords/?id=2010-03-30a.1293.0](http://www.theyworkforyou.com/lords/?id=2010-03-30a.1293.0)) and the MfE's WMS). The original Statement undertook that details would be in a Code of Practice setting out the Government's commitment to effective scrutiny. This Code also incorporates the enhancements to the consideration of JHA opt-in decisions outlined during 2011. Schengen opt-out decisions are treated in the same way.

### **Timetable for Submission of Explanatory Memoranda (EMs), linked to the opt-in timetable**

2. The period for submitting an EM runs not from the date of deposit of the document, but from the date of its publication as a Council document in English. The undertaking given by Baroness Ashton is that Departments will submit EMs "as soon as possible," and no longer than ten working days from the date of the document's publication (as defined here). Departments should be aware that the DEXEU guidance requires the completion of further EMs as a dossier progresses.

### **Content of Explanatory Memoranda**

3. The EM will state the date of publication of the proposal, and the date for the Committees to express their opinions on the Government's opt-in or Schengen opt-out decision. This date is eight weeks from the date of publication of the last language version of the proposal and should, where known, be included in the EM. The date by which the UK must notify its opt-in decision will also be three months from the date on the last language version of the proposal. This date should be ascertained by the Government Department from the General Secretariat of the Council. If not all language versions are available at the point of the EM submission, the date must be provided to the Committees as soon as possible thereafter.
4. The EM will set out the main features of the proposal and the Government's views on it. Additionally it will provide an indication, to the extent possible, of the Government's views as to whether or not it would opt in and the factors likely to influence the Government's decision, but bearing in mind the undertaking not to reach a final decision for at least eight weeks to enable the Government to take into account the opinions of the Committees.

### **Debates in Government Time**

5. If the Government considers that a proposal is likely to attract particularly strong Parliamentary interest sufficient to warrant the offer of a debate in Government time, this offer will be made in the EM whilst recognising that in the House of Lords decisions on debates will rest with the House as provided for under pre-existing arrangements. This is also without prejudice to the right of the House of Commons to call a debate under the usual scrutiny arrangements. The decision on whether an offer should be made will fall to the lead Government Department in light of the process set out in paragraph 6. The Commission Work Programme, the Presidency forward look, pre- and post-Council Statements and the opt-in website will all be used to inform the offer. Departments should liaise with Business Managers via their Parliamentary Teams at the earliest opportunity to request they schedule a Commons debate.
6. An indicative list of opt-in decisions to be made during the year will be provided every six months to both Committees as part of the process set out in paragraph 17. The Government will make an indicative offer of those to be debated in Government time every six months by WMS to both Houses following consultations with the Committees.
7. All debates concerning the Government's opt-in decision should usually take place in the four weeks that follow the initial eight-week period of consideration after the publication of a proposal. Where Parliamentary time cannot be found for an opt-in debate to be held on a Government motion (for example recess), debates could be held on a take note motion early in the three month window. Where the Government offers a debate in Government time, the Business Managers should be informed at the same time as the offer is made to the Committees. The motion for debate should, wherever possible, be notified in advance to allow the Committee discussion time.
8. Decisions on the signing or conclusion of international agreements which concern JHA matters or which the Government considers are subject to the UK's opt-in Protocol

because they include JHA obligations, usually state that the agreement is annexed to the draft Decision. Departments will ensure that they include with the EM the text of the agreement in the form in which it is to be signed or concluded, in accordance with DEXEU guidance on negotiating mandates and external agreements. These arrangements apply to the Council Decisions to sign and conclude international agreements which concern JHA matters or include JHA obligations but not the negotiating mandates which are classified. The Committees will be informed of the existence of a negotiating mandate in writing.

