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**The role of Member State and regional parliaments in overcoming the EU's crisis of legitimacy: the cases of the Scottish Parliament and the House of Lords**

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**Introduction**

Following the recent fall in the electoral turnout for the European Parliament elections there is little doubt that the EU faces an increasing crisis of democratic legitimacy. This paper argues that the future success of the EU, in terms of public support, is dependent on addressing this deficit and that this must be contingent on improving the effective parliamentary scrutiny of the EU at both a Member State and regional government level. As such, we agree with Hazell and Paun who state that:

Part of the reason for growing public disenchantment with the EU is the sense of a 'democratic deficit'...It is vital to the success of the EU, and of devolution in the UK, that parliaments succeed in holding the main policy actors more effectively to account.<sup>1</sup>

While this may include seeking to influence the EU institutions directly, it must also include the effective scrutiny of the role of Member State governments and regional governments in EU policy development. Through the scrutiny process there is a real need to demystify the EU and highlight the role of Member State and regional governments in shaping EU legislation in order to ensure effective democratic accountability.

Here we will examine EU scrutiny at both a Member State and regional level. In looking at the work of both the House of Lords EU Committee and the Scottish Parliament's European and External Relations Committee (EERC), drawing on our practical experience as officials working within those institutions, we will seek to identify some of the strengths and weaknesses of parliamentary scrutiny of the EU. These two cases studies provide a useful comparative study.

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<sup>1</sup> Robert Hazell and Akash Paun, "Parliamentary Scrutiny of Multi-Level Governance", The Constitution Unit, UCL (2006).

On the one hand, the House of Lords EU Committee is viewed as an exemplar of EU scrutiny and its work is well respected throughout the EU. In large part this is dependent on the formal recognition by the UK Government of the right of parliament to seek to influence the EU legislative process. Through the “scrutiny reserve” both Houses of Parliament can operate a “braking” mechanism on the development of the UK line to ensure that the views of Parliament are addressed. However, while this work can be highly effective in holding the UK Government accountable for its role at an EU level, it goes largely unnoticed by the general public. In large part this is due to a historical lack of emphasis on public engagement at Westminster.

In stark contrast the Scottish Parliament is built upon the principle of public engagement. Given the premise of this paper that enhanced parliamentary scrutiny is essential in addressing the democratic deficit within the EU it is significant that the Scottish Parliament emerged in many respects as a response to a perceived democratic deficit within the UK. Devolution in Scotland emerged largely from a campaign to restore popular sovereignty and address the perceived injustice of having a government imposed from Westminster which the Scots had rejected at the polls.

Viewed from Edinburgh, Westminster was depicted as being burdened by an outmoded 19th Century model of representative government through which an overly powerful Executive dominates the parliamentary and political process thus severely limiting the democratic process. In turn this leads to an increasing crisis of legitimacy and distrust in the political process.

Within this narrative the Scottish Parliament is established as Westminster’s other. Consistent with the logic of devolution the aim was to decentralise power not only from the political centre in London to Edinburgh but from the government to the people. In seeking to deliver a more bottom-up politics the Parliament agreed a number of key principles which had been proposed by the Consultative Steering Group (CSG) which had been set up by the Secretary of State for Scotland in November 1997 to develop the ways of working of the Scottish Parliament. The CSG identified 4 key principles:

- Sharing the Power;
- Accountability;
- Openness and Accessibility;
- Equal Opportunities.

In adopting these principles the CSG sought “to provide an open, accessible and above all, participative Parliament, which will take a proactive approach to engaging with the Scottish people.”<sup>2</sup> The Scottish Parliament was, therefore, founded on the basis of a new style of politics which would be more open and accessible, less Executive dominated and where there would be real accountability to the Scottish people who would be encouraged to take an active role in the process. The CSG clearly envisioned that this would include scrutiny of EU issues. It recommended that: “the Scottish Parliament needs arrangements to facilitate proper scrutiny of draft European legislation and other developments in Europe.”<sup>3</sup>

On this basis it could be expected that Edinburgh provides fertile ground for the cultivation of effective EU scrutiny and public engagement in the process. However, as we will demonstrate below, whereas there are good examples of the Scottish Parliament seeking to engage widely on European issues it has been considerably constrained in developing an effective scrutiny role by the lack of formal arrangements with the Scottish Government<sup>4</sup> on EU matters.

This paper, therefore, will argue that in order to address the democratic deficit facing the EU there is a need to focus on the role of effective parliamentary scrutiny at both the Member state and regional level. This is dependent on formal arrangements between the Executive and legislature especially in relation to the level of information provided. At the same time there is a need for increased levels of public engagement. We will begin with a brief summary of recent attempts by the European Commission to address the democratic deficit. We will then look more closely at our two case studies and identify some strengths and weaknesses and finally set out the lessons learned.

## **Part 1, The EU’s Crisis of Legitimacy**

Debate over an alleged lack of democratic legitimacy in the EU intensified after the Dutch and French electorates rejected the Treaty establishing a Constitution for Europe in 2005. After those rejections, EU leaders called for a period of reflection<sup>5</sup>, further to which the

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<sup>2</sup> *Shaping Scotland’s Parliament*, Report of the Consultative Steering Group, HMSO, 1998, p3.

<sup>3</sup> *Ibid.*, p8.

<sup>4</sup> Previously known as the “Scottish Executive”, the Scottish administration was re-named “Scottish Government” after the 2007 Scottish Parliament election.

