

Call for evidence on the UK Government's review of the balance of competences between the United Kingdom and the European Union

Response from the Constitutional and Legislative Affairs Committee of the National Assembly for Wales

1. On behalf of the Constitutional and Legislative Affairs Committee, I am writing in response to the call for evidence launched on 27 March 2014 on 'Subsidiarity and Proportionality' as part of the ongoing Balance of Competences Review. This Committee has the lead responsibility within the National Assembly for Wales for monitoring subsidiarity issues arising out of draft EU legislation.

2. As Chair of this Committee and in my capacity as Deputy Presiding Officer of the Assembly I also attend the regular meetings of the EC-UK Forum, which brings together the Chairs of committees responsible for EU affairs within the UK and Devolved Legislatures, and where subsidiarity and proportionality are discussed as a regular agenda item. I am copying this letter to the Chairs of these Committees for their information.

3. I would like to emphasise the excellent working relations we have with the other UK legislatures on subsidiarity issues, and underline the value we place on the regular informal channels of communication provided by the EC-UK Forum and the day to day contacts between the responsible officials in our institutions.

Role of the National Assembly for Wales and the other Devolved Legislatures

4. The call for evidence makes reference to the recognition in the Treaty of Lisbon (Article 6 of Protocol No.2 *On the Application of the Principles of Subsidiarity and Proportionality*) of the role of 'regional parliaments'¹ in the Reasoned Opinions Procedure² as it is referred to in the Balance of Competences paper. The call for evidence does not, however, make any reference to the way this has been applied in the UK; to the participation by the National Assembly for Wales, the Northern Ireland Assembly and Scottish Parliament in this process. Nor does it refer to the dynamic of relations between the House of

¹ Whilst we would prefer use of a phrase that avoids the word 'regional' given the historic and recognised status of Wales as a distinct 'nation' within the UK, for pragmatic reasons we recognise at EU level 'regional' is the lingua franca to describe bodies like ourselves, acting below the Member State (and above the local authority) level.

² This is also often referred to at EU level as the Subsidiarity Early Warning System.

Commons and House of Lords in relation to this work; nor to the relationships between the devolved legislatures (and governments) and the EU Institutions.

5. This is an unfortunate omission particularly given the responsibility we have as a devolved legislature to ensure that our legislation is consistent with European Law (section 108(6)(c) of the Government of Wales Act 2006). The subjects where this is particularly relevant include agriculture, fisheries, forestry and rural development; environment; water and flood defence; economic development; education and training; and health, where both the National Assembly and the EU make policy and legislate.

6. Therefore, we would like to draw to the UK Government's attention how we approach subsidiarity issues within the Assembly so that there is a greater awareness within the UK Government and its departments for future exercises. We expand further on our experiences with the UK Parliament's two chambers, the House of Commons and House of Lords, which act as the gates through which any comments or concerns we raise as part of the Reasoned Opinions Procedure proceed.

7. We include information on the relationships we have at the EU level, through the Committee of the Regions, our membership of CALRE (EU network of regional legislative assemblies and parliaments), as well as how we work with the EU Institutions in Brussels.

Internal processes within the Assembly

8. Under the Assembly's Standing Orders (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 (as set out in Article 5 of the Treaty of Lisbon and in accordance with Protocol No.2 of the Treaty *On the Application of the Principles of Subsidiarity and Proportionality*).

9. In order to ensure that the Constitutional and Legislative Affairs Committee fulfils its subsidiarity monitoring function effectively, Assembly officials monitor all draft EU legislative proposals that apply to Wales on a systematic basis to check whether they raise any subsidiarity concerns. Where concerns are raised, these are notified to the Committee for consideration. The Chair of the Committee is empowered to take a decision on behalf of the Committee when time

constraints do not permit discussion within a formal meeting. A subsidiarity monitoring report is prepared by officials for information on a termly basis.³

10. Within this process the UK Government's 'batch list' of EU proposals (sent to the Assembly by the Foreign and Commonwealth Office) is used to carry out an initial filter to identify legislative dossiers relevant to the Assembly's competence, and a more detailed analysis is undertaken subsequently using the UK Government's Explanatory Memoranda (which are sent to the Assembly by the House of Commons European Scrutiny Committee). Assembly officials also refer directly to the European Commission's proposals and supporting documents in undertaking this more detailed assessment.

Limited number of concerns raised on subsidiarity

11. To date the Assembly has made two written representations (in accordance with the procedure set out in Standing Order 21.9):

- On the proposals for a directive on public procurement (COM(2011)896) – February 2012. The concerns raised were included in the Reasoned Opinion adopted by the House of Commons, and debated on the floor on 6 March 2012;
- On the proposals for a regulation on high-speed electronic communications networks (COM(2013)147). The Committee in correspondence agreed with the subsidiarity concerns raised by the House of Commons in its Reasoned Opinion adopted on 13 May 2013.