### **The opt-in period**

9. During the 3-month period for opting in, Departments will keep the Committees informed of the progress of any negotiations and of any substantial shift in their position on a dossier, in particular on the question of opting in.
10. If the Government decides to opt in, the Minister will write to inform the Committees that it has done so as soon as the Presidency has been notified. If the Government decides not to opt in, the Minister will write to inform the Committees of its decision as soon as it has been reached. The Government will report opt-in and Schengen opt-out decisions and the reasons why they believe their decisions to be in the national interest to both Houses of Parliament as a Written or, where appropriate, Oral Ministerial Statement (WMS/OMS) with a Ministerial letter sent during recess. No undertakings should be given to make an Oral Statement to the House until agreement has been sought as currently required (outlined in chapter 9 of the Ministerial Code). Officials should contact the Clerk/Clerk Adviser to the Scrutiny Committees in advance of publication so that they can inform the Committee Chairmen.

### **Early opt-in decisions**

11. Where the Presidency wishes to put a proposal on the Council agenda for approval or adoption less than 8 weeks after publication and the Government has decided whether or not it wishes to opt in, the Business Managers and Committees will be informed immediately of the decision and the reasons for it.
12. The Lords' Resolution further provides that, in the case of an early opt-in to a proposal awaiting debate in the House, the Minister must give reasons to the House at the opening of the debate.
13. An early opt-in counts as a "scrutiny override" unless cleared by the Committees, and should be an exceptional occurrence. A Minister who has overridden scrutiny must write to the relevant European Scrutiny Committee(s) setting out the reasons why she or he failed to respect the eight-week scrutiny period.

### **Schengen opt-outs**

14. In the case of measures building on the Schengen acquis ("Schengen-building measures") the Schengen Protocol (No 19) takes precedence over the Opt-In Protocol (No 21). The result is that Schengen-building measures which can apply to the UK (broadly, those dealing with police and judicial cooperation) will apply automatically

unless within 3 months the UK exercises an opt-out. The WMS made by the Europe Minister indicates that the enhanced scrutiny arrangements will also apply to decisions under the Schengen Protocol.

### **Post-Adoption Opt-Ins**

15. Where the Government decides to opt in after a measure has been adopted it will inform the Committees of its intentions. The Committees will normally have a similar eight-week period in which to offer their views; however, the Government will need a degree of flexibility in cases where an earlier opt-in is considered in the national interest. As with a pre-adoption opt-in the Government will consider whether to offer a debate on Government time where the proposal attracts particularly strong Parliamentary interest.

### **Debates on Committee reports**

16. Where the Lords Committee has adopted a report on the issue of opting in and has recommended that the report should be debated, the Government has undertaken that its business managers in the Lords will, through the Usual Channels, use their best endeavours to arrange a debate before the Government formally notifies its opt-in decision to the Council.

17. Where the Commons Committee has recommended a debate on the Government's opt-in decision in European Committee or on the Floor of the House, the Government has undertaken that its business managers in the Commons will, through the Usual Channels, use their best endeavours to arrange a debate before the Government finally notifies its opt-in decision to the Council.

### **Annual Report**

18. The Government has undertaken to report each year on the scrutiny of opt-ins. This report will include a review of the Government's application of the Protocol and its adherence to the enhanced scrutiny commitments, as well as opt-in decisions expected in the following year. A table annexed to the Report will show, for each dossier, the date of publication, date of deposit, date of Explanatory Memorandum and, where the Government decided to opt in, the date on which this was done. An update to the table and list of forthcoming opt-in decisions will be provided to the Business Managers and Committees at the mid-year point.

19. In addition, a public [JHA opt-in webpage](#) has been established. This lists opt-in and Schengen opt-out decisions taken by all Government Departments as well as active and forthcoming decisions. It is updated by the Home Office and Ministry of Justice.

### **Recess**

20. The lead Government Department will write to the Committees well in advance of each recess (where relevant) notifying them of forthcoming opt-in decisions. In the House of Commons, the use of policy (take note) debates referred to at paragraph 7, will be considered where the only time available is early in the opt-in process, on the

understanding that further Committee scrutiny may be necessary over recess. In the House of Lords, debates will continue to be on the basis of an amendable motion.

