Constitutional and Legislative Affairs Committee

Meeting Venue:
Committee Room 2 - Senedd

Meeting date:
19 May 2014

Meeting time:
13.30

Cynulliad Cenedlaethol Cymru
National Assembly for Wales

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Agenda

1 Introduction, apologies, substitutions and declarations of interest

2 Instruments that raise no reporting issues under Standing Order 21.2 or 21.3 (Pages 1 - 2)

CLA(4)14-14 - Paper 1 - Statutory instruments with clear reports

Negative Resolution Instruments

CLA400 - The Federation of Maintained Schools (Wales) Regulations 2014
Negative procedure; Date made: 29 April 2014; Date laid: 30 April 2014; Coming into force date: 22 May 2014.

CLA401 - The Education (Small Schools) (Wales) Order 2014
Negative procedure; Date made: 29 April 2014; Date laid: 30 April 2014; Coming

into force date: 22 May 2014.

CLA402 - The Plant Health (Wales) (Amendment) (No. 2) Order 2014
Negative procedure; Date made: 6 May 2014; Date laid: 8 May 2014; Coming into force date: 31 May 2014.

3 Other Legislation

SICM 3 - The Public Bodies (Abolition of Food from Britain) Order 2014 (Pages 3 - 21)
CLA(4)-14-14 - Paper 2 - Statutory Instrument Consent Memorandum;
CLA(4)-14-14 - Paper 3 - Order;
CLA(4)-14-14 - Paper 4 - Explanatory Memorandum.

4 Supplementary Legislative Consent Memorandum: Deregulation Bill
(Pages 22 - 29)
CLA(4)-14-14 - Paper 5 - Supplementary Legislative Consent Memorandum;
CLA(4)-14-14 - Paper 6 - Legal Advice Note

5 Wales Bill Legislative Consent Memorandum (Pages 30 - 47)
CLA(4)-14-14 - Paper 7 - Legislative Consent Memorandum;
CLA(4)-14-14 - Paper 8 - Written Statement;
CLA(4)-14-14 - Paper 9 - Legal Advice Note

6 Subsidiarity Report September 2013 to April 2014 (Pages 48 - 58)
CLA(4)-14-14 - Paper 10 - Report

7 Paper to Note (Pages 59 - 91)
CLA(4)-14-14 - Paper 11 - UK Government review of the balance of competences

8 Motion under Standing Order 17.42 to resolve to exclude the public from the meeting for the following business:
(vi) the committee is deliberating on the content, conclusions or recommendations of a report it proposes to publish; or is preparing itself to take evidence from any

person;

(ix) any matter relating to the internal business of the committee, or of the Assembly, is to be discussed.

Consideration of Committee response to UK Government review of balance of competences (Pages 92 - 93)
CLA(4)-14-14 - Paper 12

Constitutional and Legislative Affairs Committee
Statutory Instruments with Clear Reports
19 May 2014

CLA400 - The Federation of Maintained Schools (Wales) Regulations 2014

The Education Wales Measure 2011 provided local authorities with the power to establish a federation of two or more schools using a process to be set out in regulations. These Regulations set out the process local authorities and governing bodies are required to follow to federate, de-federate or dissolve a federation; set out the constitution and membership of a federated governing body, which is between 15 and 27 governors; impose a cap of six on the number of schools which may federate and set out the governance framework within which federated governing bodies operate and conduct their business. In addition they consolidate, with some amendments, the Federation of Maintained Schools and Miscellaneous Amendments (Wales) Regulations 2010 and revoke those Regulations.

CLA401 - The Education (Small Schools) (Wales) Order 2014

Procedure: **Negative**

This Order identifies a small maintained school for the purposes of Chapter 1 of Part 2 of the Education (Wales) Measure 2011 ("the 2011 Measure"). That chapter sets out the statutory framework for the federation of maintained schools. Section 11 of the 2011 Measure provides that a local authority may make proposals to federate schools and that certain provisions relating to publication and consultation do not apply to a proposal to federate only small schools.

CLA402 - The Plant Health (Wales) (Amendment) (No.2) Order 2014

Procedure: **Negative**

This Order amends the Plant Health (Wales) Order 2006 which contains measures to prevent the introduction and spread of harmful plant pests and diseases. It extends the existing statutory notification scheme for certain tree species to include elm planting material and also implements

Commission Implementing Directive 2014/19/EU and Commission Implementing Decision 2014/62/EU and Commission Implementing Decision 2014/62/EU.

dissolve a federation; set out the constitution and membership of a federated governing body, which is between 15 and 27 governors; impose a cap of six on the number of schools which may federate and set out the governance framework within which federated governing bodies operate and conduct their business. In addition they consolidate, with some amendments, the Federation of Maintained Schools and Miscellaneous Amendments (Wales) Regulations 2010 and revoke those Regulations.

STATUTORY INSTRUMENT CONSENT MEMORANDUM

The Public Bodies (Abolition of Food from Britain) Order 2014

1. This Statutory Instrument Consent Memorandum is laid under Standing Order ("SO") 30A.2. SO 30A prescribes that a Statutory Instrument Consent Memorandum must be laid and a Statutory Instrument Consent Motion may be tabled before the National Assembly for Wales ("Assembly") if a UK Statutory Instrument makes provision in relation to Wales amending primary legislation within the legislative competence of the Assembly.

2. The Public Bodies (Abolition of Food from Britain) Order 2014 was laid before Parliament on 6 May 2014 and before the Assembly on 9 May 2014. The order can be found at:

   http://www.legislation.gov.uk/ukdsi/2014/9780111114599

3. Section 9(6) of the Public Bodies Act 2011 requires the consent of the Assembly in circumstances where an Order made under sections 1 to 5 of that Act makes provision which would be within the legislative competence of the Assembly if it were contained in an Act of the National Assembly.

Summary of the Order and its objective

4. The objective of the Order is to abolish the council known as Food from Britain (FFB), established by section 1 of the Agricultural Marketing Act 1983. This Order simply repeals the Agricultural Marketing Act 1983 and dissolves Food from Britain in law.

5. The Order extends to Wales, England, Scotland and Northern Ireland,

Provision to be made by The Public Bodies (Abolition of Food from Britain) Order 2014 for which consent is sought

6. Article 2 of the draft Order abolishes the council known as "Food from Britain" established by section 1 of the Agricultural Marketing Act 1983. It also provides for the transfer of the property, rights and liabilities of the council to the Secretary of State for the Environment, Food and Rural Affairs.

7. Article 3 of the draft Order provides that the Secretary of State must prepare a report of what has been done in the discharge of Food from Britain's functions between 1st April 2013 and the date of its abolition. The Secretary of State must prepare a statement of accounts for that period for Food in Britain and submit them to the Comptroller and Auditor General. The Comptroller and Auditor General must examine, certify and report on that statement of accounts and send a copy of the certified statement to the Welsh Ministers. The Welsh Ministers must then lay both reports before the National Assembly for Wales.

8. Article 4 and the Schedule to the Order repeals the Agricultural Marketing Act 1983 in its entirety and also makes necessary consequential amendments to other legislation, to remove references to that Act, or Food from Britain that are present in other legislation.

9. It is the view of the Welsh Government that the provisions of the Public Bodies (Abolition of Food from Britain) Order 2014 fall within the legislative competence of the National Assembly for Wales under Part 1 of Schedule 7 to the Government of Wales Act 2006 in relation to subjects listed under headings 1 (Agriculture, forestry, animals, plants and rural development), 4, (Economic Development) and 8 (Food).

Why is it appropriate for the Order to make this provision

10. The Welsh Government considers that it is appropriate to use a single legislative vehicle to deal with the abolition of Food from Britain. Food from Britain was a UK wide body; the most efficient way for it to be abolished in all four countries at the same time will be through a single order. Whilst the Welsh Government and the Assembly have the requisite powers to effect the abolition in Wales, the use of the Order to effect the abolition in England, Wales, Scotland and Northern Ireland appears to represent the most practicable and proportionate method to take this forward.

11. FFB is a defunct body which has not operated since 2009. It has no staff, premises, assets or liabilities. Its former functions are carried out by other Government departments and industry bodies. This Order will simply serve to dissolve FFB in law. Its abolition will not impact on business and will generate savings for the taxpayer. The Public Bodies Act (PBA) 2011 is seen as an appropriate and effective vehicle for abolishing FFB.

12. Whilst the Agricultural Marketing Act remains in force, DEFRA continues to have a legal obligation to publish Annual Report and Accounts for FFB which must be laid before all UK Governments each year. Despite having no activity to report, the preparation, auditing and printing of the report costs DEFRA in the region of £5,000 per annum. Repealing the Agricultural Marketing Act will eliminate this unnecessary cost to the taxpayer.

Financial implications

13. There are no financial implications arising from the abolition of Food from Britain. Food from Britain has no staff and the abolition is merely an administrative step to reduce the number of existing redundant public bodies.

Alun Davies AM
Minister for Natural Resources and Food
May 2014

Draft Order laid before Parliament under section 11 of the Public Bodies Act 2011, for approval by resolution of each House of Parliament after the expiry of the 40-day period referred to in section 11(4) of that Act.

D R A F T S T A T U T O R Y I N S T R U M E N T S

2014 No.

AGRICULTURE

PUBLIC BODIES

The Public Bodies (Abolition of Food from Britain) Order 2014

Made - - - - ***

Coming into force in accordance with article 1

The Secretary of State, in exercise of the powers conferred by sections 1(1), 6(1) and (5), 24(1) and 35(2) of the Public Bodies Act 2011(**a**) ("the Act"), makes the following Order.

In accordance with section 8 of the Act, the Secretary of State considers that this Order—

(a) serves the purpose of improving the exercise of public functions, having had regard to the factors set out in section 8(1) of the Act;

(b) does not remove any necessary protection or prevent any person from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise.

The Scottish Parliament has consented to the making of this Order in so far as its consent is required by section 9(1) of the Act.

The Northern Ireland Assembly has consented to the making of this Order in so far as its consent is required by section 9(3) of the Act.

The National Assembly for Wales has consented to the making of this Order in so far as its consent is required by section 9(6) of the Act.

The Secretary of State has carried out consultation in accordance with section 10 of the Act.

The Secretary of State has consulted the Scottish Ministers in accordance with section 88(2) of the Scotland Act 1998(**b**) and the Welsh Ministers in accordance with section 63(1) of the Government of Wales Act 2006(**c**).

(**a**) 2011 c. 24.
(**b**) 1998 c. 46.
(**c**) 2006 c. 32.

A draft of this Order and an explanatory document containing the information required in section 11(2) of the Act have been laid before Parliament in accordance with section 11(1) after the end of the period of twelve weeks mentioned in section 11(3).

In accordance with section 11(4) of the Act, the draft of this Order has been approved by resolution of each House of Parliament after the expiry of the 40-day period referred to in that provision.

Citation, extent and commencement

1.—(1) This Order may be cited as the Public Bodies (Abolition of Food from Britain) Order 2014.

(2) The repeals and revocations made by article 4 and the Schedule have the same extent as the provisions to which they relate.

(3) This Order comes into force on the day after the day on which it is made, except as provided by paragraph (4).

(4) The entry in the table of repeals in the Schedule relating to the Public Bodies Act 2011 comes into force two days after the day on which this Order is made.

Abolition of Food from Britain

2.—(1) The council established by section 1 of the Agricultural Marketing Act 1983(**a**) (Food from Britain) is abolished.

(2) The property, rights and liabilities of the council are transferred to and vest in the Secretary of State for Environment, Food and Rural Affairs.

Final report and accounts

3.—(1) The Secretary of State must prepare a report of what has been done in the discharge of Food from Britain's functions during the periods—

(a) beginning with 1st April 2013 and ending with 31st March 2014; and

(b) beginning with 1st April 2014 and ending immediately before the day on which this article comes into force.

(2) The Secretary of State must—

(a) prepare a statement of accounts of Food from Britain in respect of the periods referred to in paragraph (1)(a) and (b), and

(b) send a copy of the statement to the Comptroller and Auditor General.

(3) The Comptroller and Auditor General must—

(a) examine, certify and report on the statement prepared under paragraph (2), and

(b) send a copy of the certified statement and of the Comptroller and Auditor General's report to the Secretary of State, the Scottish Ministers, the Welsh Ministers and the Department of Agriculture and Rural Development in Northern Ireland as soon as possible.

(4) The Secretary of State must lay the final document before each House of Parliament.

(5) The Scottish Ministers must lay the final document before the Scottish Parliament.

(6) The Welsh Ministers must lay the final document before the National Assembly for Wales.

(7) The Department of Agriculture and Rural Development in Northern Ireland must lay the final document before the Northern Ireland Assembly.

(**a**) 1983 c. 3.

(8) In this article, "the final document" means a document consisting of—

(a) a copy of the report prepared under paragraph (1), and

(b) a copy of the statement and of the report sent under paragraph (3)(b).

Repeals and revocations

4. The provisions mentioned in the Schedule are repealed or revoked to the extent specified.

Name
Parliamentary Under Secretary of State
Date Department for Environment, Food and Rural Affairs

SCHEDULE

Article 4

Repeals and revocations

Table of repeals

Short title	*Extent of repeal*
Parliamentary Commissioner Act 1967(**a**)	In Schedule 2, the entry relating to Food from Britain.
Agriculture Act 1967(**b**)	Part 4.
House of Commons Disqualification Act 1975(**c**)	In Schedule 1, in Part 3, the entry relating to the Chairman of Food from Britain.
Northern Ireland Assembly Disqualification Act 1975(**d**)	In Schedule 1, in Part 2, the entry relating to Food from Britain.
Agricultural Marketing Act 1983	The whole Act.
Agriculture Act 1986(**e**)	Section 8. Section 24(2) and (3). In section 24(7), "8,".
Freedom of Information Act 2000(**f**)	In Schedule 1, in Part 6, the entry relating to Food from Britain.
Scottish Public Services Ombudsman Act 2002(**g**)	In Schedule 2, in Part 2, paragraph 70.
Natural Environment and Rural Communities Act 2006(**h**)	In Schedule 7, paragraph 11.

(**a**) 1967 c. 13. Schedule 2 was substituted by article 2 of S.I. 2011/2986. There are amendments to Schedule 2, but none is relevant.
(**b**) 1967 c. 22. Repeals to provisions of Part 4 were made by the Statute Law (Repeals) Act 2004 (c. 14). Section 2 of the Agricultural Marketing Act 1983 transferred the functions of the Central Council for Agricultural and Horticultural Co-operation to Food from Britain.
(**c**) 1975 c. 24.
(**d**) 1975 c. 25.
(**e**) 1986 c. 49. Repeals to sections 8 and 24 were made by the Statute Law (Repeals) Act 2004.
(**f**) 2000 c. 36. There are amendments to Schedule 1 that are not relevant to this Order.
(**g**) 2002 asp 11.
(**h**) 2006 c. 16.

Short title	*Extent of repeal*
Public Bodies Act 2011	In Schedule 1, the entry relating to Food from Britain.

Table of revocations

Title	*Extent of revocation*
The Agricultural Marketing Act 1983 (Commencement) Order 1983(**a**)	The whole Order.
The Agriculture Act 1986 (Commencement No. 3) Order 1986(**b**)	The whole Order.
The Companies Act 1989 (Eligibility for Appointment as Company Auditor) (Consequential Amendments) Regulations 1991(**c**)	In the Schedule, paragraph 48.
The House of Commons Disqualification Order 1993(**d**)	In the Schedule— (a) in paragraph 2, the entry relating to Food from Britain, (b) in paragraph 4, the entry relating to the Chairman of Food from Britain.
The Agriculture Act 1986 (Commencement No. 6) Order 1998(**e**)	The whole Order.
The Scotland Act 1998 (Cross-Border Public Authorities) (Specification) Order 1999(**f**)	In the Schedule, the entry relating to Food from Britain.
The Scotland Act 1998 (Cross-Border Public Authorities) (Adaptation of Functions etc) Order 1999(**g**)	In Schedule 1, the entry relating to Food from Britain. Schedule 11.
The Northern Ireland Act 1998 (Designation of Public Authorities) Order 2001(**h**)	In Schedule 1, the entry relating to Food from Britain.
The Ministry of Agriculture, Fisheries and Food (Dissolution) Order 2002(**i**)	Article 3(1)(f) (but not the "or" at the end of that sub-paragraph).
The Freedom of Information Act 2000	In Schedule 1, in Part 1, the entry relating to

(**a**) S.I. 1983/366 (C. 13).
(**b**) S.I. 1986/1596 (C. 57).
(**c**) S.I. 1991/1997, to which there are amendments not relevant to this Order.
(**d**) S.I. 1993/1572.
(**e**) S.I. 1998/879 (C. 19).
(**f**) S.I. 1999/1319, to which there are amendments not relevant to this Order.
(**g**) S.I. 1999/1747, to which there are amendments not relevant to this Order.
(**h**) S.I. 2001/1294.
(**i**) S.I. 2002/794, to which there is an amendment not relevant to this Order.