12. The Committee also wrote informally to the House of Commons' European Scrutiny Committee about proposals for directives on tobacco and related products (COM(2012)0788) and alternative fuels infrastructure (COM(2013)0018).

Insufficient detailed information on devolved concerns

13. The system we operate to review subsidiarity concerns relies heavily on the information provided in the UK Government EM and the Committee is grateful to the House of Commons for its co-operation in making this information readily available to us.

14. The UK Government EMs rarely include any information on views expressed by the Devolved Administrations. The Committee in its recent inquiry into Wales' Role in EU Decision-Making (report published

³ See: <http://www.senedd.assemblywales.org/mgIssueHistoryHome.aspx?IId=8668>

on 6 March 2014 and debated by the full Assembly on 4 June 2014) noted this point, expressing concerns over the lack of detailed information on Welsh Government positions on EU legislative dossiers. The report (Recommendation 8) calls on the Welsh Government to address this current gap.⁴

15. This is an important point as the system is currently heavily skewed towards a UK perspective on EU policy. There is an onus on the devolved administrations to demonstrate they are looking at EU proposals with a particular eye to the impact they will have at the territorial level. We are currently discussing this issue with the Welsh Government in order to persuade them that such information is essential to transparent scrutiny of Welsh influence in EU decision-making.

16. We note that Article 5 of the Protocol states that “Draft legislative acts shall be justified with regard to the principles of subsidiarity and proportionality. Any draft legislative act should contain a detailed statement making it possible to appraise compliance with the principles of subsidiarity and proportionality. This statement should contain some assessment of the proposal's financial impact and, in the case of a directive, of its implications for the rules to be put in place by Member States, **including, where necessary, the regional legislation.**” (our emphasis)

17. Our experience is that very rarely does Commission documentation include an assessment of the implications of the proposals for ‘regional’ legislation, even when, as in the UK, responsibility for implementation is devolved. This is particularly important in relation to the Common Agricultural Policy as Welsh Ministers have been designated to make implementing legislation.

Length of time to respond

18. Whilst we recognise that the timeframe of eight weeks (following formal publication of a European Commission proposal in all EU official languages) is tight, the internal procedures of the Assembly have to date provided sufficient flexibility to enable the Committee to feed in concerns (in the few cases where these have arisen) to the House of Commons and House of Lords. Strong working relationships with the

⁴ National Assembly for Wales, Constitutional and Legislative Affairs Committee, *Wales’ role in the EU decision-making process*, March 2014

<http://www.senedd.assemblywales.org/mgIssueHistoryHome.aspx?IId=6722>

Chairs and officials of the EU Committees in the UK Parliament, and the informal mechanisms alluded to above, have enabled this to work smoothly.

19. However, we note and endorse the call by the House of Lords for the eight weeks deadline to be extended to twelve weeks. This is particularly important from the perspective of enabling the government departments and devolved administrations to undertake a sufficiently robust analysis of legislative proposals, and to provide this information to the UK legislatures for scrutiny.

Inter-institutional co-operation within the UK

20. As has already been mentioned we have good working relationships with the other UK legislatures on subsidiarity matters, and more generally on EU policy monitoring. This works through the EC-UK Forum, through bilateral links between committees from the different legislatures, and through the informal contact between officials. This is invaluable in cascading and finding out about potential subsidiarity concerns within the UK.

21. Our experience with the House of Commons and House of Lords has been positive, with a clear willingness on their part to include the concerns we have raised within the representations they make formally to the European Commission through the Reasoned Opinion Procedures.

Informal links with the EU Institutions

22. The formal Reasoned Opinion Procedure does not take into account the views expressed by sub-state Parliaments and legislatures like the National Assembly for Wales directly – these are only taken into consideration if incorporated into a ‘national’ Parliament submission.

23. It is standard practice for us to write directly to the European Commission to alert it of any concerns we may raise. The European Commission will send a response, by an individual Commissioner (rather than a formal reply by the College of Commissioners) which is something we welcome. However, there is a certain anomaly in this system, in the sense that key issues or concerns falling with devolved competence, have no formal status in the European Commission’s eyes unless submitted by a Member State legislature.

24. We return to this theme when considering the question of ‘strengthening the role of national parliaments’ in the EU.

Inter-institutional co-operation and networking: EU level

25. The National Assembly for Wales is a member of the Committee of the Regions' (CoR) EU-wide Subsidiarity Monitoring Network and its Subsidiarity Expert Group. These provide fora for the exchange of information, and platforms for dialogue with the EU Institutions on the experiences of the protocol in practice. As well as the web-resources, and contacts in other legislatures, through these mechanisms the CoR also organises events and conferences where politicians and officials can meet and discuss subsidiarity concerns – for example in December 2013 I spoke at a CoR EU conference on Subsidiarity hosted by the Bundesrat in Berlin on our experiences in Wales, and I am due to speak at an EU conference in Brussels (again hosted by the Committee of the Regions) on the role of regional parliaments in scrutinising regional executives in EU decision-making.