<sup>5</sup> Declaration by the Heads of State or Government of the Member States of the European Union on the ratification of the Treaty establishing a constitution for Europe (European Council 16-17 June 2005) SN 117/05

European Commission published its “Plan D for Democracy, Dialogue and Debate”<sup>6</sup>, with the aim of engaging European citizens in discussion on the future of the European Union. Its main thrust was to listen better, explain better and to engage with citizens at a local level. The Commission recognised in its Plan D that “it is important to ensure that representative democracy continues to maintain the trust and involvement of Europe’s citizens.”

In its 2008 Communication, “Debate Europe – building on the experience of Plan D for Democracy, Dialogue and Debate”<sup>7</sup>, the Commission reviewed the results and experiences of Plan D and set out how the Commission intended to build on these experiences under the project “Debate Europe”, which fell within the broader policy of “Communicating Europe in Partnership”<sup>8</sup>.

Debate Europe made a distinction between representative democracy and deliberative democracy. Its aim was to promote the latter, facilitating avenues of discourse in relation to the European Union and its policies and assisting the input of that discourse into the decision-making process. Debate Europe planned to build on Plan D’s success in utilising tools such as internet debates, funding debates between EU officials and citizens etc.

While promoting deliberative democracy, the Commission emphasised the importance of connecting citizens’ debates to representative political bodies. The Commission stated that “there is a general wish to bridge the gap between politics at national and European level” and considered that Debate Europe could act as a catalyst to bridge that gap.

A similar debate is articulated by Roland Holzacker et al. in a series of articles under the umbrella of “Democratic legitimacy and the European Union.” The articles are concerned with how both representative institutions and deliberative processes may better link the Member States and the citizens together to increase democratic legitimacy in the emerging multi-level political system. As Holzacker states, “it is apparent that both representative and deliberative mechanisms within each of the Member States and the EU institutions need to be improved to increase the democratic legitimacy of the EU among the citizens”<sup>9</sup>.

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<sup>6</sup> COM(2005) 494, 13.10.2005

<sup>7</sup> COM(2008) 158, 02.04.2008

<sup>8</sup> October 2007 Communication “Communicating Europe in partnership”

<sup>9</sup> Holzacker, Ronald (2007) 'Democratic Legitimacy and the European Union', *Journal of European Integration*, 29:3, 257—269

It is against this background of a crisis of legitimacy that we set out our two case studies below.

## **Part 2, Case Study: The House of Lords**

The House of Lords EU Committee was originally created in 1974 following the United Kingdom's accession to the European Communities in 1973. It has evolved over time and now, with its seven Sub-Committees<sup>10</sup>, includes around 85 Members of the House of Lords supported by around 25 staff. The Members have a range of backgrounds, but include former Ministers, Commissioners, Members of the European Parliament and others with direct EU policy or institutional background.

### *The scrutiny reserve*

Fundamental to the House of Lords EU Committee scrutiny of EU documents is the scrutiny reserve. This means that a UK Minister should not give agreement to any EU legislative proposal until scrutiny committees in both Houses of Parliament have completed a process of scrutiny and given "scrutiny clearance". As the EU's own decision-making procedures have evolved, so has the scrutiny reserve, and it therefore covers agreement at all stages of the co-decision procedure. By way of derogation, the Government may give agreement to a proposal awaiting scrutiny clearance if a proposal is confidential, routine or trivial or is substantially the same as a proposal on which scrutiny has been completed (which may be, for example, at second reading of the co-decision procedure), or if Parliament has indicated that agreement need not be withheld pending completion of the scrutiny process, or for "special reasons". The Government should always explain to Parliament why it has given agreement to a proposal awaiting scrutiny clearance.

The Committee's Annual Report 2008 indicates that, of 399 documents examined, there were 24 examples of such "scrutiny overrides" in the House of Lords<sup>11</sup> over the period July 2007-June 2008. As noted in the Annual Report (pp 16-17), most of these related to timing problems.

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<sup>10</sup> A: Economic and Financial Affairs; B: Internal Market (including transport and energy); C: Foreign Affairs, Defence and Development; D: Environment and Agriculture (including fisheries and animal welfare); E: Law and Institutions; F: Home Affairs; G: Social Policy and Consumer Affairs (including education and culture).

<sup>11</sup> House of Lords EU Select Committee, *Annual Report 2008* HL 191, 20.11.2008

### *The sift of documents*

Once a document (Legislative proposal, Green Paper, White Paper, Communication, Report, European Court of Auditors Special Report, Council Joint Action under the CFSP) has been adopted by the Commission or other responsible institution, the Government is obliged to deposit the document in Parliament and, within two weeks, to submit an Explanatory Memorandum (EM). The EM should summarise the document and outline the Government's initial view, including any problems to which Parliament's attention ought to be drawn. It should also comment on consistency with the principle of subsidiarity and with fundamental rights and explain the legal base for a legislative proposal. On a weekly basis, the Chairman of the EU Committee considers the various EMs submitted to the Committee in the course of the past week and decides which of the documents ought to be sifted for examination by the Committee and which can be cleared from scrutiny without examination. The system allows the Committee to focus on the documents that raise particular policy or legal concerns. In the course of this "sift" process, the Chairman decides which Sub-Committee ought to examine the document. Over the period July 2007-June 2008, 926 EMs were sent to the Committee, 399 of which were identified as requiring further examination by either the EU Committee or one of its Sub-Committees.

### *Scrutiny in action: the examination process*

Examination of a document involves an initial discussion in private, following which a letter will be sent from the Chairman of the EU Committee to the responsible Government Minister outlining the view of the Committee, requesting any further information and indicating whether or not the document should be cleared from scrutiny. This process is repeated until such time as the Committee is content to clear the document. While the discussions between Committee Members take place in private, the correspondence between the Committee and the Government is public.