Title	*Extent of revocation*
(Commencement No. 2) Order 2002(**a**)	Food from Britain.
The Northern Ireland Act 1998 (Modification of Enactments) Order 2002(**b**)	Article 7.
The Government Resources and Accounts Act 2000 (Audit of Public Bodies) Order 2003(**c**)	Article 13. In the Schedule, the entry relating to Food from Britain.
The Companies Act 2006 (Consequential Amendments etc) Order 2008(**d**)	In Schedule 1, in Part 1, paragraph 1(bb).

EXPLANATORY NOTE

(This note is not part of the Order)

This Order abolishes the council known as Food from Britain established by section 1 of the Agricultural Marketing Act 1983 (c. 3). It transfers to, and vests in, the Secretary of State for Environment, Food and Rural Affairs the property, rights and liabilities of the council, and it makes provision for the preparation of a final report and statement of accounts. It also makes consequential repeals and revocations.

No impact assessment has been produced as no cost to the business or voluntary sectors is foreseen.

(**a**) S.I. 2002/2812 (C. 86), to which there are amendments not relevant to this Order.
(**b**) S.I. 2002/2843.
(**c**) S.I. 2003/1326, to which there are amendments not relevant to this Order.
(**d**) S.I. 2008/948, to which there are amendments not relevant to this Order.

EXPLANATORY DOCUMENT TO

THE PUBLIC BODIES (ABOLITION OF FOOD FROM BRITAIN) ORDER 2014

2014 No. [XXXX]

1. This explanatory document has been prepared by the Department for Environment, Food and Rural Affairs and is laid before Parliament under section 11(1) of the Public Bodies Act 2011.

2. Purpose of the instrument

2.1 To abolish the body known as Food from Britain (FFB), established by section 1 of the Agricultural Marketing Act 1983 as part of the Government's public body reform programme.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None

4. Legislative Context

4.1 FFB was established as a Non-Departmental Public Body (NDPB) by the Agricultural Marketing Act 1983 and came into existence on 23rd March that year, originally to develop and coordinate the marketing of UK food. FFB later focused on promoting exports and assisting the marketing of quality regional food until its administrative closure in 2009.

4.2 The FFB Council took a decision in 2008 to cease FFB's activities, following a reduction in its grant in aid by Defra Ministers. The decision to close FFB was announced in a written Ministerial Statement[1] to Parliament on 26th March 2008, by the then Secretary of State for Environment, Food and Rural Affairs. FFB ceased operating in March 2009.

4.3 Whilst FFB no longer exists as an operating body, the legislation which established FFB (the Agricultural Marketing Act 1983) does not provide for its abolition. Therefore, FFB was included in Schedule 1 to the Public Bodies Act 2011 in order to achieve its legislative dissolution. An announcement on Defra's proposals to reform a number of public bodies, including FFB, was made in July 2010 by the then Secretary of State for Environment, Food and Rural Affairs.

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1 http://www.publications.parliament.uk/pa/cm200708/cmhansrd/cm080326/wmstext/80326m0001.htm#column_10WS

4.4 The Minister for the Cabinet Office announced the outcome of the Public Bodies Bill Review on 14 October 2010, which included the proposal to abolish the FFB. The Public Bodies Review examined whether a body's functions are needed and, if they are, whether the body should continue to operate at arm's length from Government. This decision was based upon three tests:

- Does it perform a technical function?
- Do its activities require political impartiality?
- Does it need to act independently to establish facts?

5. Territorial Extent and Application

5.1 The Order extends to England and Wales, Scotland and Northern Ireland, except in so far as related repeals have the same extent as the provisions to which they relate.

6. European Convention on Human Rights

6.1 George Eustice, Parliamentary Under Secretary of State for the Department for Environment, Food and Rural Affairs, has made the following statement regarding Human Rights:

> "In my view the provisions of the Public Bodies (Abolition of Food from Britain) Order 2014 are compatible with the Convention Rights."

7. Policy background

7.1 Food from Britain was established in 1983 as a Non-Departmental Public Body (NDPB) by the Agricultural Marketing Act 1983 to organise, develop, promote, encourage and coordinate the marketing in the UK and elsewhere of UK agricultural and horticultural produce, fish (other than sea fish) and fish products and any other food produced or processed in the UK. FFB later focused on promoting exports and assisting the marketing of quality regional food. It is the joint responsibility of the four agriculture Ministers in the UK but Defra acts as its sponsor department.

7.2 FFB provided organisations with a range of business development and information services such as market assessment reports, trade missions and support at international food and drink exhibitions to help break into and maintain a presence in international markets. It had a network of independent overseas offices in the key primary markets of Western Europe as well as in North America and Scandinavia and representatives in Eastern Europe and the Far East.

7.3 FFB also took the lead in the delivery of a national programme of activity to support the quality regional food sector in England. The programme,

for which funding ended in 2007/08, focussed on trade development, consumer awareness and increasing business competitiveness. FFB received approximately £5m per year in grant-in-aid from Defra (on behalf of the four UK Agriculture Departments) for export promotion work, in addition to £1m per annum paid by Defra for its regional food work. It also generated further income from industry and by working with industry organisations.

The administrative closure of FFB

7.4 Against the background of the Comprehensive Spending review (CSR) in 2007/08 and changing Departmental priorities, Defra decided to reduce the amount of grant-in-aid available to FFB for 2008/09 to £4 million, with the expectation that the funding would come to an end before the conclusion of that CSR period (2008/09 - 2010/11).

7.5 The FFB Council took the view that FFB could not continue to function with the reduced level of Government funding and concluded that FFB should cease operating at the end of the 2008-09 financial year. Ministers in Defra and the Devolved Administrations accepted this. Hilary Benn, the then Secretary of State for Defra, made a Written Ministerial Statement before Parliament in March 2008 announcing that FFB would be closed.

7.6 FFB ceased operating and vacated its former offices in March 2009. All of FFB's staff were made redundant or retired with the exception of one member of staff with responsibility for some of the delivery work relating to the EU Protected Food Name Scheme. That person transferred with that work to ADAS UK Ltd in 2009 following a tender exercise by Defra. FFB's residual responsibilities, assets and liabilities were subsequently transferred to Defra. This included the legal ownership rights to the *Food from Britain* name and to the www.foodfrombritain.com domain name, which Defra still retains. The closedown was carried out in anticipation of legislation to dissolve FFB in law.

7.7 As part of the closedown work Defra explored with FFB the possibility of successor arrangements. A number of organisations expressed an interest in licensing the FFB brand and taking over elements of its business, but were unwilling to take on the TUPE (Transfer of Undertaking (Protection of Employment) Regulations) liabilities.

7.8 Following the decision to cease FFB activities, Defra accepted responsibility for the residual liability of the FFB pensions Scheme. In order to safeguard future payments, the FFB Trustees purchased a bulk annuity policy with a commercial insurer to provide for the scheme member's pension benefits to be paid in full. The majority of the cost was met by the scheme from its assets. Defra agreed to fund the balance, which was in the region of £8 million.

Residual obligations

7.9 Whilst the Agricultural Marketing Act remains in force, Defra and the Devolved Administrations continue to have a legal obligation to publish Annual Report and Accounts for FFB which must be laid before UK Parliament and each National Assembly/Parliament each year. Despite having no activity to report, the preparation, auditing and printing of the report costs Defra in the region of £5,000 per annum. By repealing the Agricultural Marketing Act, the abolition Order will eliminate this unnecessary cost to the taxpayer.

FFB legacy

7.10 Following the cessation of FFB's activities in 2009, advice and support to UK food and drink exporters was made available from UK Trade & Investment, as well as Scottish Development International, Welsh Government's Food and Market Development Division and Invest Northern Ireland. FFB's former network of independent International offices (now called the Green Seed Group) continues to offer consultancy services to UK exporters of food and drink on a commercial basis. The Food and Drink Federation continues to host a webpage[2] which signposts the main organisations that continue to offer export support to British food and drink companies. The Open to Export website[3] provides information on exporting, contacts and case studies to help exporters. The Food and Drink Exporters Association was set up specifically to help exporters in the sector and it works closely with Defra and UK Trade and Investment. In addition, as part of the Export Action Plan (see paragraph 7.12) there is a specific action for industry and government to collaborate in the development of export information tools. The delivery work relating to the EU Protected Food Name Scheme transferred to Defra in 2012.

Government support for food and drink exports

7.11 Despite the closure of FFB, exports in the agri-food sector continue to grow. They increased from £13.2bn in 2008 (FFB's final full year of operation) to £18.2bn in 2012. The Government is committed to working closely with industry stakeholders to boost exports, promote innovation and encourage further growth, particularly amongst SMEs.

7.12 The Food and Drink Exports Action Plan, which applies to businesses across all of the UK, is key to this activity. The recently re-launched Plan[4] aims to contribute £500m to the economy through assisting up to 1,000 UK companies by 2015 and thereby contribute to an increase in UK exports of at least £1bn by 2015. This reflects Government and industry commitment to ensure that UK food and drink companies are able to make the most of export opportunities and maximise their share of global markets. The Action Plan

[2] http://www.fdf.org.uk/exports.aspx
[3] http://opentoexport.com/

[4] https://www.gov.uk/government/publications/uk-food-and-drink-international-action-plan

aims to deliver improvements in promotion, trade development, unlocking markets and simplifying support and trade procedures for industry and so grow exports in the UK food and drink sector.

7.13 In Northern Ireland, Invest NI has for many years offered a comprehensive range of support to food companies. Following the cessation of FFB programmes the range of trade and marketing support through Invest NI was strengthened and a new Regional Food Programme introduced by DARD. In addition Invest NI delivers a programme of trade missions to international markets. Also, the Agri-Food Strategy Board which was appointed by Ministers in Northern Ireland in 2012 continues to play an important role in ensuring that the potential of the sector is maximised. Recommendations on growing the market share (put forward by the Board in its strategic plan for the sector, '*Going for Growth'*) targeted export-led growth and are currently being considered. A final response from the NI Executive and agreed implementation will follow.

7.14 In Scotland, Scottish Development International (SDI) continues to offer an extensive range of international products and support services to Scottish food and drink companies. This programme, since the closure of FFB, has continued and in fact has been enhanced through a number of additional activities including appointment of in-market specialist food and drink executives in key markets including US, Germany and China. SDI has also worked with industry partners to deliver a comprehensive programme of Missions, Exhibitions and Learning Journeys to key markets. SDI works closely with Scotland Food and Drink, the industry leadership organisation, to ensure that the international aspirations of the sector in Scotland are fully supported through an agreed strategic approach to key target markets. This approach was augmented on 4 March 2014, with the launch of the Scotland Food and Drink Export Plan. This sets out an export target of £7Billion in overseas food and drink by 2017, with a focus on priority markets.

7.15 In Wales, the Welsh Government is strongly committed to the growth and development of its food sector. The Government supports Welsh food and drink produce through a number of initiatives including support towards attending major food and drink trade exhibitions both internationally and within the UK, as well as through a programme of measures including new product development, innovation, programmes for business mentoring and market development. Also supported is the development of value-added supply chains using the primary produce of the farming industry; with the aim of helping the food sector in Wales become more sustainable economically, socially and environmentally.

7.16 Since the closure of Food from Britain, the Welsh Government has funded ADAS to support the developing potential Protected Food Name

applications in Wales, which would build upon the success of the Protected Geographical Indication status awarded to Welsh Lamb and Welsh Beef. The EU Protected Food Name Scheme identifies regional and traditional foods whose authenticity and origin can be guaranteed. Under this system a named food or drink registered at a European level will be given legal protection against imitation throughout the EU.

Legislative abolition

7.17 Essentially FFB is a defunct body which has not operated since 2009. It has no staff, premises, assets or liabilities. Its former functions are carried out by other Government departments and industry bodies. This Order will serve to dissolve FFB in law, deal with final accounting and reporting obligations, and make consequential legislative repeals and revocations. It also contains formal provision vesting in the Secretary of State for Environment, Food and Rural Affairs any remaining property, rights and liabilities of the council, although this is included only as a precaution. Its abolition will not impact on business and will generate savings for the taxpayer. The Public Bodies Act 2011 is seen as an appropriate and effective vehicle for abolishing FFB.

7.18 This Order requires the consent of the Scottish Parliament, the Northern Ireland Assembly and the National Assembly for Wales before it can be made.

8. Compliance with section 8(1) of the Public Bodies Act 2011

8.1 Section 8 of the Public Bodies Act 2011 states that a Minister may make an order under that Act only where it is considered that the order serves the purpose of improving the exercise of public functions, having regard to efficiency, effectiveness, economy and securing appropriate accountability to Ministers. The Minister considers that this Order serves the purpose of improving the exercise of public functions in section 8(1) of the 2011 Act, having regard to efficiency, effectiveness, economy and securing appropriate accountability to Ministers. Ministers have reviewed the proposed legislative abolition of FFB and are satisfied that it would serve the purpose of improving the exercise of public functions having regard to:

8.2 **Efficiency -** The proposal to abolish FFB is driven by a desire to remove a defunct non-departmental public body whose continued legislative existence results in an unnecessary annual cost to the taxpayer, providing no value. Whilst FFB no longer exists as an operating body, the legislation which established FFB (the Agricultural Marketing Act 1983) does not provide for its abolition.

8.3 **Effectiveness –** FFB no longer exists as a functioning body and has not existed as a functioning body for almost five years. Essentially FFB is a

defunct body; it has no staff, premises, assets or liabilities. Its former functions are carried out by other Government departments and industry bodies.

8.4 **Economy** – There is no budget allocated for FFB. As explained in paragraph 7.9, its abolition will result in savings in the region of £5,000 per annum.

8.5 **Securing appropriate accountability to Ministers-** Abolition of FFB does not create any issues of accountability given that the body is no longer operational. The Government is committed to working closely with industry stakeholders to boost exports, promote innovation and encourage further growth, particularly amongst SMEs.

9. Compliance with section 8 (2) of the Public Bodies Act 2011

9.1 The Minister considers that -

a) The Order does not remove any necessary protection

The abolition of FFB will not result in the removal of any protection for the businesses that made use of its former services.

b) The Order does not prevent any person from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise

The abolition of FFB will not prevent any business or individual from continuing to exercise any right or freedom which they might reasonably expect to continue to exercise.

10. Interest in the Houses of Parliament

10.1 There was no significant discussion of FFB during the passage of the Public Bodies Act**.**

11. Consultation outcome

11.1 Defra and the Devolved Administrations published a joint consultation paper on the Government's proposal to abolish FFB on 19 September 2013. It was decided a full 12 week consultation would be disproportionate for a body which had been defunct for over 4 years. As there was unlikely to be great interest in FFB's legislative abolition, a 6 week consultation period was considered sufficient. No criticism of the timescale for consultation was made by consultation respondents.

11.2 The consultation was made available via an online survey and over 80 selected consultees were invited to comment on the proposals. These included

commercial food and drink enterprises, trade associations, levy boards, consultancies, regional food groups, Government departments and Devolved Administrations. The consultation paper was also made available on the Government website[5].

11.3 The consultation closed on 31 October 2013 by which time a total of eight responses had been received. No other comments were received after this date. Defra and the Devolved Administrations consider that the consultation process in relation to this Public Bodies Order is consistent with the Government's consultation principles (of July 2012 and October 2013).

Consultation questions

11.4 The consultation asked three questions:

- Do you support the Government's preferred option to repeal the Agricultural Marketing Act and abolish FFB in law?
- If you do not support the Government's preferred option, what is your rationale for retaining the Agricultural Marketing Act?
- Do you have any additional points you would wish Ministers to consider before making their final decision?

11.5 Of the responses received, four respondents supported the government's preferred option, one was opposed, and two did not provide a clear view either way. One anonymous respondent did not want their response made public.

