European and External Affairs Committee

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Memorandum by Professor Daniel Wincott, Blackwell Law and Society Chair and Dr. Rosanne Palmer, Leverhulme Early Career Fellow, Cardiff University

Purpose – Written Evidence to the Subsidiarity Inquiry

Background

1. Article 5 of the current Treaty-base for the European Union (EU) sets out definitions of the principles of subsidiarity and proportionality:

"The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.

In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.

Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty."

The second sentence of this paragraph in effect provides the EU definition of subsidiarity, while the third refers to proportionality.

2. It is worth stressing that this legal definition of EU subsidiarity is not identical with the definition preferred within some federal States and by some commentators. In particular, the EU definition focuses on the relationship between the European level and the Member States, and in itself offers no perspective on the structure of government within the Member States.

3. Although the Lisbon Treaty is, in our view, unlikely to be wholly revived - at least in the near future - some aspects of the Treaty may well be implemented piecemeal. We believe that the Protocol on the Application of the Principles of Subsidiarity and Proportionality, or something like it, may well fall into this category. Therefore we will partly frame our discussion around the terms of this Protocol.

4. The principle of proportionality has been used extensively by the Court of Justice. While subsidiarity is an explicitly stated legal principle in the EU Treaties, it has not been widely used in decisions of the Court of Justice – indeed it is hard to think of a Case in which the Court's decision has hinged on the subsidiarity principle. There has been an extensive debate among legal and political scholars over whether the principle of subsidiarity is 'justiciable'; that is, in effect, whether it provides a legal principle of sufficient clarity and precision for the Court to rely on it in a judgment. Many commentators who insist that subsidiarity is, in principle, justiciable nevertheless explicitly acknowledge that its effect is, for the most part, political. It has had, they argue, an impact on the processes of proposing and deciding on legislation within the EU.

5. In this context, we must recall that the EU – in the form of the Commission – can, in principle, make legislative proposals only in areas where the Member States have already granted the EU the competence to act. There are sometimes disagreements about whether the EU does indeed enjoy competence in a particular field – and a fierce debate has raged about where the 'competence to decide who has competence' resides (the so-called 'competence-competence' question). In practical terms, questions about whether the EU has acted beyond its powers tend to have been raised in terms of whether the appropriate 'Treaty-base' has been used. In particular, whether legislation passed under Treaty provisions which allow for qualified majority decisions ought to have been decided under provisions which required unanimity – especially where one or more Member States were in a losing minority. In these circumstances, where the Court of Justice agreed that an inappropriate Treaty-base had been used, it has been prepared to strike down Union legislation.

6. While the Lisbon Treaty Protocol discusses proportionality as well as subsidiarity, in terms of new methods for the "application "of principles, the Protocol focuses more on the latter concept – its Articles 6, 7 and 8 refer to subsidiarity alone, not to proportionality. In other words, the Protocol focuses on strengthening the means for applying the principle of subsidiarity rather than proportionality.

7. For both National (state-wide) Parliaments and regional (sub-state) Legislatures, the key aspect of their work with regard to EU affairs has been the exercise of their scrutiny function. The two most significant facets of this have been the scrutiny of their respective executives and the scrutiny of EU legislation. It is this latter aspect where the Protocol on subsidiarity may have its most significant impact. Currently, scrutiny procedures vary widely across the parliaments of the Member States, and within Member States, from Land to Land, Community to Community, region to region. The extent to which the competent committees avail themselves of the instruments offered by their standing orders also varies considerably.

8. Enhancing the role of legislatures in the scrutiny of EU legislation is the main proposal for strengthening the application of subsidiarity. This is, in our view, a valuable suggestion, which may have some potential to re-balance relations between legislatures and executives within the EU as well as guarding against the Union encroaching into areas of aspects of law and policy properly left to Member State governmental arrangements.