## HANDLING LIMITE MARKED DOCUMENTS

The following guidelines for handling limité documents are to provide clarity and underpin best practice in a) *sharing limité documents* with the Committees and b) *pressing for the removal of limité markings with the Council of the European Union* (hereinafter 'the Council').

Information which bears an EU classification marking (i.e. RESTREINT UE / EU RESTRICTED, CONFIDENTIEL UE / EU CONFIDENTIAL, SECRET UE / EU SECRET or TRES SECRET UE / EU TOP SECRET) is not under the scope of these guidelines.

### **What does limité mean?**

Limité is not a security classification, but a distribution marking. Council Secretariat guidance states that documents marked limité may be given to any member of a national administration of a member state and the Commission (for the purposes of this guidance, national Parliaments are considered as part of national administrations). Limité documents may not, however, be given to any other person, the media, or the general public without specific authorisation, nor may they be published in any way which makes them accessible in the public domain.

### **When are documents marked limité?**

Documents are marked limité in various circumstances, including: when they contain specific and possibly sensitive views expressed by Member States; when they contain draft proposals which are of a provisional nature or are evolving; or when they contain sensitive financial or security information or information that, if disclosed, would undermine the protection of public (e.g. defence and military matters) or individual interest.

It is for Member States to decide whether to share limité documents with their national Parliaments. However, the document must retain the limité marking and so must not be used by the Parliamentary Committees in any way which makes public the substance or detail of the document. The attached Council guidance for staff (Annex X), which we understand is still under consideration in light of the Access Info judgment, provides further information.

## **Handling Advice**

### **Sharing limité documents**

#### **Principles when sharing**

Limité documents can be shared with the Committees in confidence and are made available on the Government's authority, but they cannot be deposited for scrutiny. There will be occasions when a proposal which is marked limité will be subject to an unnumbered Explanatory Memorandum (EM) and, although in those circumstances the limité text has not been deposited, the proposal will still be subject to the Houses' Scrutiny Reserve Resolutions by virtue of the EM having been submitted.

The Committees cannot publish or comment directly on any limité document in a way that publicly discloses its content, but the Committees can use the information to inform their overall scrutiny of a proposal. Officials can also provide off the record briefings on issues covered in limité documents to answer the Committee's questions whilst still



ensuring that confidential material is not made public. This may require Ministerial approval depending on departmental procedures.

Officials should decide whether to share a given document on a case-by-case basis, taking into account its political and legal importance, and in light of the following guidelines:

***What to consider sharing:***

- **Revised versions of proposals or documents that have already been deposited for scrutiny, but have changed substantially.** Access to these documents will facilitate the Committees' continued engagement with the EU decision-making process. Examples include Presidency texts, working group texts, and texts produced during the trilogue process under the Ordinary Legislative Procedure (usually in the form of tables which compare the original proposal with the positions advanced by the three institutions during negotiation). As there will be many iterations of these documents during the negotiating process, officials must decide at what point sharing a limited text will be most valuable to the Committees. An ongoing dialogue with the Clerks will often help to determine the most appropriate point to share such texts.
- **Draft Council or European Council Conclusions which relate to documents subject to scrutiny.** While Conclusions are not subject to scrutiny, Conclusions will often be adopted on or relevant to e.g. Commission Communications, which are depositable documents in their own right. Sharing copies of draft Council Conclusions can help the Committees with their scrutiny of the source document under consideration.
- **Documents which explain the progress or impact of a given programme or mission.** Sight of such documents will enable the Committees to engage the EU institutions and Government well in advance of any proposal to extend or alter EU programmes or missions. Examples include CSDP mission progress reports and strategic reviews, as well as draft budgets.
- **Documents which have been requested by the Scrutiny Committees.** The fact that the Committees are aware of a given document and asked for it to be shared indicates that they believe it to be of interest and/or relevant to their scrutiny of other documents. This should be given full consideration, unless there is a strong reason not to share the document under the "what not to share" guidelines below.