Summary of responses

11.6 A summary of the responses is shown in the table below:

Organisation	**Do you support the Government's preferred option to abolish FFB in law?**	**If you do not support the Government's preferred option, what is your rationale for retaining the Agricultural Marketing Act?**	**Do you have any additional points you would wish Ministers to consider before making their final decision**
The Wine and Spirit Trade Association	Yes		Abolition would appear to be sensible.
Walkers Shortbread Limited	No explicit view expressed		Recommend the FFB brand name is retained by Government, in case FFB is resurrected in the future and to prevent it being used by a commercial body. FFB hugely beneficial organisation. Inconceivable that [in

[5] https://www.gov.uk/government/consultations/abolition-of-food-from-britain

			2009] the government could not sustain the modest contribution to retain FFB, especially when considering the [significantly greater] support devoted to export promotion by the French and German Governments.
Tate & Lyle Sugars	No strong views either way.		No comments.
Individual response	No	The Union flag should be allowed on British meat products.	[Comments out of scope of the consultation, example as follows:] By law, Britain is not and has never been part of the European Union. When he signed the European Communities Act in 1972, Edward Heath knowingly and wilfully deceived and betrayed the British people into foreign rule by the EEC/EU. This was the most calculatingly grievous and outrageous treason in British history.
Food and Drink Federation	Yes		FFB played a valuable role in supporting exporters but this support was not adequately replaced. The lack of export support from organisations and Government in recent years has left businesses unaware of the opportunities overseas. However, strong progress made over the last year with the Food and Drink Federation, Defra and UKTI working closely together to inspire businesses to begin exporting. Must now step up our efforts under the new UK Food and Drink Action Plan to inspire businesses to begin

			exporting and to export more.
Individual response	Yes		No comments
Northern Ireland Food and Drink Association	Yes		No comments
Anonymous	Unclear		No comments

11.7 The joint response to the consultation from the UK and Devolved Administrations explained that it welcomed that fact that the majority of those who responded are in favour of the abolition of Food from Britain.

11.8 The response noted the call to support businesses to export. It pointed out that the UK Government and Devolved Administrations in Scotland, Wales and Northern Ireland were currently working closely with industry to help UK food and drink businesses. There was a real commitment to ensure that UK food and drink companies were able to make the most of export opportunities and maximise their share of global markets. This is reflected in the recently revised Food and Drink Exports Action Plan (see paragraph 7.12). Each region also has its own specifically tailored plans with this aim in view.

11.9 The Government concluded that it would, at an early opportunity, lay before Parliament a draft Order under the Public Bodies Act to abolish Food from Britain.

12. Guidance

12.1 No guidance is deemed necessary.

13. Impact

13.1 This Order repeals the Agricultural Marketing Act 1983 (and related enactments in consequence) and dissolves FFB in law. It is not concerned with the cessation of FFB's former functions or the administrative closure of the body in 2009. As such this Order has no impact on business, charities or voluntary bodies and does not impose any new costs, administrative burdens or information obligations. An impact assessment is not considered necessary.

14. Regulating small business

14.1 The legislation does not apply to small business.

15. Monitoring and review

15.1 There is no tangible outcome to monitor in respect of FFB. However, the Government continues to monitor the support available to exporters and the levels of UK food and drink exports.

16. Contact

16.1 Ian Leggat at the Department for Environment, Food and Rural Affairs (Tel: 020 7238 6477 or email: ian.leggat@defra.gsi.gov.uk) can answer any queries regarding the instrument.

16.2 Copies of all responses to the public consultation exercise can be seen at, or obtained from, Ian Leggat, Area 3A, Nobel House (Tel: 020-7238-6477 or email ian.leggat@defra.gsi.gov.uk).

16.3 Copies of the responses will also be made available to the Environment, Food and Rural Affairs Select Committee and the Secondary Legislation Scrutiny Committee of the House of Lords.

SUPPLEMENTARY LEGISLATIVE CONSENT MEMORANDUM

DEREGULATION BILL: AMENDMENTS IN RELATION TO AGRICULTURAL HOLDINGS ACT 1986, BREEDINGS OF DOGS ACT 1973 AND BREEDING AND SALE OF DOGS (WELFARE) ACT 1999

1. This Legislative Consent Memorandum is laid under Standing Order ("SO") 29.2. SO29 prescribes that a Legislative Consent Memorandum must be laid, and a Legislative Consent Motion may be tabled, before the National Assembly for Wales if a UK Parliamentary Bill makes provision in relation to Wales for a purpose that falls within, or modifies the legislative competence of the National Assembly.

2. The Deregulation Bill (the "Bill") was introduced in the House of Commons on 23 January 2014. The Bill can be found at:

   http://services.parliament.uk/bills/2013-14/deregulation.html

Summary of the Bill and its Policy Objectives

3. The Bill is sponsored by the Cabinet Office. The UK Government's policy objectives for the Bill is to remove or reduce unnecessary regulatory burdens that hinder or cost money to businesses, individuals, public services or the taxpayer.

4. The Bill includes measures relating to general and specific areas of business, companies and insolvency, the use of land, housing, transport, communications, the environment, education and training, entertainment, public authorities and the administration of justice. The bill also provides for a duty on those exercising specified regulatory functions to have regard to the desirability of promoting economic growth. In addition, the Bill will repeal legislation that is no longer of practical use.

Provisions in the Bill for which consent is sought

Agricultural Holdings Act 1986; resolution of disputes by third party determination

5. The consent of the Assembly is sought to the amendment to the Deregulation Bill, tabled on 13 March 2014 which makes amendments to various sections of and the Schedules to the Agricultural Holdings Act 1986. Those amendments to the 1986 Act make provision which enables the parties to agree for the settlement of disputes (other than those relating to a notice to quit) by an independent expert rather than arbitration.

6. Currently the Agricultural Holdings Act 1986 provides three methods of resolving disputes between landlords and tenants, namely:

   a. the Agricultural Land Tribunal (in relation to Wales);

b. arbitration; and
c. the Courts.

7. Arbitration is the primary method of dispute resolution under the Agricultural Holdings Act 1986. Most disputes, particularly those governed by practical agricultural considerations, are compulsorily referable to arbitration under the Agricultural Holdings Act 1986 which does not provide for an alternative dispute mechanism. The effect of the amendment will be to provide the parties concerned with a less burdensome alternative dispute resolution process which is quicker and cost-effective.

8. The amendments to the Agricultural Holdings Act 1986 apply in relation to Wales.

9. The amendments to the Agricultural Holdings Act 1986 do not include powers for Welsh Ministers to make subordinate legislation.

10. It is the view of the Welsh Government that these provisions fall within the legislative competence of the National Assembly for Wales in so far as they relate to:

    a. Agriculture (under paragraph 1 of Part 1, Schedule 7 to the Government of Wales Act 2006); and

    b. Housing (under paragraph 11 of Part 1, Schedule 7 to the Government or Wales Act 2006).

Breeding of Dogs Act 1973 (c.60) and Breeding and Sale of Dogs (Welfare) Act 1998 (c.11)

11. The consent of the Assembly is sought to the amendment to the Deregulation Bill, tabled on 18 March 2014 which repeals:

    a. Sub-section 1(4)(i) of the Breeding of Dogs Act 1973 (and makes the necessary consequential amendments); and

    b. Sub-sections 8(1)(e) and 8(3) of the Breeding and Sale of Dogs (Welfare) Act 1999 (and makes the necessary consequential amendments).

12. The proposed repeal of sub-section 1(4)(i) of the Breeding of Dogs Act 1973 and sub-sections 8(1)(e) and 8(3) of the Breeding and Sale of Dogs (Welfare) Act 1999 (together with the necessary consequential amendments) set out in the Deregulation Bill extends to England and, with the consent of the Assembly, Wales.

13. Section 1(4)(i) of the Breeding of Dogs Act 1973 currently requires the local authority, in determining whether to grant a licence to a breeding establishment for dogs, to have regard to the need for securing the

keeping of accurate records. Subsections 8(1)(e) of the Breeding and Sale of Dogs (Welfare) Act 1991 currently makes it an offence for the keeper of a licensed breeding establishment to sell to the keeper of a licensed pet shop or a licensed Scottish rearing establishment a dog which, when delivered, is not wearing a collar with an identifying tag or badge. Subsection 8(3) of the 1991 Act currently makes it an offence for the keeper of a licensed pet shop to sell a dog which, when delivered to him, was wearing a collar with an identifying tag or badge but is not wearing such a collar when delivered to the purchaser.

14. In England and Wales, new legislation is being developed (which will replace the existing legislation on dog breeding and identification) which, essentially, requires the identification of an animal by a microchip. If the existing requirements to retain paper records on dog identification were to be retained, this would be a duplicate requirement and retention would be a needless burden on small businesses. For information, the repeal of the dog breeding legislation mentioned above does not remove the requirement for a dog owned by a person to ensure that it has a collar and a tag identifying it and to which a lead can be attached.

15. For information, in relation to Wales, the Animal Welfare (Breeding of Dogs) (Wales) Regulations 2014 is due to be laid and made before summer recess and to come into force 6 months later. It contains appropriate identification mechanisms such as the need to microchip a dog before it leaves a breeding premises and appropriate records on dog breeding.

16. On that basis it is considered that the dog breeding provisions being revoked by the amendment in the Deregulation Bill are no longer needed and, consequently, the proposed revocations should apply in relation to Wales.

17. The Deregulation Bill provision described above simply repeal sub-section 1(4)(i) of the Breeding of Dogs Act 1973 and sub-sections 8(1)(e) and 8(3) of the Breeding and Sale of Dogs (Welfare) Act 1999 (and makes the necessary consequential amendments). This Bill provision does not, consequently, provide any powers for the Welsh Ministers to make subordinate legislation.

18. It is the view of the Welsh Government that (in so far as these provisions relate to Wales) these provisions fall within the legislative competence of the National Assembly for Wales in so far as they relate to Animal Health and Welfare under paragraph 1 of Part 1 of Schedule 7 to the Government of Wales Act 2006.

Advantages of utilising this Bill rather than Assembly legislation

19. It is the view of the Welsh Government that it is appropriate to deal with these provisions in this UK Bill as it represents the most practicable and proportionate legislative vehicle to enable these provisions to apply

in relation to Wales. The proposed amendments are technical and non-contentious. In addition, the inter-connected nature of the relevant Welsh and English administrative systems mean that it is most effective and appropriate for the Bill provisions for both to be taken forward at the same time in the same legislative instrument.

Financial implications

20. There are no financial implications for the Welsh Government.

Alun Davies AM
Minister for Natural Resources and Food
April 2014

Constitutional and Legislative Affairs Committee

SUPPLEMENTARY LEGISLATIVE CONSENT MEMORANDUM

DEREGULATION BILL: AMENDMENTS IN RELATION TO AGRICULTURAL HOLDINGS ACT 1986, BREEDING OF DOGS Act 1973 AND BREEDING AND SALE OF DOGS (WELFARE) ACT 1999

Legal Advice Note

Introduction

1. The Deregulation Bill ("the Bill") was introduced in the House of Commons on 23 January 2014 and is currently at report stage. It has been resolved that proceedings on the Bill will carry over to the next parliamentary session.

2. Alun Davies, AM, Minister for Natural Resources and Food laid a Legislative Consent Memorandum ("LCM") concerning the Bill on 24 February 2014. The LCM was considered by the Committee on 31 March 2014. The Committee subsequently laid its report on the LCM on 1 May 2014.

3. On 22 April 2014, Alun Davies, AM laid a supplementary LCM which arises because of amendments which have been tabled to the Bill.

Background

4. The UK Government's policy objectives for the Bill are to remove or reduce unnecessary regulatory burdens that hinder or cost money to businesses, individuals, public services or the taxpayer. It includes measures relating to general and specific areas of business covering diverse areas from entertainment to the administration of Justice.

The Legislative Consent Memorandum

5. The supplementary LCM identifies amendments to the Bill which were tabled at the Committee stage of the Bill in the House of Commons, which are within the legislative competence of the National Assembly in relation to which its consent will be sought.

Amendments to the Agricultural Holdings Act 1986 ("the AHA")

6. The AHA applies to agricultural tenancies entered into before 1 September 1995 and to certain tenancies granted after that date. It governs the landlord and tenant relationship, as well as providing security of tenure and succession rights, regulating the terms of the tenancy and providing for compensation for the tenant or landlord in certain circumstances.

7. Currently the AHA provides three methods of resolving disputes between landlords and tenants to include arbitration.

8. The LCM states that arbitration is currently the primary method of dispute resolution and that most disputes under the AHA are compulsorily referable to arbitration.

9. Amendments tabled to the Bill which relate to the AHA, were agreed by the House of Commons Public Bill Committee on 25th March 2014.

10. The amendments would allow the parties to certain disputes under the AHA to refer them for third party determination by a jointly instructed independent expert, rather than by arbitration. The Welsh Government says that this will provide a less formal, cheaper and quicker dispute resolution process.

11. On moving the amendment in Committee, the Solicitor-General, Oliver Heald QC MP stated that determination under the new process could result in savings to the parties of up to £10, 000.00 in each case. He also stated that the reform had been requested by tenant farmers and was strongly supported by the Tenancy Reform Industry Group who are the advisory group representing landlords and tenants of agricultural holdings in England and Wales.

12. The amendments do not include any powers for Welsh Ministers to make subordinate legislation and fall within the Assembly's legislative competence in so far as they relate to the subjects of 'Agriculture' and 'Housing' within Schedule 7 to the Government of Wales Act 2006 ("GOWA").

Amendments to the Breeding of Dogs Act 1973 ("BDA")

13. There is currently a requirement under the BDA for licensed dog breeding establishments to keep written records of their breeding bitches and any litters that they may have.

14. Amendments agreed by the House of Commons Public Bill Committee on 18th March 2014 would remove this requirement.

15. The Welsh Government state that the purpose of the amendment is to reduce the burden on small business, because it will duplicate requirements within the Animal Welfare (Breeding of Dogs) (Wales) Regulations 2014 ("the dog breeding regulations") which are due to be laid and made before summer recess. In Paragraph 15 of the LCM the Welsh Government state that the regulations will contain appropriate identification mechanisms such as the need to microchip a dog

before it leaves a breeding premises and to keep appropriate records on dog breeding.

Amendments to the Breeding and Sale of Dogs (Welfare) Act 1998 ("BSDWA")

16. Under the BSDWA it is an offence for the keeper of a licensed breeding establishment to sell to the keeper of a licensed pet shop or licensed Scottish rearing establishment a dog which when delivered is not wearing a collar with an identifying tag or badge. Similarly it is an offence for a pet shop owner to sell on such an animal.

17. Amendments agreed by the House of Commons Public Bill Committee would remove these requirements.

18. At paragraph 14 of the LCM, the Welsh Government confirm that the amendments do not remove the requirement in the Control of Dogs Order 1992 for any dog in a public place to wear a collar with the name and address of its owner either engraved or written on a tag.

19. As with the amendments to the BDA, the Government are of the opinion that the provisions are unnecessary because it is intended that the dog breeding regulations will require dogs to be identified by means of a microchip before they leave a breeding premises in any event.

20. There are no powers for the Welsh Ministers to make subordinate legislation in either the BDA or BSDWA and the amendments fall within the Assembly's legislative competence in so far as they relate to the subject of 'Animal Health' within Schedule 7 to GOWA.

Matters for the Committee

21. Paragraph 19 of the LCM state that the advantages of utilising this Bill rather than Assembly legislation are that the Bill represents the most practicable and proportionate legislative vehicle to enable these provisions to apply in relation to Wales. It states *"The proposed amendments are technical and non-contentious. In addition, the inter-connected nature of the relevant Welsh and English administrative systems mean that it is most effective and appropriate for the Bill provisions to be taken forward at the same time in the same legislative instrument.*

22. It should be noted that the power to commence the Schedules of the Bill which deal with the repeals lies with the Secretary of State. He will therefore determine when these provisions are redundant.

23. In England micro chipping regulations will not come into force until April 2016, before which there will be a general election.

24. The difficulty with the power lying wholly with the Secretary of State is that it is likely because of the proposed timetable that there will still be a period when dog breeders and pet shop owners within Wales will have to comply with the requirements under the new dog breeding regulations, in addition to the requirements under the BDA and BDSWA. There is also a danger that if there is slippage in the Welsh Government's timetable for the dog breeding regulations and the Secretary of State commences the relevant Schedule of the Bill before the dog breeding regulations are in force in Wales, there would be a lacuna in the law which would allow breeders and pet shop owners to trade in dogs which are not capable of being identified or traced back to particular establishments.