The Committee's discussions and conclusions are informed by advice from Committee staff, including Clerks, EU policy specialists and legal advisers. While Members may, on occasion, receive some representation from civil society on various issues, there is no systematic consultation of civil society in relation to proposals that are under scrutiny. Views are therefore based primarily on the professional advice received from staff and on the strong collective knowledge of the Members in addition to information from the Government.

Flow of information from the Government to the Committee at key times is fundamental to effective parliamentary scrutiny of EU dossiers. By way of example, the Committee worked closely with the Government on the revision of the Working Time Directive<sup>12</sup>. The Committee was in regular contact with the Government through a series of letters and received regular updates from the Government, including with regard to the failure to secure agreement at successive Council meetings. On one occasion, in the course of the 2005 UK Presidency, the relevant Sub-Committee held an extraordinary meeting in order to consider new information from the Government ahead of the Council meeting two days later. Draft copies of Presidency compromise documents were provided to the Sub-Committee prior to several of the Councils. When a Council Common Position had finally been reached, the Committee explored the issues further with the Minister in person, ahead of discussions at Second Reading.

Information was key too in the Committee's scrutiny of the Green Paper on Wills and Succession<sup>13</sup>, on which the relevant Sub-Committee raised concerns and received detailed responses from the Government. The Government indicated a particular interest in the Sub-Committee's input on the Green Paper, the proposals on which are of real practical importance for European citizens, but involve particularly difficult issues of reconciliation of differing legal approaches.

Nevertheless, information flow is not in all cases ideal, as was highlighted in a recent EU Committee Report on the Co-decision procedure<sup>14</sup>. In scrutinising the Returns Directive<sup>15</sup>, the Committee was faced with the situation where the Council and Parliament were holding negotiations on the basis of a significantly different document to that which had originally been scrutinised. The relevant Sub-Committee did not have access to this document, thus rendering parliamentary scrutiny ineffective. As a result of examples such as this, the Committee concluded in its Co-decision Report that the Government "must provide us with sufficient information on changes and proposed changes to proposals to allow us to comment before UK Ministers agree to them".<sup>16</sup>

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<sup>12</sup> COM(2004)607 Proposal for a Directive of the European Parliament and of the Council amending Directive 2003/88/EC concerning certain aspects of the organisation of working time, 22.9.2004

<sup>13</sup> COM(2005)65, Green Paper: *Succession and Wills*, 1.3.2005.

<sup>14</sup> House of Lords EU Select Committee, *Co-decision and national parliamentary scrutiny* HL 125, 21.07.2009

<sup>15</sup> COM(2005)391 Proposal for a Directive on common standards and procedures in Member States for returning illegally staying third-country nationals

<sup>16</sup> Paragraph 44

## *Inquiries*

In some instances, a Sub-Committee may wish to scrutinise a document in particular detail. This may take one of two forms. First, a short inquiry, which might typically involve a formal (on the record) discussion with the responsible Government Minister but may also extend to another witness. For example, one of the Sub-Committees chose to scrutinise closely the proposed Directive on environmental quality standards in water<sup>17</sup> and decided to hold formal sessions with the Minister and with the Environment Agency. A short Report was subsequently published<sup>18</sup>. Second, a long inquiry, which would take place over a period of several months. Formal evidence would be taken on the record from a variety of witnesses and a Report published by the EU Committee. Such Reports would normally reach a number of Conclusions and make Recommendations directed at the Government but also at the EU institutions. Reports have recently been published on a range of subjects including: the EU's response to the financial crisis<sup>19</sup>; the Common Frame of Reference for contract law<sup>20</sup>; and rail freight<sup>21</sup>.

Generally, the Committee's Reports are widely welcomed by the Government and other EU policy makers. Arlene McCarthy MEP, for example, described the Committee's Report<sup>22</sup> on the recent Timeshare Directive as "excellent"<sup>23</sup> and noted that she had tabled a number of amendments based on the content of the Committee's Report. Reports are also a good opportunity to secure media exposure for the Committee. By way of example, the Committee's Report on "*Including the Aviation Sector in the European Emissions Trading Scheme*"<sup>24</sup> received widespread national and regional print coverage generating positive articles in the UK press, including: The Sun; The Daily Telegraph; The Times; The International Herald Tribune; Birmingham Evening Mail; Liverpool Daily Post; and the Western Daily Press. It was also covered extensively on travel and holiday related websites.

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<sup>17</sup> COM(2006)397 17 July 2006. Proposal for a Directive of the European Parliament and the Council on environmental quality standards in the field of water policy and amending Directive 2000/60/EC.

<sup>18</sup> House of Lords EU Select Committee, *Water Framework Directive: Making it Work* (HL 136), 19.7.2007

<sup>19</sup> House of Lords EU Select Committee, *The future of EU financial regulation and supervision* (HL 106) 17.6.2009

<sup>20</sup> House of Lords EU Select Committee, *European Contract Law: the Draft Common Frame of Reference* (HL 95) 10.6.2009

<sup>21</sup> House of Lords EU Select Committee, *Recast of the First Rail Freight Package* (HL 90) 2.6.2009.

<sup>22</sup> House of Lords EU Select Committee, *Protecting the consumers of timeshare products* HL 18, 18.12.2007

<sup>23</sup> House of Lords EU Select Committee, *Co-decision and national parliamentary scrutiny* HL 125, 21.07.2009, p. 62, Q 233.

<sup>24</sup> House of Lords EU Select Committee, 9.2.2006, HL 107

In assessing the impact of the Committee's work, Cygan<sup>25</sup> highlights the Reports undertaken by the Committee on Europol<sup>26</sup>. He considers that these Reports are good examples of how "parliamentary scrutiny can contribute substantially to the transparency and openness of the EU's legislative process and arguably help to aid citizen understanding of EU activities".