***What not to share:***

- **Council Legal Service Opinions in their entirety, or documents which disclose the existence of Council Legal Service' opinions.** The UK Government cannot disclose such information to Parliament as this would breach the Council Rules of Procedure - Article 6 on professional secrecy and disclosure of documents.
- Documents which disclose detailed and sensitive information about **Member States' negotiating positions**.<sup>10</sup>
- **Revised versions of documents that have already been deposited for scrutiny, but have been subject to only minor amendments.** For example, minor changes to wording that do not alter the substance or direction of the proposal.

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<sup>10</sup> The disclosure of Member States' negotiating positions is not a reason per se to resist sharing limited documents. However, there may still be circumstances where the sensitivity of a document justifies it being withheld. If in doubt consult the relevant UKREP desk officer and departmental scrutiny co-ordinator.

However, if the document relates to an area that the Committee has demonstrated a clear interest in it would be advisable to consult the Clerks.

See section 3.5 of the guidance for further details of the stages of the procedure where limité documents may help in updating the Committees on developments.

### **How do I share limité documents with the Scrutiny Committees?**

Limité documents can be shared both informally - via an email from officials to Clerks - and formally - under the cover of a ministerial letter to the Committees or alongside an unnumbered EM.

The responsible Department must ensure that the following caveat is clearly included whenever a limité document is shared i.e. within the covering email or letter:

*The attached document is being provided to the Committee under the Government's authority and arrangements agreed between the Government and the Committee for the sharing of EU documents carrying a limité marking. It cannot be published, nor can it be reported on in any way which would bring detail contained in the document into the public domain.*

### **What if the limité document is then made public?**

If a limité document which has been shared with the Committees subsequently has its limité marking removed, the relevant scrutiny co-ordinator should contact the Clerks to let them know that the Committees can now treat it as a public document.

### **Pressing for the removal of limité markings**

As set out above, there are valid reasons for the use of the limité marking by the Council. However, where Departments think that the limité marking is not necessary or has been misapplied by the Council they should suggest its removal. Government committed to pressing for the removal of limité where unnecessary in its response to the European Scrutiny Committee's scrutiny reform inquiry report. This is an important part of Government's commitment to transparency and accountability through a strong scrutiny system, and strengthening the role of national Parliaments in EU decision-making.

### **When should I press for removal?**

The application of the limité markings should be consistent with the Council Secretariat's guidance. Therefore, this is our test for whether a document should or should not be marked limité. In line with the Council guidance on transparency (included in annex):

- a) *Departments should press for removal of the Limité marking on the following documents, which Council guidance specifies should not be marked as limité:*
- Provisional agendas for Council meetings (including lists of «A» items) and for its preparatory bodies, with the exception of agendas for the Political and Security Committee, the Military Committee, the Military Committee Working Group, the Politico-Military Working Party, the Security Committee and the Terrorism Working Parties (internal and international aspects);
  - Documents originating from a third party which have already been made public by the originator, such as cover notes and letters addressed to the Council by other institutions or bodies of the European Union or, a Member State;

- In the legislative field, 'I/A' and 'A' item notes submitted to Coreper and/or the Council, and draft legislative acts, draft common positions (Articles 251 and 252 TEC) and joint texts approved by the Conciliation Committee (Article 251 TEC) to which they refer; and
- Any other text adopted by the Council (including by the written procedure) which is intended for publication in the Official Journal.
- The latest version of a document which has previously not been marked as limité and which has not changed substantially.