9. While the Protocol may be regarded as a step in the right direction several factors mean that even National (state-wide) Parliaments with well-established EU scrutiny traditions may find it difficult to use its provisions effectively to block proposed legislation on subsidiarity grounds. These include the eight-week period for Parliaments to scrutinise proposals which imposes a tight timeframe for scrutiny, especially given the volume of legislative proposals emanating from the EU and the thresholds for the operation of the 'Yellow' and 'Orange' Card systems (1/3 and a simple majority of Parliaments respectively). Perhaps most important, however, is the continuing

secrecy of the decision-making process in the Council of Ministers. Legislative bargains may be being made between the Permanent Representations and in (or around) the Council, while Parliamentarians scrutinise the initial legislative proposal. This makes the scrutiny of legislation – and more generally holding governmental representatives in the Council to account – very difficult.

10. While the Protocol does refer to the Court of Justice in relation to infringements of subsidiarity in legislative acts, Member States – that is the executive branch of state-wide governments – still appear to act as gatekeepers in the sense that only they can bring these actions to Court under the terms of the Protocol (except, perhaps, if the legal order of a State should require that the executive bring an action notified to it by Parliament).

11. The focus of the Protocol is on enhancing the role of 'National' – that is state-wide – Parliaments, although some Protocol Articles (notably Articles 2, 5 and 6) mention aspects of 'the regional and local dimension'. As highlighted above, key difficulties faced by EU affairs committees in national parliaments in handling EU business include timing, workload and resources.

12. The challenges facing sub-state legislatures are greater still. The most significant Protocol provision for sub-state legislatures is Article 6, which touches on the prerogatives of 'regional parliaments with legislative powers'. Article 2 may provide the basis for the Commission to consult directly with regional/sub-state parliaments and governments. However, formal representations to the Presidents of the European Parliament, Council and Commission (under Article 6) can only be made on the part of National – in other words state-wide – Parliaments. That is, the form – and perhaps even the existence – of arrangements to give voice to regional/sub-state parliaments "is a matter for National (state-wide) Parliaments to decide".

13. EU affairs committees in sub-state parliaments have, to date, also encountered the same problems of timing, workload and resources faced by National (statewide) Parliaments, often in more acute forms, as well as a range of other constitutional and procedural issues that have made their effective engagement difficult. Overall, these include:

Timescale

Timeliness of information

Workload and resources

The cross-cutting nature of issues

Transparency/scrutiny

Their position vis-à-vis executives

The party political system

14. The first four issues listed above are those of key relevance to the discussion on how the subsidiarity Protocol may be applied in practice: we will focus our attention on them.

a) Timescale. The question of timescale is central to effective engagement. The eight weeks proposed by the Protocol is extremely tight in practice, as demonstrated by the procedural trials initiated by COSAC (Conference of Community and European Affairs Committees of Parliaments of the European Union). One potential response, used in Scotland and also suggested by the Austrian Länder, is to focus on the priorities of forthcoming presidencies and the annual work and legislative programmes of the Commission as a method for identifying core issues of interest.

b) Timeliness of information. The timely arrival of relevant information is also a procedural consideration as the information flow must be guaranteed effectively. In Germany, the Landtage would likely anticipate electronic distribution of documents received from the EU via the Bundesrat.

c) Workload and resources. The sheer volume of information that will be sent under the proposed Protocol will also create or exacerbate existing resource issues, particularly for sub-state parliaments and assemblies. The lack of available administrative support, in some cases coupled with a lack of specialist EU knowledge, creates practical logistical problems in terms of dealing with the number of documents generated, particularly within the timescale indicated by the Protocol.

d) Cross-cutting issues. The cross-cutting nature of EU legislative proposals can be problematic in its own right, but in the context of the timescale foreseen by the Protocol, it becomes crucial. The overlap between EU and subject committees has, for many sub-state parliaments, created problems in deciding the appropriate role/contribution of the different committees for each proposal. In Germany, the Landtag presidium often decides which committee should take the lead on an issue. However, such a system may become ineffective with the eight week timescale envisaged.