### *Scrutiny and the European Commission*

In an attempt to improve dialogue with national parliaments, the European Commission President, Jose Manuel Barroso, agreed in September 2006 that national parliaments should be encouraged to submit views on EU documents formally to the European Commission and made a formal commitment that the Commission would respond to the comments. Since then, the European Commission has received almost 300 opinions from national parliaments. Over the period July 2007-June 2008, the House of Lords submitted eight of its Reports to the Commission for a response, which have tended to be substantial. One of those Reports was a response to the Commission's Annual Policy Strategy for 2009<sup>27</sup>. Each Annual Policy Strategy is an important opportunity for engagement with the Commission. In addition to engagement in the form of sending Reports and receiving responses, the Commission has demonstrated its willingness to supply written evidence to the Committee's inquiries and to meet with the Committee and its Sub-Committees in relation to the inquiry work.

Unlike the dialogue with the Government under the formal scrutiny reserve, the dialogue with the Commission has been voluntary thus far but does, on the other hand, appear to be working well and is an important element of Parliament's scrutiny of EU documents.

Should the Lisbon Treaty enter into force, the formal role of national parliaments in the EU policy development process will be enhanced. The most visible new power means that a draft legislative act must be reviewed if a proportion of national parliaments (the exact proportion depends on the policy area) consider that it does not comply with the principle of subsidiarity.

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<sup>25</sup> *The EU Constitutional Treaty from the Perspective of the Parliament of the United Kingdom*

<sup>26</sup> *Europol* (10th Report, Session 1994–95, HL 51); *Europol: Confidentiality Regulations* (1st Report, Session 1997–98, HL 9); *Europol: Joint Supervisory Body* (13th Report, Session 1997–98, HL 71); *Europol: Third Country Rules* (29th Report, Session 1997–98, HL 135); *Europol's role in fighting crime* (5th Report, Session 2002–03, HL 43); *Europol: coordinating the fight against serious and organised crime* (29th Report, Session 2007-08, HL 183)

<sup>27</sup> House of Lords European Union Committee, *The Commission's Annual Policy Strategy for 2009* (HL 151) 23.7.2008.

## *Conclusions*

House of Lords scrutiny of EU legislation relies on a formal parliamentary mechanism, the cornerstone of which is the scrutiny reserve resolution. Delivery of an effective system of scrutiny requires both Parliament and Government to commit to it. A number of key features can be identified. First, a focus on the key issues is essential, which the Lords achieves through its “sift” of documents which merit further examination. Second, Parliament requires information from the Government on time and, third, such information must be comprehensive, a view shared by Cygan. Fourth, the level of resources, both in terms of staff and in terms of Members, is of great assistance to the EU Committee in fulfilling its scrutiny function. Finally, there is a strong commitment within Parliament to ensuring that the scrutiny reserve is applied and respected, which is reflected in the delegation by both Houses of the scrutiny role to specialist Committees, a delegation which is further enhanced in the House of Lords by the Sub-Committees.

The level of impact of the scrutiny process has been touched upon in this chapter. As Cygan acknowledges, it is impossible to identify the precise impact, but we would nevertheless make a number of observations. First, and as indicated in the Annual Report cited above, it is extremely rare that any legislative proposal is agreed to by the UK Government without having cleared formal scrutiny procedures in both Houses of Parliament. This reflects the discipline of the scrutiny reserve and the requirements upon Ministers that flow from it. Second, there is evidence (see the example of the Timeshare Directive Report above) that the Committee’s work is used to inform policy making. The Committee has thus taken advantage of its formal relationship with the Government and well resourced Committee structure to publish informed and well received Reports. Third, the Committee has had some success through its Reports in bringing its work, and therefore issues, into the media spotlight.

This chapter has demonstrated too that there are some weaknesses. These relate particularly to the poor timing and weak content of information from the Government as highlighted by the Committee Report on co-decision but, equally, the Committee has been able to use the formalities of the scrutiny reserve as the basis on which to recommend improvements. Another weakness that might be highlighted is the imbalance between public awareness of some Committee Reports and public awareness of the regular scrutiny work of the House of Lords. This may be linked to the technical nature of the work, but may also be linked to lack of direct dialogue with civil society, which tends to be restricted to Committee inquiries.

The Committee's Report in 2005-6 on public awareness of the House of Lords' scrutiny role<sup>28</sup> acknowledged that public awareness was low but highlighted the need to improve media coverage of work on inquiries. Since that Report was produced, media coverage has improved and media strategies are now an important element of each inquiry. Arguably, it is now time to focus on public awareness of the broader EU scrutiny undertaken by the House of Lords.

On balance, the House of Lords EU Committee has used its formal weapon, the scrutiny reserve resolution, to hold the Government to account effectively in terms of its approach to EU documents. Through its inquiry work, it has been able to bring some of its work to the attention of the public and to engage actively with elements of civil society. It is in the House of Lords' favour that the weaknesses identified (i.e. information problems and lack of dialogue with civil society in the course of regular scrutiny) are methodological rather than constitutional, and could be overcome in time from within the House of the Lords and the Government.