Legal Services

National Assembly for Wales

May 2014

Agenda Item 5

LEGISLATIVE CONSENT MEMORANDUM

WALES BILL

1. This Legislative Consent Memorandum is laid under Standing Order ("SO") 29.2. SO29 prescribes that a Legislative Consent Memorandum must be laid, and a Legislative Consent Motion may be tabled, before the National Assembly for Wales if a UK Parliamentary Bill makes provision in relation to Wales for a purpose that falls within, or modifies the legislative competence of the National Assembly. This Bill modifies the Assembly's legislative competence, as further described below. It also makes provision in respect of which a Written Statement must be laid in accordance with SO30, and this Memorandum should therefore be read in conjunction with the Written Statement, which has been tabled at the same time.

2. The Wales Bill ("the Bill") was introduced in the House of Commons on 20 March. The Bill, amendments tabled to the Bill and the Impact Assessment are available at: Bill documents — Wales Bill 2013-14 — UK Parliament

   The Command Paper 'Wales Bill: Financial Empowerment and Accountability', which was published alongside the Wales Bill, is available at: www.gov.uk/government/publications/wales-bill

Summary of the Bill and its Policy Objectives

3. The Bill is sponsored by the Wales Office. The UK Government's expressed policy objectives for the Bill are to make the National Assembly for Wales ("the Assembly") and the Welsh Government more accountable to the people of Wales for raising the money they spend, and to improve the system of elections to the Assembly.

4. The Bill is in four parts:

   - Part 1, clauses 1 to 5, makes changes to the National Assembly for Wales and the Welsh Assembly Government.

   - Part 2, clauses 6 to 22, establishes new tax and borrowing arrangements. It devolves responsibility for tax on land transactions and disposals to landfill, creates borrowing powers, and creates the possibility, subject to approval in a referendum, of a 10 pence reduction in income tax across each rate band, coupled with the power for the Assembly by resolution to impose a Welsh rate of income tax in compensation. It also creates the possibility of new devolved taxes, and provides competence to legislate on budgetary procedures.

   - Part 3, clauses 23 and 24, covers two miscellaneous issues: limits on housing revenue account debts, and the relationship between the Law Commission and Welsh devolved institutions.

   - Part 4, clauses 25 to 29, sets out commencement, extent, and other matters.

   - Schedule 1 gives detail on the tax referendum, while Schedule 2 covers amendments consequential to the devolution of tax on land transactions.

Provisions in the Bill for which consent is sought

5. The provisions in the Bill modifying the Assembly's legislative competence and for which consent is sought are in clauses 6, 7, 14, 17 and 21.

Clause 6: Taxation: introductory

6. Clause 6 inserts a new Part 4A (comprising four Chapters) into the Government of Wales Act 2006 ("GOWA 2006") in order to modify the Assembly's competence to provide fiscal powers over fully devolved taxes.

7. The clause describes the structure of the new Part 4A, defines "devolved taxes" and provides the introductory Chapter 1. It explains that the Assembly's competence would be modified by enabling it to:

   - introduce a new devolved tax on transactions involving interests in land (Part 4 Chapter 3 - covered below under Clause 14);

   - introduce a new devolved tax on disposals to landfill (Part 4 Chapter 4 - covered below under Clause 17).

8. Should the Assembly decide to establish a body to collect and manage its devolved taxes, Clause 6 (section 116B) would confer legislative competence on the Assembly to appoint civil servants to that body, provided their functions relate to the collection and management of devolved taxes and/or local government finance matters. Regardless of on whom the Assembly confers the power to appoint those civil servants, the costs associated with their appointment would be borne by the Welsh Ministers.

9. Changes to the new Part 4A, including the devolution of additional devolved taxes to Wales, may be amended by Order in Council, although this would be subject to the affirmative resolution procedure in the Assembly and both Houses of Parliament before it could become law.

10. Clause 6 would amend the legislative competence to ensure that, if in the future an Order is made devolving additional taxes to Wales, existing exceptions (which include, for example, motor vehicle insurance) would not prevent provision about taxes on those matters.

Clause 7: Amendments relating to the Commissioners for Revenue and Customs

11. Clause 7 includes amendments to Parts 2 and 3 of Schedule 7 to GOWA 2006 to allow the Assembly, with the consent of HM Treasury, to remove or modify the functions of HMRC where those functions relate to devolved taxes.

Clause 14: Welsh tax on transactions involving interests in land

12. Currently stamp duty land tax is payable on the purchase or transfer of property or land in the UK where the amount paid is above a certain threshold (Scotland is excluded by the Scotland Act 2012, although those amendments have not yet come into effect). Clause 14 would allow the Assembly to introduce its own land

transaction tax, and links the introduction of the new Welsh tax to the disapplication of stamp duty land tax in Wales.

13. Clause 14 includes Chapter 3 of the new Part 4a for insertion into GOWA 2006 which describes the tax and when it may be chargeable. It also lists those who would be exempt from paying the tax:

    - in Government: a Minister of the Crown; the Welsh Ministers, the First Minister and the Counsel General; the Scottish Ministers; and a Northern Ireland department; and

    - in Parliament: The Corporate Officer of the House of Lords; The Corporate Officer of the House of Commons; The Assembly Commission; The Scottish Parliamentary Corporate Body; and The Northern Ireland Assembly Commission.

Clause 17: Welsh tax on disposals to landfill

14. Currently landfill tax is charged on the disposal of waste to landfill in England and Wales or Northern Ireland (landfill in Scotland is excluded by the Scotland Act 2012, although those amendments have not yet come into effect). Clause 17 provides the mechanism for allowing the Assembly to introduce its own tax on disposals of waste to landfill.

15. Clause 17 introduces a new Chapter 4 into Part 4A of GOWA 2006, which sets out the scope of the Welsh Government's power to introduce a tax on disposals to landfill made in Wales. Section 116N(1) provides that a tax charged on disposals to landfill made in Wales would be a devolved tax and section 116N(2) explains when a disposal is a disposal to landfill. Subsection (2) ensures that the devolved tax could not be charged on disposals to which UK landfill tax applies, thereby linking the commencement of the new devolved tax to the disapplication of the UK landfill tax in Wales.

Clause 21: Budgetary procedures

16. Clause 21 would provide the Assembly with competence to legislate for its own budgetary procedures by inserting this as a new subject in paragraph 13 of Part 1 of Schedule 7 to GOWA 2006. Subsection (2) of the clause also defines what budgetary procedures comprise.

17. The clause would enable the Assembly to legislate in relation to procedures for scrutinising and setting the annual budget of Welsh Ministers, other "relevant persons" and any other body receiving payments from the Welsh Consolidated Fund by virtue of an enactment (either Parliamentary or Assembly). It would, for example, allow the Assembly to pass an annual Finance Act in place of the current annual budget motion.

18. As the Assembly would also have competence for devolved taxes (i.e. transactions involving interests in land, and disposals to landfill), the budgetary procedures could include the determination of the tax rates in relation to these taxes, tax receipt forecasts, variances, borrowing for current and capital purposes and amounts for

repaying borrowing, in addition to authorising how much "relevant persons" (defined in the Bill) may spend.

19. In order to legislate for new budgetary procedures, Part 2 of Schedule 7 of GOWA 2006 is amended by subsection (3) of clause 21 to permit the Assembly to modify those sections in GOWA 2006 which refer to the current budget motion process - i.e. sections 119 (so far as it relates to the estimated payments described and not the Secretary of State's duty in subsection (3) of that section), 120(2), and 125 to 128. As the Assembly may also need to make limited modifications to other provision in Part 5 of GOWA 2006, subsection (3) inserts a new sub-paragraph into paragraph 5 of Part 2 of Schedule 7 enabling an Act of the Assembly to make amendments to other sections in Part 5 or section 159 of GOWA 2006 provided they are (a) incidental to, or consequential on, provisions in an Assembly Act relating to budgetary procedures or devolved taxes, and (b) consented to by the Secretary of State.

20. Should a referendum decide that there should be devolution of income tax rate-varying powers to Wales, it would be for the Assembly to decide whether the Assembly resolution setting the Welsh rate of income tax should be considered as part of the budgetary procedures.

Rationale for using this UK Bill

21. It is the view of the Welsh Government that it is appropriate to deal with these provisions in this UK Bill because the provisions could not be made by Assembly Act. The provisions are not currently within the legislative competence of the Assembly but are instead modifying that competence by extending it for the future. The provisions implement a number of the recommendations of the Silk Commission's Part 1 report, which the Welsh Government has accepted in their entirety.

Financial implications

22. Discussions are ongoing between the Welsh Government and UK Government on the costs of implementing the financial reforms that would be brought about by the measures included in the Wales Bill.

23. Alongside the introduction of the new Welsh taxes (in April 2018), HM Treasury would apply a reduction to the Welsh block grant to reflect the Welsh Government's new revenue-raising powers. Discussions are ongoing to agree what the level of this reduction would be.

24. As the Welsh budget would bear the volatility generated by the revenues from fully devolved taxes, the Wales Bill provides the Welsh Government with a short term borrowing capability to manage this volatility. The operation of the overall funding system, in which devolved tax revenues would interact with the block grant and with borrowing powers, is a matter of ongoing discussion with HM Treasury.

25. It is not expected that the new borrowing powers - to manage volatility or for capital investment purposes - would have a significant administrative overhead.

26. The UK Government has said that any additional costs associated with the establishment of new Welsh taxes on transactions involving interests in land and on disposals to landfill (net of savings to the UK Government because it would no longer collect or administer UK stamp duty land tax and UK landfill tax in Wales) would be borne by the Welsh Government, however it would work constructively with the Welsh Government to minimise any such costs.

27. Were there to be a "yes" vote in a referendum to introduce a new Welsh rate of income tax, the UK Government considers that the associated costs should be borne by the Welsh Government. No discussions have taken place with the UK Government on those costs, however in its Impact Assessment on the Wales Bill, the UK Government comments that the cost of updating HMRC's IT systems and operational processes to support the changes to income tax powers brought about by the Scotland Act 2012 have been estimated to be about £40-45 million, with annual running costs of around £4.2 million. The UK Government notes that while lessons learned following the work for Scotland may help minimise implementation costs in Wales, as could the smaller population, other factors could serve to increase costs, including the greater economic activity on the border between Wales and England (which may increase the number of enquiries), the need to expand the capacity of HMRC's Welsh language helpline, and additional compliance costs related to the treatment of certain tax reliefs and incomes such as Gift Aid and tax relief for pension schemes.

Jane Hutt AM
Minister for Finance
May 2014

Llywodraeth Cymru
Welsh Government

WRITTEN STATEMENT
BY
THE WELSH GOVERNMENT

TITLE **Wales Bill**

DATE **01 May 2014**

BY **Jane Hutt, Minister for Finance**

The Wales Bill was introduced in the House of Commons on 20 March 2014. The Bill was originally published in draft on 18 December 2013 for pre-legislative scrutiny. The Welsh Affairs Committee reported on the draft Bill on 28 February 2014.

This written statement is laid under Standing Order 30 - Notification in relation to UK Parliament Bills. It relates to provisions in the Bill which modify Welsh Ministers' functions, but which do not require a Legislative Consent Motion under Standing Order 29.

The UK Government's expressed policy objectives for the Bill are to make the National Assembly for Wales ("the Assembly") and the Welsh Government more accountable to the people of Wales for raising the money they spend, and to improve the system of elections to the Assembly.

For ease of reference, the provisions which modify the functions of Welsh Ministers are described in the order in which they appear in the Bill, namely clauses 6, 8, 12, 16, 19, 20, 22, 23, 24 and Schedule 1.

Clause 6 - Taxation: introductory

Clause 6 provides the structure within which the Welsh Government may legislate on tax. Clause 6 introduces a new Section 116B into the Government of Wales Act 2006. Subsections (5), (6) and (7) provide that, if the Assembly were to appoint civil servants to a body that it establishes to collect and manage devolved taxes, the Welsh Ministers must pay the salaries, expenses and pensions of those civil servants.

Clause 8 - Welsh rate of income tax

Clause 8 deals with the Welsh rate of income tax. Subsection (1) inserts Chapter 2 into the new Part 4A of GOWA 2006, consisting of sections 116D to 116K. New Section 116D confers on the Assembly a power to set, by resolution, a Welsh rate of income tax, for

Welsh taxpayers. 116D(8) requires that the Assembly's standing orders ensure that only the First Minister or a Welsh Minister may move a motion for a resolution on a Welsh rate of income tax.

New section 116J provides that the Welsh Ministers may reimburse any Minister of the Crown or any UK Government department, for example HMRC, for administrative expenses incurred through the establishment of a Welsh rate of income tax.

Clause 12 - Proposal for referendum by Assembly

Clause 12 provides the mechanism through which the Assembly can trigger a referendum on whether there should be a Welsh rate of income tax. Subsections (1) and (2) specify that the First Minister or a Welsh Minister may move a resolution in the Assembly that a recommendation should be made to Her Majesty in Council to make an Order causing a referendum to be held. If that resolution is passed by at least two-thirds of AMs, then the First Minister must write giving notice to the Secretary of State as soon as practicable.

If an Order is not laid within 180 days of the Secretary of State receiving the First Minister's letter, then the Secretary of State must write to the First Minister stating this and giving reasons for not doing so. Subsection (4) requires the First Minister to lay a copy of that notice before the Assembly.

Clause 16 - Information on Welsh land transactions

Clause 16 provides for the supply of information to HMRC about land transactions in Wales. Subsection (1) inserts a new section 116M into Chapter 3 of Part 4A GOWA 2006 imposing a duty to provide certain information to HMRC about Welsh land transactions. Section 116M(1) provides that the Welsh Government must provide to HMRC, when requested to do so, such information as HMRC may require, as this information would no longer be available to HMRC from land transaction returns. The remaining subsections of clause 116 define the information that would be required for this purpose and how it should be provided etc.

Clause 19 - Borrowing by the Welsh Ministers

Clause 19 amends sections 121 and 122 of GOWA 2006, and inserts a new section 122A, to revise the circumstances under which the Welsh Ministers may borrow and to set out the main controls and limits on such borrowing. The clause enables the Welsh Ministers to borrow, subject to HM Treasury's controls and limits, in order to:

- manage in-year volatility of receipts, where actual income for a month differs from the forecast receipts for that month;
- provide a working balance to the Welsh Consolidated Fund in order to manage cash-flow;
- deal with differences between the full year forecast and outturn receipts for devolved taxes; and
- to fund capital expenditure.

Subsection 19(3) replaces subsection (1) in section 121 of GOWA:

- re-enacting Welsh Ministers ability to borrow temporarily from the Secretary of State for Wales to provide a working balance to the Welsh Consolidated Fund and to manage in-year volatility of receipts; and
- extending the Welsh Ministers' existing borrowing powers to include borrowing from the Secretary of State across years to fund deviations between full year forecast and outturn receipts of the devolved taxes.

Subsection (3) also adds two new subsections into section 121((1A) and (1B)). Subsection (1A) would enable the Welsh Ministers to borrow to fund capital expenditure, subject to HM Treasury's approval. The borrowing must be in the form of a loan either from the National Loan Fund (through the Secretary of State) or from another lender, such as a commercial bank. The new subsection requires the Welsh Ministers to borrow by way of loan, and they are not permitted to issue Welsh gilts or bonds.

Subsection (10) inserts a new section 122A into GOWA 2006 which includes further provisions on capital borrowing. Section 122A(5), (6) and (7) contain additional rules on Welsh Ministers' borrowing to fund capital spending. Subsection (6) states that Welsh Ministers are prohibited from mortgaging or charging any property as security for money which they have borrowed (but this does not affect the rule in section 121(3) of GOWA 2006 that borrowing is to be charged on the WCF).

Clause 20 - Repeal of existing borrowing power

Clause 20 amends the Welsh Development Agency Act 1975, repealing the borrowing power which this conferred upon the Welsh Ministers, thereby removing a function of the Welsh Ministers.

Subsection (1) repeals paragraph 3 (power for Welsh Ministers to borrow money) and paragraph 6 (power for HM Treasury to guarantee money borrowed under paragraph 3) in Schedule 3 to the Welsh Development Agency Act 1975. Subsection (2) states that the repeals in subsection (1) do not affect the outstanding liability of Welsh Ministers to repay money previously borrowed under paragraph 3, nor any guarantee previously given by HM Treasury under paragraph 6.

Clause 22 - Reports on the implementation and operation of this Part

Clause 22 sets out the requirements for the Secretary of State and Welsh Ministers to report on the implementation and operation of the new financial provisions set out in Part 2 of the Wales Bill.