15. Discussions on handling the new Protocol have been taking place in the main federal and devolved Member States of the EU in accordance with the Protocol's own standpoint that the inclusion of regional parliaments within the system be managed and decided internally by individual Member States.

16. In the Federal Republic of Germany, the key forum will be the Bundesrat, the organ responsible for representing Länder interests at the federal level. However, the Bundesrat is composed of representatives of Land executives. For the Landtage, it is proposed that each Land regulates the relationship between executive and parliament individually. This will likely lead to variation in terms of what is agreed in each of the 16 Länder and the extent to which effective use is subsequently made of the available instruments (as, indeed, is true of the existing standing orders). The presidents of the Landtage, meeting in 2005, also argued in favour of forcing the Länder executives to

report back on the extent to which Landtage concerns were taken into account, though it is unlikely many Landtage would achieve the inclusion of this principle in agreements with their respective executives in practice. The role of the Bundesrat as a national-level parliamentary organ potentially allows the Länder executives to dominate this process in Germany.

17. To enhance its effective subsidiarity-scrutiny of EU legislative proposals the National Assembly for Wales might focus on developing relationships and structures within the UK. There are several factors which point towards the potential viability of such a strategy. First, although the general thrust of the Protocol is towards scrutiny by Member State legislatures of the EU executive, there may be a stronger common interest in protecting devolved competences between the National Assembly and the Welsh Assembly Government (and indeed other devolved legislatures and executives) than is the case at the Member State level. It may be possible to develop joint scrutiny – perhaps including supportive institutional arrangements – among the devolved legislatures and/or executives. Equally, it may be worth exploring potential modalities of cooperation with the UK Parliament, given that the strongest thrust of the Protocol is towards enhancing the role of Member State legislatures in monitoring subsidiarity. In this context, it is worth recalling the paper presented by Peter Hain – on Europe and the Regions (CONV 526/03 CONTRB 221 3 February 2003) – to the European Convention, which may have been one original source for the Protocol emerged and is widely regarded as one of the most radical proposals to improve the position of 'regions' within the EU institutional framework.

18. Equally, however, there are a number of difficulties that may face any attempt to construct robust intra-UK process to use subsidiarity to protect devolved competences from potential EU encroachments. First, even in the Protocol, the Member States, and particularly their executive branch, continue to play the pivotal role between the EU level and most public institutions within states. Second, the asymmetrical character of UK devolution may make formalising intra-UK cooperation difficult – either among devolved actors (legislatures and/or executives) or, especially including UK-wide institutions. In this respect, the most vocal proponents of the prerogatives of the Parliament at Westminster in relation to the EU may not be the easiest of allies for members of devolved legislatures and executives. While there are certainly examples where it has operated effectively (perhaps particularly in relation to the EU), the institutional framework for the coordination of devolved arrangements – such as the Joint Ministerial Committees at the governmental level – is generally rather underdeveloped and frequently relies on informal contact at official level. Labour Party incumbency of the leading positions in government across Wales, Scotland and the UK helped devolution to bed down relatively smoothly – perhaps initially meaning relatively few demands were made of the formal institutions for managing inter-governmental arrangements within the UK. These arrangements are likely to prove increasingly problematic especially given that the political make-up of legislatures and governments has changed, and may change further.

19. A second strategy for the National Assembly would be to look towards European partnership to monitor and scrutinise the application of subsidiarity. In this context, the Committee of the Regions clearly has the strongest institutional position within the EU framework. However, this Committee represents a large and diverse set of sub-state institutions, many of which do not have powers to legislate. It also combines executive and parliamentary representation. So, it may be worth exploring the possibility of developing the role of the Conference of European Regions with Legislative Power (REGLEG) and perhaps its sibling the Conference of European Regional Legislative Assemblies (CALRE). However, such a strategy would face challenges in developing effective scrutiny capacity, getting timely access to legislative proposals and generally raising the profile and role of regional legislative assemblies and their collective organisations within the EU.