Departments can also *consider pressing for removal* on documents which do not fit under the criteria above but are politically and legally important and where there is a clear case that it would be helpful for the Committees' work to be able to formally scrutinise this document, rather than just seeing it for information. For example, on dossiers which are coming up for adoption at Council swiftly but where no publically available text is available. Departments should not press for removal where the documents meet any of the criteria set out below.

b) *Departments should not press for the withdrawal of the Limité marking on the following documents, which Council guidance specifies should be marked as limité:*

- Documents that include a Council Legal Service Opinion or disclose the existence of a Council Legal Service opinion. The UK Government cannot disclose such information to Parliament as this would breach the Council Rules of Procedure - Article 6 on professional secrecy and disclosure of documents;
- Documents that disclose detailed and sensitive<sup>11</sup> information about Member States' negotiating positions;
- Documents that contain politically sensitive information that would undermine the decision-making process of the Council;
- Documents that contains draft proposals which are of a provisional or evolving nature; and
- When disclosure of the document would undermine the protection of public interest (public security, defence and military matters, international relations, the financial, monetary or economic policy of the Community or a Member State), the privacy and integrity of the individual, commercial interests, court proceedings and legal advice, inspections, or investigations and audits.

Departments should also use these criteria to consider any requests from the Committees for the limité marking to be removed from a document. If Departments are unsure about how to proceed, they should consult DEXEU, FCO and UKREP officials.

### **How do I press for removal?**

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<sup>11</sup> The disclosure of Member States' general negotiating positions is not a reason per se not to push for the removal of the limité marking. The lead official, consulting as appropriate, should make a judgement as to the sensitivity of the negotiation positions. The bar here will be higher than for decisions about when limité documents can be shared with national authorities.

Departments should instruct the relevant UKREP desk officer for the dossier in question to submit a request to the Council Secretariat.

If the request is denied by the Council Secretariat, but Departments in liaison with UKREP believe the case still has merit, then an appeal can be lodged and the Council Secretariat Transparency Unit will take another look at the document, together with the originating authority and Council Legal Service. If the Council Secretariat still believe that there is justification that the document should remain non-public, they will draft a reply which will go to the Information Working Party for their approval. If this is approved, Departments will be informed of the decision.

**Further information:**

- Council Secretariat transparency guide, pages 94-97 – attached to this guidance at link?????
- 11336/11 - Handling of documents internal to the Council - on the Council's Public Register – 9 June 2011<sup>12</sup>

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<sup>12</sup> <http://data.consilium.europa.eu/doc/document/ST-11336-2011-INIT/en/pdf>

**BEST PRACTICE TIPS FOR SUCCESSFUL SCRUTINY****Forward planning**

1. Familiarise yourself with forthcoming **Presidency priorities** – Work closely with UKRep to identify which proposals will need to go through the Parliamentary Scrutiny process. Send detailed Presidency letters to the Committees to forewarn them of upcoming proposals that may require scrutiny clearance and include an assessment of the position the UK will take on these matters.
2. Be aware of the timing of proposals (publication by the Commission/consideration at Council/EP Readings - UKRep should be able to help with this).

**EMs process**

1. Meet deadlines set. If you need more time for an EM then discuss a revised timetable with the Clerks and DEXEU. The Clerks will usually agree extensions as long as the window of opportunity for the Committee to engage before decision points are reached is not compromised. If a new deadline is agreed and the EM is submitted by that date the Committees will not consider the EM as late and therefore won't be recorded as failing to meet the Government's commitment to Parliament.
2. Ensure that the document summary is as clear as possible. The reader should be able to gain all the relevant facts without referring to the original document. The first sentence should explain what the document does in simple terms.
3. Ensure the EM is as clear and concise as possible when explaining the Government's position and the policy implications of the document for the UK. It is important that where appropriate, an EM contains a robust assessment by the Government of compliance with subsidiarity in view of Parliament's role in delivering Reasoned Opinions.
4. Ensure the EM is as clear as possible about the timetable for Council discussion or agreement, including where a document may lead to Council conclusions; this will help the Committees promote an EM up the line for consideration at the earliest possibility and give you a better chance of clearance.
5. Give Ministers' Private Offices as much prior warning as possible that an EM will be submitted for clearance, checking that the relevant Minister will be available to sign the EM within the time available.
6. It may help to send an advance copy of an EM to the clerks ahead of signature (If the Minister's office is happy with this approach) if confident that the content of the EM will not be changed significantly by the Minister; this is helpful when timing is tight.