Clause 22(1) and (3) require the Secretary of State to publish a report on the implementation and operation of the finance provisions in Part 2 within a year of the Act being passed and thereafter before each anniversary of the Act being passed. Subsection (4) states that these reports must continue until a year after the tax and borrowing powers are fully transferred to the Assembly and the Welsh Ministers. Copies of the reports must

be laid before both Houses of Parliament and sent to the Welsh Ministers, who must lay the reports before the Assembly.

Subsections (2) and (3) require the Welsh Ministers to make and lay reports before the Assembly of the same kind and to the same timetable, and to provide a copy of each report to the Secretary of State to lay before both Houses of Parliament.

Subsections (5) and (6) set out how it is determined that a Part 2 provision is implemented, for the purpose of determining for how long the reports must continue, and Subsection (7) sets out the areas that each report must include.

Clause 23 - Local housing authorities: limits on housing revenue account debt

Subsection (1) amends Part 6 (Housing Finance) of the Local Government and Housing Act 1989 “the 1989 Act”, in relation to how that Part of the 1989 Act would apply in Wales. In doing so, the new provision reflects the effect of sections 171 to 173 of the Localism Act 2011 which only apply in England.

Subsection (2) introduces a new section 76A (Limits on indebtedness) into the 1989 Act. Section 76A confers powers upon: (i) HM Treasury to make a determination which provides for the maximum amount of housing debt which may be held, in aggregate, by Welsh Local Housing Authorities (”LHAs”) which maintain a Housing Revenue Account, and (ii) Welsh Ministers to determine both the amount of housing debt which an individual LHA is to be treated as holding and the maximum amount of such housing debt which a LHA may hold. Section 76A requires Welsh Ministers to make a determination in relation to each LHA within a 6 month time period which starts the day after HM Treasury has made a determination. The aggregate of the amounts of debt held by each LHA must not exceed the “all Wales cap” stipulated in HM Treasury’s determination. It would also be unlawful for a LHA to exceed its individual borrowing limit.

Subsection (2) also introduces a new section 76B (Power to obtain information) into the 1989 Act. Section 76B confers new powers upon the Welsh Ministers to obtain information which enables the Welsh Ministers to discharge their functions under section 76A. Section 76 B places a duty upon each LHA to supply the Welsh Ministers with information and certificates which support this information.

Subsections (3) to (7) make minor changes to section 87 of the 1989 Act.

Clause 24 - The work of the Law Commission so far as relating to Wales

Clause 24 inserts new provisions into the Law Commissions Act 1965 (the 1965 Act) in order to impose a new duty on the Law Commission to provide advice and information directly to the Welsh Ministers. This makes it clear that the Welsh Ministers would be able to refer law reform matters to the Law Commission themselves.

Clause 24(4) inserts a new section 3C into the 1965 Act to provide that Welsh Ministers must produce an annual report to be laid before the Assembly. The report must include

details of any Law Commission proposals which relate to Welsh devolved matters and either have been implemented since the last report or have yet to be implemented. If in the previous year there are proposals that have yet to be implemented, the Welsh Ministers' report must include plans for implementation, any decision not to implement, and the reasons for any such decision. If there are no outstanding Law Commission proposals on Welsh devolved matters in the year since the previous report, the Welsh Ministers would not be required to produce a report for the Assembly.

Subsection (4) also provides for a protocol about the Law Commission's work as regards Wales, to be agreed between the Law Commission and Welsh Ministers for purposes of the Law Commission's work relating to Welsh devolved matters. If a protocol is taken forward, the Welsh Ministers and the Law Commission must keep it under review from time to time and the Welsh Ministers must lay it (and any revisions) before the Assembly. The Welsh Ministers and the Law Commission must have regard to the protocol.

Finally, subsection (5) of clause 24 makes a minor amendment to section 5(4) of the 1965 Act which clarifies that the Welsh Ministers would be able to pay for the services of the Law Commission.

Schedule 1 - Referendum about commencement of income tax provisions

Schedule 1 sets out a framework for the conduct of a referendum about bringing the income tax provisions into force. In accordance with the Political Parties, Elections and Referendums Act 2000, the Secretary of State is required to consult the Electoral Commission on the intelligibility of the referendum question to be included on the ballot paper. The Secretary of State must send the First Minister a copy of the report, containing the Commission's views, as laid in Parliament. Paragraph 3(4) of Schedule 1 sets out that, as soon as practicable after receiving the report, the First Minister must lay a copy of it before the Assembly.

An Order allowing for a referendum to be held must specify the date of the poll. Paragraph 4(2) sets out that the Secretary of State (or the Lord President of the Council) may vary that date, by order, if it appears inappropriate for it to be held on that date. However, the Welsh Ministers must consent to such an order being made.

Rationale for including these provisions in this UK Bill

The Welsh Government considers it appropriate for these provisions to be made, and to be made by means of the Wales Bill, because the provisions could not be made by an Assembly Act.

Most of the provisions included above complement the enhanced legislative competence in relation to devolved taxes being conferred on the Assembly and borrowing powers being conferred on Welsh Ministers by means of the Wales Bill, or are required in order for the other provisions to work effectively.

The clause in the Bill in relation to the Law Commission was included at the Welsh Government's request.

Clause 23 on the limits on housing revenue account debt reflects an essential part of the agreement reached between HM Treasury and Welsh Ministers, and will enable Welsh local housing authorities to exit from the existing Housing Revenue Account Subsidy system.

Constitutional and Legislative Affairs Committee

LEGISLATIVE CONSENT MEMORANDUM -WALES BILL

Legal Advice Note

Background

1. On 1 May 2014 Jane Hutt AM, the Minister for Finance, laid a Legislative Consent Memorandum ("LCM") concerning the Wales Bill ("the Bill") pursuant to Standing Order 29.2. A written statement required under Standing Order 30 was also laid on 1 May setting out modifications to Welsh Ministers' functions which are outside the Assembly's legislative competence and consequently not dealt with by the LCM.

2. The LCM was considered on the 6 May 2014 by the Business Committee, who agreed to refer it to the Constitutional and Legislative Affairs and Finance Committees. The Committees must report to the Assembly by 26 June 2014 to allow the Legislative Consent Motion to be debated in Plenary on 1 July 2014.

The Bill

3. The Bill was introduced in the House of Commons on 20 March 2014 and completed its Committee stage on 6 May. The Bill, as amended, can be accessed via –

http://www.publications.parliament.uk/pa/bills/cbill/2013-2014/0205/14205
The LCM considers the Bill as amended.

Summary of the Bill and its Policy Objectives

4. The Bill is sponsored by the Wales Office. The expressed policy objectives for the Bill are to make the National Assembly ("the Assembly") and the Welsh Government more accountable to the people of Wales for raising the money they spend, and to improve the system of elections to the Assembly.

5. The Bill is in four parts and two Schedules:
Part 1, clauses 1 to 5, makes changes relating to the frequency of elections to the National Assembly for Wales. Ordinary general elections to the Assembly will take place every five years (avoiding a clash with the 2020 and subsequent Westminster elections). The ban on dual candidacy is removed and amendments made to the provisions relating to the practice of simultaneously being a Member of the Assembly and of Parliament. The Welsh Assembly Government is renamed the Welsh Government and GOWA is amended to clarify that the First Minister retains office during a period of dissolution.
Part 2, clauses 6 to 22, establishes new tax and borrowing arrangements. It devolves responsibility for tax on land transactions and disposals to landfill, revises Welsh Ministers' borrowing powers, and creates the possibility, subject to approval in a referendum, of a 10 pence reduction in income tax across each rate band, coupled with the power for the Assembly by resolution to impose a Welsh rate of income tax in compensation. It also creates the possibility of new devolved taxes, and provides competence to legislate on budgetary procedures.
Part 3, clauses 23 and 24, covers two miscellaneous issues:
limits on housing revenue account debts, and the relationship between the Law Commission and Welsh devolved institutions.
Part 4, clauses 25 to 29, sets out commencement, extent, and other matters.
Schedule 1 provides detail on the tax referendum, while Schedule 2 covers amendments consequential to the devolution of tax on land transactions.

Provisions in the Bill for which consent is sought

6. The provisions in the Bill modifying the Assembly's legislative competence and for which consent is sought are in clauses 6, 7, 14, 17 and 21. There are no provisions that come within the Assembly's existing competence. The Welsh Government's commentary on these sections is set out in the LCM. The way in which they add to the Assembly's competence can be summarised as follows -

- Clause 6 provides the structure within which the Assembly may legislate on tax matters.
- Clause 7 introduces amendments to Parts 2 and 3 of Schedule 7 to GOWA which enable the Assembly, with the consent of the Treasury, to remove or modify the functions of HM Revenue and Customs ("HMRC") where those functions relate to devolved taxes.
- Clause 14 (together with clause 15) would allow the Welsh Government and the Assembly to introduce a Welsh tax on transactions involving interests in land. This would be linked to the disapplication of stamp duty land tax in Wales. Members will wish to note that the introduction of a Welsh tax is dependent on the disapplication of the stamp duty land tax which will be from "the effective date" i.e. a date provided for in an order made by the Treasury.
- Clause 17 insert into GOWA provisions which set out the scope of the new power to introduce a tax on disposals to landfill made in Wales. As with stamp duty land tax, the current UK landfill tax will be disapplied in accordance with an order made by the Treasury not by Welsh Ministers.
- Clause 21 amends Schedule 7 to GOWA by conferring on the Assembly competence to legislate for its own budgetary procedures. This includes the ability to amend certain currently 'protected provisions' of GOWA i.e. sections 120(2), and 125 to 128. It will also permit an amendment to section 119 in relation to estimated payments for a financial year into the Welsh Consolidated Fund or to the Welsh Ministers, the First Minister or the Counsel General. Amendment of section 159 or Part 5 of Schedule 7 is permissible where it is incidental to, or consequential on, a provision of an Act of the Assembly relating to budgetary procedures or devolved taxes. and the Secretary of State consents to the provision.

Clause 21 would enable the Assembly to legislate in relation to procedures for scrutinising and setting the annual budget of Welsh Ministers and other "relevant persons". It would allow for a more holistic process which would authorise expenditure, taxation rates (e.g. in relation to new devolved taxes) and borrowing.

Modification of Welsh Ministers' functions

7. The Written Statement laid by the Minster for Finance sets out the ways in which the Bill modifies the Welsh Ministers' functions. They may be summarised as follows:-

- clause 8 confers a power to set, by resolution, a Welsh rate of income tax for Welsh tax payers. Strictly this is not a modification of a Ministerial function as it is for the Assembly, by resolution, to set a Welsh rate of income tax. However, the Bill requires that Assembly Standing Orders provide that only the First Minister or a Welsh Minister may move a motion for a Welsh rate resolution. Members may wish to note that whilst the draft Bill preserves the 'lockstep', the references to Welsh basic, higher and additional rates of income tax clarify that the Assembly is able to vary each rate of income tax but such variation must be by the same percentage point. The consultation draft made reference only to a Welsh rate of income tax which could have been interpreted as one flat rate of income tax for all Welsh taxpayers.
- Clause 12 provides a mechanism through which the Assembly can trigger a referendum on whether there should be Welsh rate of income tax. This procedure is similar to that which applied to the bringing into force of Part 4 of GOWA.
- Clause 16 requires the supply of information to HMRC about land transactions in Wales as this information will no longer be available to HMRC from land transaction returns.
- Clause 19 amends GOWA to revise the circumstances under which the Welsh Ministers may borrow and to set out the main controls and limits on such borrowing which will be permitted to manage in-year volatility of receipts, provide a working balance, deal with differences between full year forecasts and outturn receipts for devolved taxes and to fund capital expenditure.

- Clause 20 repeals the current borrowing provision set out in the Welsh Development Agency Act 1975.
- Clause 22 sets out the requirements for the Secretary of State and Welsh Ministers to report on the implementation and operation of the new financial provisions set out in Part 2 of the Bill.
- Clause 23 enables the Treasury to set a cap on the maximum level of housing debt that may be held, in aggregate, by Welsh local housing authorities and requires the Welsh Ministers to determine how much housing debt may be held by each housing authority under that cap. This establishes a system similar to that operating in England.
- Clause 24 imposes a duty on the Law Commission to provide advice and information to the Welsh Ministers directly and enables the Welsh Ministers themselves to refer law reform matters to the Commission .
- Schedule 1 sets out the framework for the conduct of a referendum about bringing the income tax provisions into force.

Rationale for using the Bill

8. The provisions referred to in the LCM are not currently within the legislative competence of the Assembly but modify that competence by extending it for the future. The provisions implement a number of the recommendations made by the Silk Commission in its first report which were accepted in their entirety by the Welsh Government. The provisions referred to in the Written Statement are complementary to the enhanced legislative competence in relation to the devolved taxes and borrowing being conferred on the Assembly and Welsh Ministers respectively or are required for the other provisions to work effectively.

Matters of particular relevance to the Constitutional and Legislative Affairs Committee

9. Clause 3 of the Bill provides for MPs to be disqualified from being also Assembly Members. Whilst of general interest in the context of the Committee's inquiry into disqualification provisions, the clause contains useful precedents for disqualification to take effect only after an election. The disqualification is only effective eight days after the Assembly election, which provides an opportunity for a sitting MP to 'resign' from Parliament.

Members who wish to resign their seats must be appointed to one of two paid offices of the Crown, retained from antiquity for this purpose only. These are the Crown Steward and Bailiff of the Chiltern Hundreds and the Crown Steward and Bailiff of the Manor of Northstead. The Committee may wish to consider whether this is an approach that it would wish to recommend in other cases.

10. Clause 24 of the Bill introduces provisions for the Law Commission to provide advice and assistance to the Welsh Ministers. It does not, however, include reference to "a comprehensive programme of consolidation and revision of statute law in devolved areas" as the Committee sought in its submission to the Secretary of State.

11. The Bill at clause 6 contains a power to add new devolved taxes by Order in Council, which has to be approved by resolution of the Assembly. However, the commencement of the provisions relating to devolved taxes depends on orders made by the Treasury in relation to which neither the Assembly nor Welsh Ministers have a part to play. Similarly, if there is an affirmative vote in a referendum, the income tax provisions are to be commenced by the Treasury, not by the Welsh Ministers; this contrasts with the last referendum.

12. This LCM and accompanying statement have highlighted a gap in the Assembly's existing Standing Orders. Standing Order 29 requires an LCM in relation to matters within the Assembly's legislative competence, or that modify that competence. Standing Order 30 requires a statement when a Westminster Bill proposes to modify functions of the Welsh Ministers and the Counsel General. Neither Standing Order covers modifications to the functions of the Assembly other than to its legislative competence. The result is that the power contained in clause 8 for the Assembly, by resolution, to set the Welsh rate for the purpose of calculating the rates of income tax, does not come within either Standing Order, despite being a very significant addition to the Assembly's powers.

Conclusion

13. The provisions referred to in the LCM and the Written Statement could not be made by made by an Assembly Act and it is therefore appropriate for the matters to be addressed by the Bill and LCM.

Legal Services 12 May 2014

Agenda Item 6

Committee Reference: CLA(4)-14-14

Cynulliad Cenedlaethol Cymru
National Assembly for Wales

Constitutional and Legislative Affairs Committee

Spring 2014 subsidiarity monitoring report (September 2013–April 2014

Date of paper:	**May 2014**

This briefing has been produced by the Research Service for use by the Constitutional and Legislative Affairs Committee.

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Research Service

Contents

1. Introduction

Under Standing Order 21, a 'responsible committee' in the Assembly (currently the Constitutional and Legislative Affairs Committee) is empowered to consider draft EU legislation that relates to matters within the legislative competence of the Assembly or to the functions of the Welsh Ministers and of the Counsel General, to identify whether it complies with the principle of subsidiarity.