### **Part 3, Case Study: The Scottish Parliament**

As we have seen above, the House of Lords EU Committee has developed a highly effective EU scrutiny role. In contrast, the Scottish Parliament has struggled to find a role in relation to the EU. On one hand this is unsurprising as relations with the EU are reserved to Westminster, and Holyrood as a regional parliament is twice removed from Brussels. At the same time, though, the Parliament has responsibility for the implementation of EU legislation relating to devolved matters. This covers many aspects of the Parliament's areas of competence including justice issues and environmental and rural affairs matters. Consequently, the UK Government has recognised that the devolved institutions have a legitimate interest in seeking to influence the UK line on EU legislative proposals and is committed to consulting with them in devolved areas. The caveat is that any consultation must be conducted on a confidential basis and that the devolved institutions must abide with the UK negotiating line once agreed.

In this section of the paper we will demonstrate the constraints which this emphasis on confidentiality has on effective parliamentary scrutiny. As we have seen above the

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<sup>28</sup> House of Lords EU Committee, 32nd report of session 2005-6, *EU Legislation – Public Awareness of the Scrutiny role of the House of Lords* (HL 179) 25.5.2006

fundamental basis of effective EU scrutiny at Westminster is the scrutiny reserve and the flow of information from the Government to the EU Committee at key times. There is no Scottish equivalent of the scrutiny reserve and, therefore, the flow of information from the Government to the EERC is limited. Despite Holyrood's emphasis on a new style of politics which would be less elitist and more open and accessible, engagement with the EU remains Executive-dominated. As Jeffrey points out: "The devolved legislatures self-evidently enough stand outside a system which works through informal and/or behind-closed-doors processes of intergovernmental coordination."<sup>29</sup>

Within the context of other regions of the EU this in itself is not unusual. The extent of parliamentary scrutiny of the EU at a regional level is extremely limited. Indeed, this can also be said of parliamentary scrutiny at Member State level in many countries. What is unusual in the Scottish context is the extent to which Holyrood has consistently sought to develop more effective parliamentary scrutiny despite the barriers which it faces as a consequence of the devolution settlement. Again as Jeffrey points out: "No other regional government in the EU faces...consistent pressure for parliamentary scrutiny and accountability as that in Scotland."<sup>30</sup> However, as we will see below, despite this consistent pressure the level of parliamentary scrutiny of the EU at Holyrood remains relatively limited.

#### *EU Relations – A Reserved Matter*

Under Schedule 5 of the Scotland Act, international relations including with the European Communities and their institutions are reserved to Westminster. Relations between the UK Government and the devolved institutions are set out in a "memorandum of understanding and supplementary agreements" which was published in 2001.<sup>31</sup> This includes a 'Concordat on co-ordination of European Union policy issues – Scotland' which states: "As all foreign policy issues are non-devolved, relations with the European Union are the responsibility of the Parliament and Government of the United Kingdom, as Member State."<sup>32</sup> This includes those policy areas within EU competence which are devolved to Holyrood.

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<sup>29</sup> C.Jeffery, 'Devolution and the European Union' in Trench (ed.) *The Dynamics of Devolution, The State of the Nations 2005*, (UCL, 2005), p189.

<sup>30</sup> *Ibid.*, p190.

<sup>31</sup> Memorandum of Understanding and Supplementary Agreements Between the United Kingdom Government, Scottish Ministers, the Cabinet of the National Assembly for Wales and the Northern Ireland Executive Committee, CM 2450 (London: the Stationery Office, 2001).

<sup>32</sup> *Ibid.* p10-11

However, the Scottish Parliament has responsibility for the implementation of any EU legislation in devolved areas and is liable for any infraction costs resulting from a failure of implementation or enforcement. Accordingly, the Concordat states that: “the UK Government wishes to involve the Scottish Executive as directly and as fully as possible in decision-making on EU matters which touch on devolved areas.”<sup>33</sup> In practice it was expected that the consultation procedures would be broadly similar to the arrangements prior to devolution and would occur mainly at official level. A Joint Ministerial Council for Europe was also established at which any disputes could be considered.

Any influence which the Scottish Government has on EU matters is, therefore, primarily dependent on relations with Whitehall and the promotion of Scottish interests in finalising the UK Government’s negotiating line. The effectiveness of these relations came under scrutiny just prior to the Scottish elections in 2007 following a leaked memo from the Head of the Scottish Executive’s office in Brussels to the First Minister. It was suggested that Whitehall departments could be reluctant to take on board the views of the Scottish Executive and that it was not uncommon for Whitehall to dismiss views of the Executive when formulating the UK line. While some Whitehall departments were identified as having good relations with their Edinburgh counterparts, others were viewed as having little understanding of the devolution settlement and contact was limited. The memo concluded that: “Awareness and understanding of devolution across Whitehall is evidently a problem which must be tackled.”

### *Confidentiality*

While it is beyond the scope of this paper to consider the veracity of the leaked document, it is useful in highlighting the difficulties faced by the Scottish Parliament in scrutinising its own Government on EU matters. The reason the leaked memo was viewed as being significant is that it provided a rare insight to the relationship between Holyrood and Whitehall which is otherwise primarily conducted on a confidential basis. While this may be entirely legitimate it means that the Scottish Parliament is presented with a fundamental obstacle in holding the Government to account on its role in relation to the EU. As stated in the Concordat:

Participation will be subject to mutual respect for the confidentiality of discussions and adherence by the Scottish Executive to the resulting UK line without which it

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<sup>33</sup> Ibid. p9.

would be impossible to maintain such close working relationships. This line will reflect the interests of the UK as a whole.<sup>34</sup>

Given this emphasis on confidentiality it inevitably limits the level of effective scrutiny. The lack of scrutiny of inter-governmental relations was an issue which was addressed by the House of Lords Constitution Committee in its 2001 report on "*Devolution: Inter-Institutional Relations in the United Kingdom*". In considering devolution and the European Union, the Committee concluded that: "The process is not an open one, for the devolved administrations let alone the general public, and it is one in which the UK Government retains a high level of control."<sup>35</sup> This means that the Parliament is not likely to be aware of any disagreements which the Scottish Government may have with the UK line.