26. Through our membership of CALRE we are able to talk directly to other sub-state parliaments, and discuss the interactions they have with their national legislatures and governments in dealing with subsidiarity and other EU policy issues.

27. The National Assembly for Wales is the only UK devolved legislature with a parliamentary office in Brussels, supporting the work of the Assembly on EU affairs, including the work of the Committee of the Regions representatives. We have established a strong reputation in Brussels for positive engagement and participation in the EU policy and legislative process, and have regular direct contact with European Commission officials, including formal evidence sessions and updates to Assembly committees (in person and via video conference) to inform this work. We have also focused during the current Assembly on the role of committees in acting as platforms through which to communicate key EU developments to Welsh stakeholder organisations. We engage them in discussions around the relevance of proposals and their potential impact on Wales, and feed these key points into the legislative cycle. This is on the basis that as a legislature within the EU the Assembly has a legitimate role and responsibility to engage as effectively as possible in the EU legislative process, including in a direct 'legislature to legislature' dialogue with the European Parliament. We underline the importance of the Welsh MEPs in this, in helping to facilitate such contacts.

Role of ‘national Parliaments’ in the EU and status of ‘regional’ parliaments

28. These are critically important points in any reassessment that is made of the status of ‘national’ (Member State level) Parliaments within the EU. We read with interest the recent reports by the House of Lords (on the role of national parliaments in the EU) and House of Commons (on the EU scrutiny system within the Commons). We have also noted the statements by the Prime Minister David Cameron with regard to enhancing the status and powers of national parliaments within the EU being a core part of his agenda to ‘renegotiate’ the terms of the UK’s membership of the EU.

29. We would underline the importance of any discussions around the status of ‘national’ Parliaments (Member State level) in the EU decision-making being sensitive to the realities of devolution as it currently stands in the UK, and as it develops further. The second report by the Silk Commission (“Silk 2”) published in March 2014, on the future devolution of powers to Wales, has particular relevance in this context⁵.

Informal v formal mechanisms within the UK

30. The current approach within the UK is informal, relying on good working relationships between the devolved legislatures and the House of Commons and House of Lords. There is a broader question as to whether a more formalised arrangement should be put in place.

31. We note in particular the Silk 2 report recommendation for the creation of a Welsh Intergovernmental Committee and a Statutory Code of Practice on intergovernmental relations: questions around EU policy and law-making, the voice of the Welsh Government (and, therefore, scrutiny role of the National Assembly for Wales over this), subsidiarity and proportionality would be core issues that would fall within the remit of such a body.

Proportionality

32. We note with interest the comments on proportionality, and would draw the UK Government’s attention to the work of the CoR in this area, including in particular with reference to the preparation of ‘impact assessments’ by the European Commission. The CoR has focused on ‘upstream’ and early engagement in the preparation of

⁵ Silk Commission web-site:
<http://commissionondevolutioninwales.independent.gov.uk/>. See Part II report (‘Silk 2’) published March 2014

these impact assessments, aimed at identifying potential problems and avoiding these. The CoR has helpfully produced a 'subsidiarity and proportionality toolkit', which can be used as a checklist for new legislative proposals.

33. We agree that more attention needs to be given to the question of 'proportionality', as the Reasoned Opinions Procedure as it stands – and according to the wording of Article 6 – does not extend to questions of proportionality. Consideration should be given to either: (i) introducing a new mechanism (perhaps during the preparatory/consultative phase of new EU legislation) where questions of proportionality would be addressed fundamentally, building on the initiative undertaken by the Committee of the Regions, or (ii) extending the scope of the Reasoned Opinion Procedure to explicitly include proportionality as part of the assessment.

34. The absence of a formal procedure for consideration of questions of proportionality explains why we as a Committee have focused primarily on questions of subsidiarity with regard to new legislative proposals from the EU. We recognise that in many cases it is not easy to distinguish between the two principles. This was the case, for example, in relation to the proposals for a directive on public procurement (COM(2011)896) – February 2012 referred to above. A 'national oversight body' would have been set up under Articles 84-86 of the draft Directive. From our perspective the crucial wording appeared in the very first sentence "Member States shall appoint a single independent body responsible for the oversight and coordination of implementation activities (hereinafter 'the oversight body')." We took that the requirement to have a single oversight body in each Member State breached the principle of subsidiarity and made representations accordingly. We might equally have argued that the content and form of the proposed Union action exceeded what was necessary to achieve the objectives of the Treaties and therefore breached the principle of proportionality.