The principle of subsidiarity is enshrined in Article 5 of the Treaty on European Union:

> 1. The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality.
>
> 2. Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.
>
> 3. Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.
>
> The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol.
>
> 4. Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.
>
> The institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality.[1]

In addition, the application of the principle is governed by the Protocol on the Application of the Principles of Subsidiarity and Proportionality. The relevant part in relation to the work of the Assembly is included in the first paragraph of Article 6:

> Any national Parliament or any chamber of a national Parliament may, within eight weeks

[1] Official Journal of the European Union, *Consolidated version of the Treaty on European Union*, C83/204, 30 March 2010

> from the date of transmission of a draft legislative act, in the official languages of the Union, 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. **It will be for each national Parliament or each chamber of a national Parliament to consult, where appropriate, regional parliaments with legislative powers.** *[RS emphasis]*[2]

2. The monitoring process

In order to ensure that the Constitutional and Legislative Affairs Committee fulfils its subsidiarity monitoring function effectively as set out in Standing Orders, Assembly officials monitor all draft EU legislative proposals that apply to Wales on a systematic basis to check whether they raise any subsidiarity concerns. The way in which Assembly officials monitor these proposals is outlined below for information:

- The Assembly in the first instance is notified of all proposals published by the European Commission for consideration through a list (known as the "batch list") which is sent by the Foreign and Commonwealth Office on behalf of the UK Government to the Assembly's Research Service for information.
- The relevant UK Government department will then prepare an Explanatory Memorandum (EM) based on the proposals included on the batch list usually within 4 to 6 weeks of the initial notification by the Foreign and Commonwealth Office. Each EM includes an assessment of the policy impact of the proposals (including whether the UK Government department believes the proposal raises any subsidiarity concerns). Copies of each EM are sent to the Assembly via the Research Service.
- The Research Service filters the EMs received to check whether the proposal they relate to are 'legislative' or 'non-legislative'[3] and whether they encompass issues which may be of interest to the Assembly (i.e. relating to devolved matters).
- Those EMs that relate to proposals that are both 'legislative' and deal with issues of interest to the Assembly are then checked further by officials from the Assembly's Legal Services, Brussels Office and the Research Service to see whether they raise any

[2] Official Journal of the European Union, *Protocol on the Application of the Principles of Subsidiarity and Proportionality*, C310/207, 16 December 2004

[3] Subsidiarity concerns can only be raised in relation to draft 'legislative' proposals.

potential subsidiarity concerns.

- If a proposal raises subsidiarity concerns, Assembly officials will alert the Constitutional and Legislative Affairs Committee immediately whereupon Members will be asked to consider whether the Committee should ask either or both Houses at Westminster to issue a 'reasoned opinion' on the proposal or not.
- Those proposals which are 'legislative' and relate to devolved matters but raise no subsidiarity concerns are then collated in a monitoring report produced by the Research Service which is considered as a paper to note by the Constitutional and Legislative Affairs Committee during each term in an Assembly year (Autumn [September-December], Spring [January-April] and Summer [May – August]).

This report therefore includes a general overview of those draft EU legislative proposals received by the Assembly's Research Service between September 2013 and April 2014, and provides further information about those proposals that were identified by Assembly officials as being both 'legislative' in nature and relating to devolved matters.

Please note however that this report primarily monitors 'legislative' proposals, in the main it does not contain details of 'non-legislative proposals' that may be relevant to the work of the Assembly. These are monitored on a separate basis by the Research Service.

3. Overview of draft EU proposals received (September 2013-April 2014)

A total of 548 UK Government EMs relating to EU proposals were received by the Assembly's Research Service from the UK Government between 1 September 2013 and 30 April 2014.

Of these, 15 EMs were identified by Assembly officials as being both 'legislative' in nature and of interest to the Assembly.

Following further analysis by officials from the Assembly's Legal Service, Brussels Office and Research Service, none of the xx proposals were identified as raising subsidiarity concerns. Details of these proposals are included below.

Heading

3.1. EU legislative proposals that did not raise any subsidiarity concerns

Date emailed	Title and description
06/09/2013	*Proposal for regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1698/2005 on* ***support for rural development by the European Agriculture Fund for Rural Development*** (COM(2013)521) The proposed regulation would allow Member states which are experiencing serious financial difficulties to receive an increase in financial assistance from the fund of 10 percentage points above the normal permitted ceilings until 31 December 2015.
24/09/2013	Proposal for a Regulation of the European Parliament and of the Council on ***the prevention and management of the introduction and spread of invasive alien species.*** (COM(2013)620) The proposals require Member States to prevent the introduction and spread of invasive alien species, a list of which will be agreed within 12 months of the regulation coming into force.
03/10/2013	Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No.718/1999 on a ***Community-fleet capacity policy to promote inland waterway transport.*** (COM(2013)621) Regulation (EC) no 718/1999 established an Inland Waterway Fund which was to be used in cases of 'serious market disturbance' in the inland waterway market and to improve working environments in the industry. The fund has not yet been used and this amendment to 718/1999 aims to widen its scope. It is a first step towards implementing a revised European action

	plan ("NIAIDES II") to move more freight transport onto EU waterways and reduce carbon emissions. **Non-devolved.**
14/10/2013	Proposal for a **Regulation** of the European Parliament and of the Council on new psychoactive substances. (HO - EM due by 8 October) The draft Regulation would aim to strengthen the EU's ability to respond to new psychoactive substances and allow harmful psychoactive substances to be quickly withdrawn from the market. It would replace an existing instrument, Council Decision 2005/387/JHA. **Non-devolved.**
28/10/2013	Proposal for a Council **Recommendation** on promoting health-enhancing physical activity across sectors. (DOH/DCMS - EM due by 24 September) This recommendation seeks to address shortcomings in the development and implementation of health-enhancing physical activity (HEPA) policies by member states. These include a need to develop cross sectoral approaches and adopt clear objectives and goals for HEPA, and the monitoring and evaluation of HEPA rates and policies. **Non-legislative.**
13/11/2013	Proposal for a Regulation of the European Parliament and of the Council establishing the ***Connecting Europe Facility.*** (COM(2013)665) In 2011 the European Commission proposed the creation of a new integrated instrument for investing in EU infrastructure priorities in transport, energy and telecommunications: the "Connecting Europe Facility".
22/11/2013	Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No.1166/2008 on ***farm structure surveys and the survey on agricultural production methods, as regards the financial framework for the period 2014-2018.*** (COM(2013)757) A community survey on the structure of agricultural holdings is required by

	Regulation (EC) 1166/2008 in 2016. These surveys include a financial contribution by the European Commission to expenses incurred by the Member States. The proposed amendment keeps the level of contribution the same for existing Member States and introduces a new contribution for Croatia.
22/11/2013	Proposal for a Directive of the European Parliament and of the Council *amending Directive 94/62/EC on packaging and packaging waste to reduce the consumption of lightweight plastic carrier bags.* (COM(2013)761) The proposal requires Member States to take measures to reduce the consumption of lightweight plastic carrier bags, of a defined thickness, within two years of the measure entering into force. Wales has introduced a charge on all single use bags at point of sale and this measure extends beyond lightweight plastic carrier bags covered by the Commission proposal. There will be interest in how the final legislation impacts (if at all) on existing Welsh legislation – so this raises a question of the 'proportionality' of the measures proposed rather than a question of 'subsidiarity'.
11/12/2013	Proposal for a Regulation of the European Parliament and of the Council on *information provision and promotion measures for agricultural products on the internal market and in third countries.* (COM(2013)812) The proposal aims to reform the ways in which EU funding promotes agricultural products in the EU and in third countries. A range of measures would be introduced which would ensure better targeting of promotion measures in internal and external markets through: the development and implementation of a strategy, extension of the list of beneficiaries and potential beneficiaries, encouragement of multi-Member State programmes, with some limited use of origin and branding allowed. The budget for the

	fund would be increased from €60m (£51m[4]) in 2013 to €200m (£170m) by 2020.
09/01/2014	Proposal for a Council Recommendation on a ***Quality Framework for Traineeships.*** (COM(2013)857) The Recommendation asks Member States (MS) to ensure that open-market traineeships (i.e. those involving only the trainee and employer and no other institution) comply with a set of quality requirements. The proposal would primarily cover what the UK would call 'graduate internships', but as currently drafted could encompass any form of work experience placement which is not part of a formal education or vocational course. **Non-legislative**
14/01/2014	Proposal for a Council Directive on ***the placing on the market of food from animal clones.*** (COM(2013)893) The proposal aims to prohibit the marketing of animal and embryo clones and any food produced from them.
14/01/2014	Proposal for a Directive of the European Parliament and of the Council on ***the cloning of animals of the bovine, porcine, ovine, caprine and equine species kept and reproduced for farming purposes.*** (COM(2013)892) The proposal aims to prohibit the commercial cloning of traditionally farmed animal species. However, the proposals will allow the continuation of the use of reproductive material from clones for livestock breeding purposes; and scientific research into cloning and its use for the preservation of rare breeds or endangered species; and for sporting or cultural events.
15/01/2014	*Proposal for a Regulation of the European Parliament and of the Council on* ***novel foods***. (COM(2013)894) The proposed regulation aims to update the existing novel foods regulation

[4] All monetary figures are provided using the Cabinet Office November 2013 exchange rate

and includes clarification of the definition of a novel food and a streamlined authorisation procedure for novel foods.

21/01/2014 *Proposal for a Directive of the European Parliament and of the Council on* ***the limitation of emissions of certain pollutants into the air from medium combustion plants.*** (COM(2013)919)

A new Directive would regulate emissions from combustion plants with a rated thermal input of between 1 and 50MW. This would cover energy plants for large buildings and small industrial installations. The proposed Directive is part of a Clean Air Policy Package adopted by the Commission on 18 December 2013.

21/01/2014 *Proposal for a Directive of the European Parliament and of the Council on the* ***reduction of national emissions of certain atmospheric pollutants and amending Directive 2003/35/EC.*** (COM(2013)920)

The proposed Directive is part of a Clean Air Policy Package adopted by the Commission on 18 December 2013. The package was developed following a review of air quality policy by the Commission which began in 2011. The package seeks to update existing legislation and further reduce harmful emissions from industry, traffic, energy plants and agriculture, with a view to reducing their significant impact on health and the environment.

06/02/2014 *Proposal for a Council Regulation laying down* ***maximum permitted levels of radioactive contamination of food and feed following a nuclear accident or any other case of radiological emergency.*** (COM(2013)943)

The proposal brings together three existing regulations: Council Regulation (Euratom) No 3954/87, Commission Regulation (Euratom) No 944/89 and Commission Regulation (Euratom) No 770/90. It also updates the procedure for implementing the levels of radioactive contamination following a nuclear or radiological emergency.

10/03/2014	*Proposal for a Council Recommendation on* ***European Tourism Quality Principles.*** (COM)(2014)85) This recommendation aims to establish quality principles for organisations providing tourism services and thus demonstrate to consumers the quality of EU tourist destinations. **Non-legislative**
08/04/2014	*Proposal for a Regulation of the European Parliament and of the Council on* ***organic production and labelling of organic products****, amending Regulation (EU) No.XXX/XXX of the European Parliament and of the Council [Official controls Regulation] and repealing Council Regulation (EC) No.834/2007.* (COM(2014)180 The proposal consists of a new regulation and Impact Assessment covering organic production and labelling of organic products. There is also an associated Action Plan which considers the future of organic production. The documents have been produced following a Commission review of the legislative and policy framework for organic production across the EU. No subsidiarity issues are raised, however, there will be interest in Wales in the content of the proposals and the 'proportionality' of the measures proposed.

Review of the
Balance of Competences

CALL FOR EVIDENCE ON THE GOVERNMENT'S REVIEW OF THE BALANCE OF COMPETENCES BETWEEN THE UNITED KINGDOM AND THE EUROPEAN UNION

Semester 4

SUBSIDIARITY AND PROPORTIONALITY

Foreign and Commonwealth Office

Opening date: 27 March 2014

Closing date: 30 June 2014

Contents

1. Introduction

1.1 The Foreign Secretary launched the Balance of Competences Review in Parliament in July 2012, taking forward the Coalition commitment to examine the balance of competences between the UK and the European Union. The review will provide an analysis of what the UK's membership of the EU means for the UK national interest. It aims to deepen public and Parliamentary understanding of the nature of our EU membership and provide a constructive and serious contribution to the national and wider European debate about modernising, reforming and improving the EU in the face of collective challenges. It will not be tasked with producing specific recommendations or looking at alternative models for Britain's overall relationship with the EU.

1.2 The review is broken down into a series of reports on specific areas of EU competence, spread over four semesters between autumn 2012 and autumn 2014. The review is led by Government but will also involve non-governmental experts, organisations and other individuals who wish to feed in their views. Foreign Governments, including our EU partners and the EU Institutions, are also being invited to contribute. The process will be comprehensive, evidence-based and analytical. The progress of the review will be transparent, including in respect of the contributions submitted to it.

1.3 This call for evidence sets out the scope of the review which will cover the EU principles of Subsidiarity and Proportionality, as well as Article 352 of the Treaty on the Functioning of the European Union (TFEU) (the so-called "flexibility clause"). The report will look at the principles of Subsidiarity and Proportionality, how they developed, and how they are used today, assessing what this means for the UK and its national interest, as well as where future challenges and developments may lie.

1.4 As Subsidiarity and Proportionality are fundamental principles rather than distinct areas of competence, the scope of the report is expected to be broad, and to assess the impact of the principles in different policy areas. It will therefore draw heavily on previous work in this area, including previous Balance of Competences reports. Full details of the programme as a whole can be found at: http://www.gov.uk/review-of-the-balance-of-competences.

2. EU competence and principles

2.1 For the purposes of this review, we are using a broad definition of competence. Put simply, competence in this context is about everything deriving from EU law that affects what happens in the UK. That means examining all the areas where the Treaties give the EU competence to act, including the provisions in the Treaties giving the EU institutions the power to legislate, to adopt non-legislative acts, or to take any other sort of action. But it also means examining areas where the Treaties apply directly to the Member States without needing any further action by the EU institutions.

2.2 The EU's competences are set out in the EU Treaties, which provide the basis for any actions the EU institutions take. The EU can only act within the limits of the competences conferred on it by the Treaties, and where the Treaties do not confer competences on the EU they remain with the Member States.

2.3 There are different types of competence: exclusive, shared and supporting. Only the EU can act in areas where it has exclusive competence, such as the customs union and common commercial policy. In areas of shared competence, such as the single market, environment and energy, either the EU or the Member States may act, but the Member States may be prevented from acting once the EU has done so. And in other areas covered by the EU Treaties, the primary responsibility for action rests with Member States, with the EU playing a supporting role; action by the EU does not prevent the Member States from acting. In other areas, the EU has no competence.

2.4 The table below sets out the current state of EU competence after the changes made by the Treaty of Lisbon.

Exclusive Competence	Shared Competence	Supporting Competence
• Customs union • Competition policy within the internal market Monetary policy for eurozone members • Conservation of marine biological resources • Common commercial policy	• Internal market • Social policy • Economic, social and territorial cohesion • Agriculture and fisheries • Environment • Consumer protection • Transport • Trans-European networks • Energy • Area of freedom, security and justice • Common safety concerns in public health matters	• Protection and improvement of human health • Industry • Culture • Tourism • Education, vocational training, youth and sport • Civil Protection • Administrative cooperation

2.5 Subsidiarity and Proportionality are not types of competence, but rather fundamental principles which must be followed by the EU when it is exercising competence. The EU must act in accordance with fundamental rights as set out in the Charter of Fundamental Rights (such as freedom of expression and non-discrimination) and with the principles of Subsidiarity and Proportionality. Under the principle of Subsidiarity, where the EU does not have exclusive competence, it can only act if it is better placed than the Member States to do so because of the scale or effects of the proposed action. Under the principle of Proportionality, the content and form of EU action must not exceed what is necessary to achieve the objectives of the EU treaties.

2.6 Considering how these principles, as existing Treaty mechanisms to regulate EU action, work in practice is an essential starting point for considering future reform to how the EU operates and when it acts.

2.7 Both principles are “legal” principles in that the EU institutions are bound by them and cannot legally act in breach of them. However, given their nature, they

require significant political judgment as to whether proposed action can better be achieved by Member States, or whether specific EU action is necessary in order to meet a given objective. As considered in section 4 below, the EU courts have to date not struck down an EU law on the grounds that it breaches the principle of Subsidiarity.

2.8 Article 352 TFEU is similarly not a free-standing area of EU competence, and cannot be used to extend EU competence but rather provides a power for the EU to take action in support of EU objectives when other Treaty Articles do not suffice.

3. A brief history of the EU Treaties

3.1 The Treaty on the European Economic Community (EEC) was signed in Rome on 25 March 1957 and entered into force on 1 January 1958. The EEC Treaty had a number of economic objectives, including establishing a European common market. Since 1957 a series of treaties has extended the objectives of what is now the European Union beyond the economic sphere. The amending treaties (with the dates on which they came into force) are: the Single European Act (1 July 1987), which provided for the completion of the Internal Market by 1992; the Treaty on European Union – the Maastricht Treaty (1 November 1993), which covered matters such as justice and home affairs, foreign and security policy, and economic and monetary union; and the Treaty of Amsterdam (1 May 1999), the Treaty of Nice (1 February 2003) and the Treaty of Lisbon (1 December 2009), which made a number of changes to the institutional structure of the EU.