**Engagement with the Committees**

1. Speak to the Clerks – They are willing to help and keeping them informed early on can often avoid problems further down the line. Encourage desk officers to do the same.
2. Pass on feedback from Committee Clerks to policy leads (both good and constructive criticism).

3. Be creative – think of customer friendly ways to provide the Committees with information. For example, provide advice on people they could take evidence from, offer meetings with officials and Ministers.

### **Avoiding overrides**

1. Make sure you are aware of the timings of Councils and when proposals will be reaching General Approach/Political Agreement or any other stage of agreement including Council conclusions on documents.
2. Ensure policy leads are aware of the necessity to clear proposals before they are reach agreement at Council, writing ahead as far as possible to alert the Committees to the Government's intentions for the Council. Investigate whether it is possible to delay agreement in Brussels if you haven't cleared scrutiny.
3. Exemplary engagement and constant contact with the clerks may help your arguments to use a waiver to avoid an override.

### **Managing and tracking business**

1. Keep a record of all EM's and correspondence sent to each Committee.
2. Regularly update (and check for accuracy) 'Remaining Business' and 'Progress of Scrutiny' documents produced by the Committees regularly for accuracy. Inform Clerks if you spot any discrepancies.
3. Carry out a "quality control" role in ensuring that correspondence with the committees is correctly addressed, contains attachments where these are referred to, that document references are included in the title of letters to help the clerks identify the scrutiny item, that "word" versions of letters accompany PDF copies, and that information is provided about policy officials who can be contacted if there are points the clerks need to follow up.
4. Write to the Committees before Recess to alert them to any issues that might require an override, or their urgent attention when they return.

### **Liaising with the devolved administrations**

1. Involve colleagues from the Devolved Administrations at the earliest opportunity so they are aware they may need to provide comments at short notice.

### **Clearance of A&I point**

1. Check whether A/I point is still subject to scrutiny.
2. Send A/I point form to policy lead for completion ensuring they are aware of the tight deadline.
3. When returned, ensure summary of A/I point is included.

### **Use of Extranet**

1. If you are aware that a document is due to be published check to see if this is available on the Commission website or on the Council Secretariat Extranet. This could give you a couple of extra days to produce the EM prior to it being deposited in Parliament.

## USEFUL CONTACT POINTS AND TELEPHONE NUMBERS

<b><u>DEXEU</u></b>	0207 276 0190	Questions on policy and procedure
	0207 276 0241	Routine questions on deposit of documents, submission of EMs, progress of scrutiny
EMs website		<a href="http://europeanmemorandum.cabinetoffice.gov.uk/">http://europeanmemorandum.cabinetoffice.gov.uk/</a>
<b><u>Chief Whip's Office</u></b>	0207 276 2020	Questions on the arrangement of Commons scrutiny debates, business management
<b><u>House of Commons</u></b> Scrutiny Committee	Clerk: 0207 219 5467	Strategic Questions
	0207 219 6291	Terms of motions and document packs for debates
	Support Staff: 0207 219 3292	Routine enquiries about items under scrutiny, preparation of Committee business
Committee website:		<a href="http://www.parliament.uk/escom">http://www.parliament.uk/escom</a>
Vote Office	European Desk: 0207 219 4669	Provision of papers to Parliament including those made available for scrutiny debates
Clerk of European Committees	0207 219 3257	Plans for European Committee sitting; procedural advice on European Committees
Public Bill Office	0207 219 3251	Advice on European Committee membership
<b><u>House of Lords</u></b> Scrutiny Committee	Clerk: 0207 219 3616	Questions on procedure and handling of documents
	Support Staff: 0207 219 5791	Routine enquiries about progress of scrutiny, preparation of Committee business

Committee website:  
<http://www.parliament.uk/business/committees/committees-a-z/lords-select/eu-select-committee/>