The main difficulty for the Committee, though, is that the emphasis on confidentiality means that the level of information provided by the Scottish Government on EU issues is limited. The primary means through which the EERC receives information from the Government is a six monthly update from the Europe Minister on its EU priorities. There are usually around 20 priorities which are identified by the Minister on the basis that they are "the issues currently being discussed at EU level which will have a significant impact on Scotland in the near future."<sup>36</sup> While the Committee has welcomed the willingness of successive Ministers to appear before it on a regular basis, it has questioned the level of information provided. For example, at its meeting on 11 March 2008 in questioning the Europe Minister, the EERC's Convener pointed out: "our fundamental problem is how we can scrutinise what the Government is doing if we do not have any detail on these key and substantive European issues."<sup>37</sup> The Minister responded that the new (Scottish National Party) administration was providing much more information to the Committee than previous Governments and that she was willing to be as transparent as possible. However, she was constrained in doing so by the need for confidentiality in the Scottish Government's dealings with the UK government on EU issues. Despite these limitations the Minister did agree to revise the presentation of its priorities and these now include much more detailed information on the actions of the Government including a description of progress and the implications for Scotland.

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<sup>34</sup> Ibid, p 10.

<sup>35</sup> House of Lords Constitution Committee, 2nd Report, 2002-03, HL 28.

<sup>36</sup> <http://www.scotland.gov.uk/Topics/Government/International-Relations/Europe/EuropeanStrategy/EU-Priorities>

<sup>37</sup> <http://www.scottish.parliament.uk/s3/committees/europe/or-08/eu08-0601.htm>

## *Scrutiny Reserve*

As we have seen above, the scrutiny reserve is fundamental to effective scrutiny of EU documents within the House of Lords. In contrast to Westminster, the devolved parliaments and assemblies do not have a scrutiny reserve and there is no equivalent of an EM. Although the UK Government EM does indicate whether or not the devolved institutions have been consulted, no details are disclosed. More significantly, if the devolved institutions have a different view from the UK Government this is unlikely (although not unknown) to be set out in the EM. The devolved institutions do have access to all EU documents but without a scrutiny reserve there is no formal mechanism through which the devolved administrations set out their views on EU legislative proposals even where they relate to devolved matters.

This is a point which has recently been addressed by the Welsh Assembly's European Committee which recommended that the Assembly Government should produce an EM "explaining its views on all proposals that have devolved consequences and the implications they will have for Wales."<sup>38</sup> The Welsh Assembly Government has rejected this recommendation on the basis that there would be "significant resource implications and add little value because the existing EMs...already identify the interests of the Assembly Government." However, due to the emphasis on confidentiality in the Memorandum of Understanding, it is not always clear what the views of the devolved institutions are.

The EERC recognised very early on that the lack of a scrutiny reserve and the confidentiality arrangements within the Concordat represented "major stumbling blocks" in developing its own scrutiny role.<sup>39</sup> In its 9<sup>th</sup> Report 2001 the Committee noted that: "The systems and process of governance within the UK as regards the handling of EC/EU matters need...to be made more open and transparent."<sup>40</sup> The Committee, therefore, made a number of recommendations in relation to improving EU scrutiny which included the introduction of a "Scottish scrutiny reserve" and a review of the Concordat to "open up the system" and lessen the emphasis on confidentiality.

In its response to the Committee's report, the Scottish Government while recognising the Committee's "legitimate desire to scrutinise" nevertheless emphasised the need for

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<sup>38</sup> European and External Affairs Committee, National Assembly for Wales, *Report of inquiry into Subsidiarity*, (March 2009), p 21.

<sup>39</sup> <http://www.scottish.parliament.uk/business/committees/historic/europe/reports-01/eur01-09-vol01-02.htm>

<sup>40</sup> *Ibid.*, paragraph 240.

confidentiality in its discussions with the UK Government on EU issues. Responding directly to the Committee's recommendation on the Concordat, the Government stated:

We believe the Concordat's provisions on confidentiality remain fundamental to the operation of an effective relationship with the UK Government, and that amending these provisions could only harm the Executive's ability to represent Scottish devolved interests.<sup>41</sup>

At the same time the Government agreed that there was a need to develop arrangements which would provide the Committee with "a greater opportunity to contribute to the Executive's discussions with the UK Government on EU matters." On the basis that these procedures would allow the Committee's view to be reflected in discussions with the UK Government the Government rejected the need for a Scottish scrutiny reserve. Although agreeing that "the principle and purpose of a scrutiny reserve should be reflected in the arrangements" the Government did not believe that "a formal scrutiny reserve would be a useful or workable feature of those arrangements."

In practice, though, there is little within the "arrangements" between the Parliament and the Government which could be viewed as amounting to the "principle and purpose" of a scrutiny reserve. At Westminster, as we have seen, the UK Government will not, except in special circumstances, agree to any proposal in the Council, until it has been cleared by the scrutiny committees of both the House of Lords and the House of Commons. There is nothing remotely similar at Holyrood.

#### *The Role of the EERC*

Given the complex nature of the devolution settlement in relation to the EU and the lack of a scrutiny reserve, the EERC has struggled to develop its own role in scrutinising the Scottish Government. This is evident in the various approaches which it has adopted in the first ten years of devolution. Initially the Committee sought to adopt a similar approach to Westminster by introducing a "sifting process" which ostensibly involved consideration of every EU document. In practice this amounted to a "brief analysis" of each document by the Committee clerks with little substantive action undertaken by either the EERC or the relevant subject Committee. Moreover, with little resources the Committee was unable to sustain even this extremely limited level of scrutiny.