3.2 Following these changes, there are now two main treaties which together set out the competences of the European Union:

- The Treaty on European Union (TEU); and
- The Treaty on the Functioning of the European Union (TFEU).

4. Subsidiarity

4.1 The EU can only act (or "exercise competence") where it has been given the power to do so by its 28 Member States, in one of its Treaties. This is known as the principle of conferral – the powers the EU has are ones conferred on it by its Member States.

4.2 In areas where the EU and Member States share the right to act, how is it to be decided which of them should act? This is where the principle of Subsidiarity comes in, to clarify at which level decisions should be taken.

4.3 Subsidiarity is a cross-cutting principle in the EU context, applicable whenever there is a choice between EU and national (or regional or local) action. It regulates the exercise of powers at EU level. In areas of shared or supporting competence, the EU should act only where action at EU level is more effective than action taken at national, regional or local level. Article 5(3) of the Treaty on European Union provides:

"Under the principle of Subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level."

Where these conditions are not met, it would be contrary to the principle of Subsidiarity for the EU to act.

4.4 As successive Treaties have given the EU powers to act in more policy areas, the principle of Subsidiarity has arisen in more contexts. These are considered in case studies below.

4.5 It is important to note that the principle of Subsidiarity does not apply to areas of **exclusive EU competence**. In these areas, only the EU is entitled to act. And so the issue of the objective being better met by Member States simply does not arise.

4.6 The principle of Subsidiarity might be understood as having the following aims:

- Seeks to protect the powers of Member States;
- Seeks to limit EU action to cases where it is really needed;
- Focuses attention on the best level for action to achieve objectives;
- Ensures that actions are taken by the appropriate actor and that decisions are taken as closely as possible to citizens.

4.7 Some indicative understandings of Subsidiarity may be useful:

- Decisions should be taken as close as possible to the citizen.

- "*European when necessary; national when possible*"[1]

- a presumption that, where there is a choice, action should be taken by Member States except where EU action can add value

- "*For me, Subsidiarity is not a technical concept. It is a fundamental democratic principle. [This]...demands that decisions are taken as openly as possible and as closely to the people as possible.*

  Not everything needs a solution at European level. Europe must focus on where it can add most value. Where this is not the case, it should not meddle. The EU needs to be big on big things and smaller on smaller things - something we may occasionally have neglected in the past. The EU needs to show it has the capacity to set both positive and negative priorities."[2]

1 Netherlands Subsidiarity Review – June 2013 – expressing the guiding principle of subsidiary.

2 José Manuel Durão Barroso, President of the European Commission, State of the Union address, 11 September 2013. http://europa.eu/rapid/press-release_SPEECH-13-684_en.htm

1. Subsidiarity in the treaties

4.8 Subsidiarity as a concept was first introduced in the area of environment, in the Single European Act of 1987. It was made an explicit principle, applying to all areas where both Member States and the EU could act (shared and supporting competence), in the Maastricht Treaty, which entered into force in 1993. The Treaty of Amsterdam (1999) included Protocol (No 2) (with equal legal status to the treaty) on the application of the principles of Subsidiarity and Proportionality. The most recent EU treaty, the Lisbon Treaty, restated the principle of Subsidiarity in Article 5(3) TEU (see above atabove).

4.9 The Treaty of Lisbon also added an explicit reference to the regional and local dimension of the principle of Subsidiarity – it is no longer just about national or European action, but also asks about whether local or regional action could achieve the objective. Another innovation of the Lisbon Treaty was to strengthen the role of national Parliaments in policing compliance with the principle (Protocol (No 2) discussed in more detail from Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality is of equal legal status to the Lisbon Treaty. It establishes that all EU institutions shall have 'constant respect for the principles of Subsidiarity and Proportionality' and gives specific roles to certain institutions. below).

4.10 Subsidiarity as a general principle of EU law can be seen elsewhere in the Treaties. For example, the second paragraph of Article 1 TEU refers to "*decisions [being] taken ... as closely as possible to the citizen*".

2. The roles of different EU institutions in upholding Subsidiarity

4.11 The principle of Subsidiarity applies to all the EU institutions. The rule has practical significance for legislative procedures. Inter-institutional agreements among three of the major EU institutions (the Council, Parliament and the Commission) in 1993 and 2003 (on Better Law-making[3]) set out how these institutions are to support application of the principle of Subsidiarity.

4.12 The **European Commission**, the body which proposes most EU legislation, must explain for each proposal why it thinks EU action is justified. It does this in the recitals to the act, in an explanatory memorandum, and in impact assessments. In order to do this effectively the European Commission's Impact Assessment Board routinely assesses the quality of Commission Subsidiarity assessments. In this way, Subsidiarity is also part of the European Commission (and UK's) drive for Better Regulation and high quality Impact Assessments.

4.13 The European Commission also draws up an annual report on the observance of the principle[4]. The European Commission and the European Parliament have also, in a framework agreement of 2010, undertaken to cooperate with national parliaments in order to facilitate the exercise by national parliaments of their power to scrutinise compliance with the principle of Subsidiarity.

3 http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2003:321:0001:0005:EN:PDF

4 http://ec.europa.eu/smart-regulation/better_regulation/reports_en.htm

3. Subsidiarity in the EU courts

4.14 Member States and EU institutions[5] can bring challenges to new EU legislation in the Court of Justice of the EU (CJEU) in Luxembourg if they believe it does not comply with the principle of Subsidiarity. The Committee of the Regions, a consultative body which represents regions of EU Member States, can also bring challenges against legislation if it is on areas where the Treaties require them to be consulted.

4.15 When a challenge is brought in the EU courts to EU legislation on grounds of breach of Subsidiarity, the court will examine:

- Process: has the legislator sufficiently explained why it considers action at the EU level is justified in to achieving a desired policy objective?
- Substance– is action at the EU level justified to achieve a desired policy objective?

4.16 Courts may also use the concept of Subsidiarity as an interpretative tool where EU legislation is ambiguous and needs to be settled in favour of either greater or lesser scope for Member State action.

4.17 To date, there have been few cases and the Court of Justice of the EU (CJEU) has not struck down any legislation for breach of the principle.

4.18 On **process**, in the *Deposit Guarantee Schemes Directive* case[6], the CJEU was asked by Germany to consider a breach of Subsidiarity in respect of a piece of legislation which was alleged not to have set out why action at the EU level was justified. However, the Court was of the view that whilst Subsidiarity was not specifically referred to in the legislation, the legislation did explain why the proposed action could not be taken by Member States acting alone. As such, the Court decided that the EU had fulfilled the need to explain compliance with the principle of Subsidiarity.

4.19 On **substance**, in the *Working Time Directive case*[7], the UK challenged a piece of EU legislation (that regulated the maximum working week) on the basis of a breach of the principle of Subsidiarity. The CJEU, however, was satisfied that, once the Council had found that action at the EU level was justified to meet the objectives of the EU, that would be sufficient to meet the requirements of

5 Challenges to EU action on grounds of breach of Subsidiarity can also come before the EU courts in cases brought by people and legal persons (such as companies) in certain limited circumstances.

6 C-233/94 *Germany v Parliament and Council (Deposit Guarantee Schemes Directive)* [1997] ECR I-2405.

7 C-84/94 *United Kingdom v Council (Working Time Directive)* [1996] ECR I-5755.

Subsidiarity. In essence, the CJEU found that the political judgment of the EU legislature was that action at the EU level was sufficient to meet the test of Subsidiarity.

4.20 However, in some recent cases concerning challenges to the Biotechnological Inventions Directive[8], the Second Tobacco Labelling Directive[9] and the Food Supplements Directive[10], the CJEU asked - in greater detail than in previous cases - whether the measures that were being challenged were justified. It concluded on its own assessment that the relevant objectives could not satisfactorily be achieved by Member States acting alone, thus requiring action to be taken by the EU.

4.21 For the most part, cases before the CJEU have concerned measures relating to the EU's internal market where, once it is established that the EU has competence to act at all, the Subsidiarity question is relatively easy to answer given that there is normally a strong justification for action to be taken at the EU level given the cross-border impact. The CJEU's approach to the principle of Subsidiarity in respect of areas where there is not necessarily a cross-border element (such as environmental or social policies) remains to be seen.

4. The role of national parliaments

4.22 National parliaments play a vital role in ensuring that the principle of Subsidiarity is respected in the EU legal order.

5. Scrutiny

4.23 Different Member States have different processes for involving their national parliaments in the EU legislative process. In the UK, the Government has a system of Parliamentary scrutiny involving the two European committees of the House of Commons[11] and House of Lords[12]. The lead Whitehall department writes an explanatory memorandum explaining the draft legislation to help inform Parliament's consideration. This memorandum also sets out the Government's view of whether the draft legislation complies with Subsidiarity.

8 C-377/98 *Netherlands v European Parliament and Council* [2001] ECR I-7079.

9 C-491/01 *ex parte British American Tobacco* [2002] ECR I-11453.

10 C-154/04 and C-155/04 *Alliance for Natural Health* [2005] ECR I-6451.

11 http://www.parliament.uk/documents/upload/TheEuroScrutinySystemintheHoC.pdf

12 http://www.parliament.uk/documents/lords-committees/eu-select/Lords-EU-scrutiny-process.pdf

4.24 Some Member States operate in a similar manner to that of the UK, whereby their Parliament will scrutinise most EU legislative proposals in specialist European Affairs Committees. Others handle their scrutiny in sectoral committees, meaning that where a piece of proposed EU legislation relates to the environment, it is the environment committee which considers it. And in other Member States, Parliaments will focus their scrutiny on specific proposals identified in the Commission Work Programme identified as potentially raising Subsidiarity concerns, rather than scrutinising all draft legislation.

6. Reasoned opinions

4.25 The Treaty of Lisbon in 2009 enhanced the role of national parliaments with respect to Subsidiarity. Now national parliaments can formally object, via a "**reasoned opinion**" to the Presidents of the European Commission, the Council and European Parliament, if they consider that draft EU legislation does not comply with the principle of Subsidiarity. The timings are tight. Reasoned opinions must be produced within **eight weeks** of publication of the draft legislation.

4.26 The Treaty sets down rules on the consequences of reasoned opinions, based on the number of votes coming from national parliaments. Over certain thresholds, these are called "yellow" and "orange cards.

- Votes: In EU Member States with two chambers of parliament, as in the case of the UK, each chamber's opinion counts for one vote. If there is only one chamber, as in the case of Ireland, the reasoned opinion counts for two votes. At present, there are a total of 56 votes (28 Member States).

- **Yellow card:** If national parliaments representing at least one-third[13] of the total votes issue Reasoned Opinions on a draft, it must be reviewed. The institution which produced the draft legislative act may maintain, amend or withdraw it.

- **Orange card**: If national parliaments representing a simple majority challenge an ordinary legislative procedure proposal on grounds of Subsidiarity but the Commission maintains its proposal, it will be referred to the legislator (European Parliament and the Council). The proposal can be rejected by 55% of the members of the Council or a majority of European Parliament votes.[14]

13 Reduced to one quarter for proposals in the field of police and judicial cooperation in criminal matters.

14 See "National parliaments and EU law-making: how is the 'yellow card' system working? - Commons Library Standard Note", 12 April 2012 | Standard notes SN06297 at http://www.parliament.uk/briefing-papers/SN06297/national-Parliaments-and-eu-lawmaking-how-is-the-yellow-card-system-working

4.27 Since the entry into force of the Treaty of Lisbon, two yellow cards have been issued but no orange cards (see text box below).

4.28 The Lisbon Treaty also introduced new provisions which allow national parliaments to request their Government to take a case to the Court of Justice on their behalf where they think there has been a breach of the Subsidiarity principle. The UK Government and the European Committees in both Houses of Parliament have signed a Memorandum of Understanding to set out the procedures by which the UK Parliament may make use of these new powers. These new provisions have not yet been used in the UK, or in any other Member State.

4.24 The latest available figures show that in 2012, 70 Reasoned Opinions were submitted to the Commission on 34 proposals[15]. The UK Parliament issued five Reasoned Opinions in 2012. The House of Commons European Scrutiny Committee has to date issued 13 Reasoned Opinions during the life of the current Parliament (2010-15)[16] and the House of Lords EU Committee has issued seven Reasoned Opinions to date.[17]

15 Croatia became a Member State of the EU on 1 July 2013, and is therefore not included in this table.

16 http://www.parliament.uk/business/committees/committees-a-z/commons-select/european-scrutiny-committee/scrutiny-reserve-overrides/

17 http://www.parliament.uk/business/committees/committees-a-z/lords-select/eu-select-committee-/committee-work/parliament-2010/Subsidiarity/

5. Proportionality

5.1 Proportionality is the principle that where the EU acts, it should do no more than is necessary to achieve the objectives behind the action. Specifically, Article 5(4), paragraph 1 TFEU states:

> "*Under the principle of Proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties*."

This means that, where the EU acts, that action must be suitable to achieve the desired objective, and that the action should not go beyond what is necessary in order to achieve that objective. This includes a requirement that where there are differing ways to achieve an objective, the least onerous should be taken. Essentially this principle aims to prevent EU actions going beyond what is necessary to achieve the intended outcome.

5.2 Like Subsidiarity, the principle of Proportionality binds the EU institutions. Unlike Subsidiarity, it also applies to EU Member States when they act within the scope of EU law. So challenges can be brought in national courts to national actions which give effect to EU law.

5.3 Proportionality dates back to the establishment of what is now known as the EU, in the 1957 Treaty of Rome.

7. How the Court of Justice approaches Proportionality

5.4 The Court has considered a number of challenges to EU (and Member State) actions on the grounds of breach of the principle of Proportionality, but the Court has been cautious in using Proportionality to annul legislation.

5.5 For example, in a challenge to EU legislation which banned the use of some substances having a hormonal action in livestock farming (the *Fedesa* case[18]), it was argued that a total ban of those substances was disproportionate to the objective. The Court found that the decision taken by the EU legislator was proportionate, even taking into account the substantial negative financial

18 C-331/88 *R v Minister for Agriculture, Fisheries and Food, ex p Fedesa* [1990] ECR I-423.

consequences for some traders, and that the Court would only interfere in such policy judgments on grounds of Proportionality where the action was manifestly inappropriate.

5.6 Similarly, in the *Affish*[19] case, the EU Decision banning the importation of Japanese fish into the EU on health grounds was challenged as being disproportionate to the objective of protecting health. It was argued that not all Japanese fish factories had hygiene issues, and that banning all fish imports from Japan went too far. However, the Court held that because it would not be practical to check the hygiene standards of all Japanese fish factories and that a reasonably representative sample had been checked, it was proportionate to ban all Japanese fish imports.

5.7 A good example of where the Court has found an EU measure to be disproportionate is the *ABNA*[20] case. This concerned an EU Directive which required manufacturers of animal feed to indicate, at a customer's request, the exact composition of the feed. The Court found that this requirement impacted seriously on the economic interests of the manufacturers of animal feed, and that this obligation could not be justified by the objective of protecting health, and went beyond what was necessary to attain that objective. The Court annulled the legislation on the grounds of Proportionality.

5.8 In the context of review of Member State action, the Court held in *Kreil,*[21] that a rule requiring all armed units in the German armed forces had to be male was disproportionate. And in *Canal*[22] the Court found that Spanish legislation which requiring operators of certain television services to register details of their equipment was disproportionate where it duplicated controls already carried out in that state or another Member State.

19 C-183/95 *Affish BV v Rijksdienst voor de Keuring van Vee en Vlees* [1997] ECR I-4315.

20 Joined Cases C-453/03, C-11/04, C-12/04 and C-194/04 *ABNA Ltd and Others v Secretary of State for Health and Others* [2005] ECR I-10423.

21 C-285/98 *Kreil v Bundesrepublik Deutschland* [2000] ECR I-69.

22 C-390/99 *Canal Satellite Digital SL v Aministracion General del Estado and Distribuidora de Television Digital SA (DTS)* [2002] ECR I-607.

8. Comparison of Subsidiarity and Proportionality

5.9 Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality is of equal legal status to the Lisbon Treaty. It establishes that all EU institutions shall have '*constant respect for the principles of Subsidiarity and Proportionality*' and gives specific roles to certain institutions.

5.10 However, there are differences in the powers given to national parliaments in relation to their capacity to monitor legislative proposals on the grounds of Proportionality and Subsidiarity. Although national parliaments are able to issue reasoned opinions, which can trigger yellow and orange cards, on the grounds of Subsidiarity concerns, no such mechanism explicitly exists for parliaments to register their Proportionality concerns formally.