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<sup>41</sup> Scottish Executive response to the European Committee's 9<sup>th</sup> Report, 2001.

## *Mainstreaming*

Consequently, the Committee agreed in January 2002 to mainstream the consideration of EU issues. As stated in its legacy paper at the end of the first session: “This places the emphasis on the other subject Committees to be more responsible for deciding themselves which EC/EU issue to engage with.”<sup>42</sup> This meant that the sift now consisted of sending a list of newly published EU documents to the appropriate subject Committee after each fortnightly Committee meeting. This approach was strengthened by training for parliamentary officials supporting the Committees who were now expected to build up some expertise in EU issues. A number of familiarisation visits to Brussels were also arranged for Committees. More significantly, the Parliament also agreed to recruit a European Officer who is based in Scotland House in Brussels. The European Officer has an intelligence gathering role and acts as “the eyes and ears” of Holyrood in Brussels.

In practice the impact of this mainstreaming approach has been patchy and has tended to depend on the interests of individual Members. EU issues have continued to have a low priority within Committee work programmes which for the first two sessions of the Parliament were dominated by the scrutiny of domestic legislation. At the same time there has been an increasing awareness that many EU issues do have a significant impact on devolved areas. In particular, both the Justice Committee and the Environment and Rural Development Committee (ERDC) have sought to develop a more active role and both have developed informal arrangements for tracking and monitoring EU issues within their respective remits.

As well as monitoring and tracking developments, both Committees have also sought on occasion to influence actively the progress of draft EU legislation. For example, during the second session of the Parliament the Justice Committee was particularly active in relation to the Rome III proposals in the area of family law. The Committee submitted its view that the proposals would not be in the interests of Scotland to both the Scottish Government and the European Commission.

The Committee has also recognised the need to continue to develop its EU scrutiny role. In its legacy paper, for example, at the end of the second session one of the Committee’s key

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<sup>42</sup> <http://www.scottish.parliament.uk/business/committees/historic/europe/reports-03/eur03-legacy-01.htm>

recommendations was that the new Committee in the third session “should set aside dedicated time within its work programme for future scrutiny of EU legislative proposals.”<sup>43</sup>

The ERDC also sought to develop its consideration of EU issues during the second session. This is recognised in its legacy paper for session two which states that:

Matters within the Committee’s remit are heavily influenced by EU policy and legislation. The Committee has, therefore, sought to maintain awareness of relevant developments and incorporate consideration of them into its work programme.<sup>44</sup>

This includes taking evidence from the Minister at the beginning of each EU Presidency and in advance of the December Agriculture and Fisheries Council each year. There is substantial interest in fisheries issues and the Committee considers the annual round of quota discussions on total allowable catches under the Common Fisheries Policy.

In addition to its regular monitoring of EU issues the Committee also carried out a number of inquiries directly focussed on the development or implementation of EU policy including its inquiry into the implementation of CAP reform in Scotland, and the inquiry into the national waste plan. Scrutiny of the Environmental Assessment (Scotland) Bill also involved direct consideration of the transposition of EU legislation into domestic law.

### *EU priorities*

Given this emphasis on mainstreaming, the EERC agreed to focus on cross-cutting issues such as its current inquiry on the EU budget review. It has also sought to take the lead in identifying EU priorities for the Parliament. It conducts an annual consultation on the Commission’s Legislative and Work Programme and identifies a number of priority issues which then form the basis of the work of the European Officer. Regular updates are provided by the European Officer through the fortnightly *Brussels Bulletin* which is considered at each Committee meeting and published on the Parliament’s website.

More recently the Committee has again sought to refine its approach by becoming “more proactive in its scrutiny of European issues and engage earlier in the EU policy development

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<sup>43</sup> <http://www.scottish.parliament.uk/business/committees/justice1/reports-07/j1r07-08.htm>

<sup>44</sup> <http://www.scottish.parliament.uk/business/committees/environment/reports-07/rar07-07.htm>

process.”<sup>45</sup> This follows on from its inquiry into the scrutiny of EU legislation in which the Committee recognised that any attempt to influence the European legislative process requires engagement at a very early stage.<sup>46</sup> Consequently the Committee has shifted its focus to “those issues which are being discussed in Brussels but which have not yet emerged as formal proposals”.<sup>47</sup>

At its meeting on 4 November 2008, therefore, the Committee agreed a revised approach to its scrutiny of EU issues. This will focus on scrutinising the Scottish Government’s role in representing Scottish interests at an “early intervention” stage. At the same time the Committee will also continue to monitor current issues within the EU legislative process including its annual consultation on the Commission’s Legislative Work Programme and an annual rather than 6 monthly update from the Minister for Europe on the Government’s EU priorities.