5.11 Nonetheless, national parliaments can and do record Proportionality concerns in their reasoned opinions and in their general political dialogue with the European Commission. For example, in its 2012 annual report on Subsidiarity and Proportionality the European Commission highlights the importance national parliaments place on considering questions of Proportionality, and their views on the interplay between the two principles.[23] According to a survey conducted by COSAC, the inter-Parliamentary forum for EU Parliaments, most national parliaments are of the view that Subsidiarity monitoring is not effective unless Proportionality monitoring also takes place[24]. Some commentators have called for the scope of reasoned opinions to be extended to include Proportionality.[25]

5.12 The Commission is required to produce an annual report for the European Council, European Parliament, the Council and national parliaments on the application of Article 5 of the TFEU which covers both Proportionality and Subsidiarity. This report is also sent to the Economic and Social Committee and the Committee of the Regions. The most recent report (for 2012):

- sets out the Commission's views on democratic accountability and how this can be increased through political dialogue between national parliaments and the Commission.
- notes the important role played by COSAC.

23 See Report from the Commission, Annual Report 2012 on Subsidiarity and Proportionality

24 See COSAC Eighteenth Bi-annual Report: Developments in European Union Procedures and Practices Relevant to Parliamentary Scrutiny, 27 September 2012

25 See From Subsidiarity to Better EU Governance: A Practical Reform Agenda for the EU | Clingandel Report March 2014

- argues for greater strengthening of scrutiny at national and European parliamentary levels, and for more cooperation between national parliaments and the European Parliament.
- notes that in 2012, 663 written opinions (an increase of 7% compared to 2011) on legislative and non-legislative documents were received from national parliaments, of which 70 were reasoned opinions (on 34 proposals) up from 64 in 2011.
- notes that six policy areas accounted for more than half of the opinions: internal market and services; justice; home affairs; mobility and transport; employment; and health.
- notes that Portugal, Italy and Germany's parliamentary chambers were the most active in issuing opinions. The UK issued 22: 16 from the House of Lords; and 6 from the House of Commons.

	Subsidiarity	Proportionality
General principle of EU law	√	√

Binds European Commission	√	√
Binds European Parliament	√	√
Binds Council	√	√

Binds EU Member States when implementing EU law	**X**	√
Can be challenged in Court of Justice of the EU	√	√
Can be basis for Reasoned Opinion of national parliament – leading to yellow or orange card	√	**X**

Covered in annual Commission report	√	√

6.1

6. Article 352 – a broad enabling or flexibility clause

6.1 Article 352 TFEU provides a power that can be used to fill the gap where no specific provisions of the Treaty confers express or implied powers to act, if such powers appear none the less to be necessary to enable the Union to carry out its functions with a view to attaining one of the objectives laid down by the Treaty. It says:

> *If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures. Where the measures in question are adopted by the Council in accordance with a special legislative procedure, it shall also act unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament.*

6.2 This provides a potentially wide and flexible legal basis that could extend to anything coming within EU competence, as defined by its tasks and activities in Articles 3 TEU and 3, 4 and 6 TFEU. However, the powers in Article 352 TFEU are not unlimited, and cannot be used to extend EU competence.

6.3 As this is a sensitive power with potentially wide-ranging application, any proposal made must secure the unanimous agreement of the Council and, following the entry into force of the Lisbon Treaty, the consent of the European Parliament. Some national parliaments also play a role. The case of the UK is described below at paragraph Section 8 of the European Union Act 2011 ("EU Act") contains provisions on the rules and procedures applicable in the UK to proposals for EU legislation based in whole or in part on Article 352 TFEU. Under section 8 of the EU Act, a UK Government Minister may not vote in favour of, or otherwise support, a proposal for EU legislation which is based on Article 352 TFEU, in whole or in part, unless the draft legislation has received prior approval by Act of Parliament.. The German government may not support the use of Article 352 without seeking prior legislative approval from both houses of parliament, following an important decision[26] by its Constitutional Court on the compatibility of Treaty of Lisbon with the German constitution.

6.4 Article 352's predecessor article (Article 308 of the then Treaty on the European Community) was used as a legal base for hundreds of pieces of legislation. This attracted some criticism for stretching the EU treaties beyond what was originally intended. In many cases, following the use of Article 308 in a particular area, a new Treaty article was adopted in the Lisbon Treaty providing the legal base for action which had been missing before. Thus for example, in the case of sanctions, there are now two Treaty articles, Article 75 and 215, which allow for targeted sanctions against individuals. So it would seem likely that these more

26 Decision of BVerFG 30 June 2009, 123, 267.

specific provisions will be used, and that Article 352 will be used less often. This seems to be the case so far (see examples of legislation adopted since Lisbon below) but may evolve if Member States and the EU institutions wish to agree EU action in new areas.

6.5 There have been only a few examples of EU action on the basis of Article 352 TFEU since the entry into force of the Lisbon Treaty:

- legislation to recognise electronic versions of the EU's Official Journal as authentic and legally binding;
- approving the framework of an EU agency on fundamental rights;
- a decision to give EU historical archives at the European University Institute in Florence; and
- a decision to adopt a "Europe for Citizens" programme.

9. Historical development of Article 352

6.6 The EU Treaties have always contained a catch-all provision like Article 352 TFEU.

6.7 Article 235 of the original Treaty of Rome (1957) specified that the power should be used for *"action by the Community... necessary to attain, in the course of the operation of the common market one of the objectives of the Community"*, and this provision remained unchanged up to and including the Treaty of Nice. Prior to the Lisbon Treaty (2009), this clause was last numbered Article 308 of the Treaty on the European Community.

6.8 The Lisbon Treaty has a broader wording to reflect that the scope and objectives of EU action had widened to encompass issues beyond the economic and market-based, such that Article 352 TFEU can now be used for *"action by the Union...necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties"*. However, Lisbon amendments also made clear that Article 352 TFEU cannot be used for action in the area of common foreign and security policy[27] as an area in which decision-making is for the most part intergovernmental and taken by Member States.

6.9 Another change in the Lisbon Treaty is that the European Parliament must now consent to the use of Article 352 TFEU. Under the previous version (Article 308 TEC), it was merely consulted.

6.10 Upon the adoption of the Lisbon Treaty, the Heads of State or Government adopted two relevant Declarations. Declaration (No 41) specifies that the reference to objectives of the Union in Article 352 is not limited to promoting peace, EU values and the well-being of EU people with respect to external action.

27 See *Foreign Policy report – review of the balance of competences* published 22 July 2013 available at https://www.gov.uk/review-of-the-balance-of-competences.

6.11 Declaration (No. 42) on Article 352 of the Treaty on the Functioning of the European Union made clear the view of EU Heads of State or Government on its restricted nature:

> *"The Conference underlines that, in accordance with the settled case law of the Court of Justice of the European Union, Article 352 of the Treaty on the Functioning of the European Union, being an integral part of an institutional system based on the principle of conferred powers, cannot serve as a basis for widening the scope of Union powers beyond the general framework created by the provisions of the Treaties as a whole and, in particular, by those that define the tasks and the activities of the Union. In any event, this Article cannot be used as a basis for the adoption of provisions whose effect would, in substance, be to amend the Treaties without following the procedure which they provide for that purpose."*

6.12 This is intended to make clear that this article cannot be used to widen the scope of the EU's powers beyond those already set out in the EU Treaties. It also makes clear that Article 352 TFEU cannot be used to adopt provisions which would have the effect of amending the EU Treaties, as the Treaties themselves already lay down specific procedures for their amendment.

6.13 There is no case-law yet on the use of Article 352 as a legal basis for EU action but past cases show how the EU courts approached its predecessor.

10. Scope and Interpretation of Article 352 TFEU

In *Opinion 2/94*[28] concerning accession by the European Community to the European Convention on Human Rights (ECHR), the Court held that Article 308 TEC, the predecessor of Article 352 TFEU, did not provide a legal basis because accession would have fundamental institutional implications. In particular the Court found that Article 308 cannot serve as a basis for widening the scope of [Union] powers beyond the general framework created by the provisions of the Treaty as a whole and, in particular, by those that define the tasks and the activities of the [Union].

Similarly in *Kadi*[29] the Court held that Article 308 TEC, could not be used to pursue objectives relating to the EU's common foreign and security policy. It could only be used to pursue objectives of the European Community (as was) as specified in the EC Treaty.

This restriction on the use of Article 352 has now been made explicit in its paragraph 4, which says,

> "*This Article cannot serve as a basis for attaining objectives pertaining to the common foreign and security policy*".

28 *Opinion 2/94* [1996] ECR I-1759,

29 Cases C-402/05P and C-415/P *Kadi* [2008] ECR I-06351, paragraphs 198-204.

However, Article 352 TFEU is available for police and judicial co-operation in criminal matters.

Also, the powers in Article 352 TFEU cannot be used to circumvent restrictions in other, more specific Treaty articles. Indeed, Article 352(3) expressly prohibits the use of Article 352 to harmonise the laws or regulations of Member States where this is excluded by the Treaties. So Article 352 could not be used to circumvent the exclusion of harmonisation in, for example, Articles 165(4) – concerning education, vocational training, youth and sport – or 167(5) TFEU – culture.

Article 352 TFEU or its predecessors have been used to create decision-making agencies, such as the Office for Harmonisation in the Internal Market[30] and the Community Plant Variety Office[31].

The *Pringle* case[32] (challenging the legality of the European Stability Mechanism) recently confirmed that the availability of powers for the Union to act under Article 352 TFEU does not imply any obligation to use those powers[33].

11. Relevant UK legislation

6.14 Section 8 of the European Union Act 2011 ("EU Act") contains provisions on the rules and procedures applicable in the UK to proposals for EU legislation based in whole or in part on Article 352 TFEU. Under section 8 of the EU Act, a UK Government Minister may not vote in favour of, or otherwise support, a proposal for EU legislation which is based on Article 352 TFEU, in whole or in part, unless the draft legislation has received prior approval by Act of Parliament.

6.15 Where legislation needs to be adopted urgently by the EU based in whole or in part on Article 352 TFEU, section 8(4) of the EU Act makes provision for the following procedure to apply:

30 Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1).

31 Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights (OJ 1994 L 227, p. 1).

32 Case C-370/12, *Thomas Pringle v Government of Ireland, Ireland and The Attorney General*, [2012] ECR - 00000

33 Paragraph 67, citing Case 22/70 *Commission* v *Council* ('*ERTA*') [1971] ECR 263, paragraph 95

- In each House of Parliament, a Minister must move a motion that the House approves the Government's intention to support a specified draft decision without prior approval by Act, and is of the opinion that the measure concerned is required as a matter of urgency;
- Each House of Parliament agrees to the motion without amendment.

6.16 Section 8(6) of the EU Act sets out a number of circumstances where proposals for EU legislation based in whole or in part on Article 352 TFEU will be exempt both from the requirement for prior approval by Parliament by primary legislation and, unlike the urgency condition, for a motion to be passed in both Houses. The five exemptions are that the proposed measure:–

i. is **equivalent** to a measure already adopted under Article 352 TFEU;
ii. only extends or **renews** an existing measure without changing its substance;
iii. extends existing Article 352 measures to **another Member State or third country**;
iv. **repeals** an existing measure adopted under Article 352 TFEU; or
v. **consolidates** existing measures adopted in whole or in part under Article 352 TFEU, without changing their substance.

6.17 The practice has arisen that every year or so the UK Parliament is asked to adopt measures in an annual bill, which, upon adoption, becomes known as the EU (Approvals) Act [YYYY].

6.18 The EU (Approvals) Act 2013 approved two EU decisions adopted under Article 352, providing for:

- the electronic version of the Official Journal of the European Union (OJ) to be the authentic and legally recognised edition of the OJ.
- a new Multiannual Framework for the EU Fundamental Rights Agency to operate from the beginning of 2013 until the end of 2017.

6.19 Similarly, the EU (Approvals) Act 2014 approved:

- the draft decision to adopt the Council Regulation on the deposit of the historical archives of the institutions at the European University Institute in Florence, and
- the draft decision to adopt the Council Regulation establishing for the period 2014-2020 the programme "Europe for Citizens."

7. How to respond to this Call for Evidence

7.1 We would welcome evidence from anyone with relevant knowledge, expertise or experience. We would welcome contributions from individuals, companies, civil society organisations including think-tanks, and governments and governmental bodies. We welcome input from those within the UK or beyond our borders.

7.2 Your evidence should be objective, factual information about the impact or effect of these principles of Subsidiarity and Proportionality and/or Article 352 TFEU in your area of expertise. Questions on which we would value input are set out in section 9 below. Where your evidence is relevant to other balance of competences reviews, we will pass your evidence over to the relevant review teams.

7.3 We will expect to publish your response and the name of your organisation unless you ask us not to (but please note that, even if you ask us to keep your contribution confidential, we might have to release it in response to a request under the Freedom of Information Act). We will not publish your own name unless you wish it included. Please base your response on answers to the questions set out below.

7.4 We will be hosting a series of events to proactively seek evidence and to give further information on the Review. To register your interest in these events or if you have any other questions relating to the issues in this Review, please contact: BalanceofCompetencesSubsidiarity@fco.gov.uk

7.5 Please send your evidence by midday on 30 June 2014 to:

By	Email:
BalanceofCompetencesSubsidiarity@fco.gov.uk	

By Post: BoC Team, PTF, Foreign and Commonwealth Office, King Charles Street, London SW1A 2AH

8. Call for Evidence questions on Subsidiarity, Proportionality, and Article 352 TFEU

12. Scope

1. Are the principles of Subsidiarity and Proportionality effective ways to decide when the EU acts, and how it acts? You may wish to refer to particular examples in your evidence.

13. Interpretation

2. What are your views on how the principles have been interpreted in practice by EU and Member State actors including: the EU courts, the other EU institutions, Member State governments, Member State parliaments, sub-national or regional bodies and civil society?

14. Application

3. Do you have any observations on how the different actors play their roles? Could they do anything differently to ensure that action takes place at the right level?

4. The EU Treaties treat Subsidiarity differently from Proportionality. National parliaments have a role in reviewing whether EU action is appropriate (Subsidiarity). The EU is not legally permitted to act where it is not proportionate (Proportionality). Does it make sense to separate out the two principles like this, and use different means to protect them?

15. Future options and challenges

5. Where might alternative approaches or actions as regards the scope, interpretation and application of the principles of Subsidiarity and Proportionality be beneficial?

16. Article 352 TFEU ('flexibility clause')

6. In your opinion, based on particular examples, is it useful to have a catch-all treaty base for EU action? How appropriately has Article 352 been used?

7. Which alternative approaches to the scope, interpretation and application of Article 352 might be beneficial?

17. Other

8. Are there any general points you wish to make on how well the current procedures and actors work to ensure that the EU only acts where it is appropriate to do so, and in a way which is limited to the EU's objectives, which are not captured above?

Annex A: Links with other Balance of Competences reports

The review of Subsidiarity and Proportionality overlaps with a number of other Balance of Competences reviews. These are all available at: http://www.gov.uk/review-of-the-balance-of-competences.

Semester One (final reports published in July 2013)

- **Single Market**: Raised issue of Treaty principles being applied in areas where there is limited or no formal EU competence.

- **Taxation**: The report stressed the general view of UK respondents was EU-

level action on taxation was appropriate only where there was a clear internal market justification Many said they would like less EU-level involvement in taxation.

- **Health:** References to the UK Government has asserted the principle of Subsidiarity in ongoing negotiations on EU capabilities in the area of cross-border health threats like pandemic flu.

- **Development:** The report noted this is an area of shared competence and the Treaty requires EU's and Member States' policy in these areas to complement and reinforce each other. Although the EU has legal personality, and its competence in these areas extends to concluding international agreements with third states and international organisations, it does not affect Member States' ability to do so

Semester Two (final reports published 13 February 2014)

- **Trade and Investment**: Suggestion of looking for more Subsidiarity in response to pressures between those within and outside the Eurozone.

- **Environment and Climate** Change: Some references to areas where action more appropriate at national rather than EU-Level e.g. planning, noise, protection of soli, flooding and environmental justice.

- **Transport**: Contributors supported EU action where transport crosses EU member States but there is a feeling that EU action fails to take account of distinct circumstances of Member States with peripheral geographical locations. The EU can impose some cross border rules on local and domestic transport that operate solely within UK and do not affect Single Market.

Semesters Three and Four (forthcoming)

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