### *Public Engagement*

As with all Committees within the Parliament a core aspect of the EERC’s role is public engagement and from the outset of devolution the Committee has sought to be innovative in raising the profile of EU issues within Scotland. For example, as part of its inquiry on the future of Europe in 2002 the Committee hosted a Convention on the Future of Europe in recognition that the general public “were not aware of the broader debate on Europe’s future and had not had an adequate opportunity to discuss the issues therein.”<sup>48</sup> On this basis the Committee agreed to host the Convention in order “to enable civic Scotland to input to its Parliament’s consideration of the issues and to raise the profile of the whole future of Europe debate.”<sup>49</sup>

More recently the Committee also held a conference in December 2006, in partnership with Scotland Europa, at Holyrood as part of its scrutiny of the Commission’s Green Paper on a Maritime Policy<sup>50</sup>. Over 80 delegates from organisations across Scotland attended, representing industry, academia and the public sector, as well as a number of MSPs and MEPs. The key note speakers included the head of the Commission’s maritime task force and the Minister for Environment and Rural Development. A full transcript of the conference

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<sup>45</sup> <http://www.scottish.parliament.uk/s3/committees/europe/index.htm>

<sup>46</sup> <http://www.scottish.parliament.uk/business/committees/europe/reports-07/eur07-02.htm>

<sup>47</sup> <http://www.scottish.parliament.uk/s3/committees/europe/index.htm>

<sup>48</sup> <http://www.scottish.parliament.uk/business/committees/historic/europe/reports-02/eur02-06-01.htm>

<sup>49</sup> *Ibid.*

<sup>50</sup> Green Paper: *Towards a future Maritime Policy for the Union: A European vision for the oceans and seas* (COM(2006)275, 7.6.2006)

was submitted as part of the Committee's response to the Commission's consultation on the Green Paper.

The Committee has also held a number of civic participation events to mark Europe Day. For example, in 2008 the Committee invited a number of schools from across Scotland to participate in a Europe Day conference as part of its inquiry on international development. The aim of the conference was to facilitate the views of school pupils on the core issues within the Committee's inquiry and a transcript of the conference was included as part of the Committee's report.<sup>51</sup> The conference was held in partnership with the offices of both the European Parliament and European Commission in Edinburgh and the British Council and was also supported by the Scottish Government. In holding such events the Committee has been keen to both raise the profile of the EU within Scotland and allow an opportunity for much greater public engagement on European issues.

### *Conclusion*

When introducing the Scotland Bill in the House of Commons, the Secretary of State for Scotland, Donald Dewar, stated: "We want literally to create a new politics in Scotland, bringing back popular legitimacy" and to develop "a more pluralist, outward looking democracy that is in tune with the modern world". In contrast to Westminster, the Scottish Parliament would, therefore, be more open and accessible and less Executive-dominated. However, as we have seen, the emphasis on confidentiality within inter-governmental relations means that Dewar's vision has not been practical in relation to the consideration of EU issues at Holyrood.

While the Scottish Parliament may have made great strides towards a more participatory politics in many areas, relations with the European Union remain Executive-dominated. Without a scrutiny reserve and only limited access to Government information the EERC has struggled to define its role. Yet, at the same time, despite the lack of formal scrutiny arrangements the EERC has sought to be innovative in raising the profile of the impact of the EU on Scotland and encouraging public engagement on EU issues. This activity is in stark contrast to the House of Lords where there is little comparable public engagement and consequently much of the work which it carries out on behalf of the public goes unnoticed.

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<sup>51</sup> <http://www.scottish.parliament.uk/s3/committees/europe/reports2008.htm>

## **Part 4, Conclusions: Observations and Lessons Learned**

We explained in part 1 of our paper that, as part of improving public engagement in relation to the EU, the European Commission both promoted deliberative democracy and emphasised the importance of connecting citizens' debates to representative political bodies. Our two case studies have contrasted a long established representative institution, the House of Lords, with a new institution focused on promoting deliberative democracy, the Scottish Parliament. The former has been highly effective in utilising its formal scrutiny role in holding the UK government to account on EU issues. However, an emphasis on a representative model of democracy has limited any public engagement within this process. The latter, without any formal scrutiny role, has struggled to hold the Scottish Government to account on EU issues. At the same time it has been continually innovative in seeking to raise public awareness of EU issues.

The existing formal relationship between the UK Government and the Houses of Parliament led somewhat logically to the development of a formal mechanism of EU scrutiny by both the House of Lords and the House of Commons. Through its system of Sub-Committees, high expertise, inquiries and regular correspondence with the Government, the House of Lords has used that mechanism to particular effect.

On the other hand, while the Scottish Parliament has responsibility for implementing a significant proportion of EU legislation, it has no formal right to scrutinise the positions adopted by the Scottish Government or the UK Government in relation to EU matters. Nevertheless, it has consistently sought to improve its dialogue with Scottish Ministers and this has been relatively successful, requiring increasingly detailed information from the Europe Minister on the actions of the Scottish Government, including a description of progress and the implications for Scotland.

While the Scottish Parliament may lack the formal scrutiny mechanism, we have observed a number of examples where it has sought to engage Scottish civil society and its citizens in debate on EU issues. This engagement reflects the overall ethos of the Scottish Parliament, which has explicitly sought to be particularly open, inclusive and participatory.

The House of Lords uses its formal mechanism well but the success of that mechanism does not reflect extensive efforts to engage civil society on EU issues. We have observed that it does so to some extent through its inquiries, which have also been an opportunity to secure media coverage for its work, although its inquiries focus on expertise rather than broad

public consultation. It has done little to engage citizens, nor any sectors of civil society, in its regular scrutiny of EU documents. While there may be a recognition that public engagement is desirable, there is not an expectation of it in the House of Lords.

So, on the one hand our case studies have demonstrated the need for a formal mechanism through which the legislature can hold the Executive to account on EU issues. This should include a scrutiny reserve and the need for a free flowing dialogue between the Government and Parliament, both at regional and Member State level in accordance with the constitutional arrangements of each Member State. On the other hand, we have also demonstrated the need for wider public engagement within the process. Consequently, as one contribution to addressing the growing public disenchantment with the EU, we suggest that Member State and regional Parliaments throughout the EU look towards a scrutiny model based on formal arrangements similar to those of the House of Lords and core principles along the lines of the Scottish Parliament.