



# **Cynulliad Cenedlaethol Cymru** **The National Assembly for Wales**

## **Y Pwyllgor Materion Cyfansoddiadol a** **Deddfwriaethol** **The Constitutional and Legislative Affairs Committee**

**Dydd Llun, 20 Chwefror 2012**  
**Monday, 20 February 2012**

### **Cynnwys** **Contents**

Cyflwyniad, Ymddiheuriadau, Dirprwyon a Datganiadau o Fuddiant  
Introduction, Apologies, Substitutions and Declarations of Interest

Offerynnau nad ydynt yn Cynnwys Unrhyw Faterion i'w Codi o dan Reolau Sefydlog Rhifau  
21.2 neu 21.3  
Instruments that Raise No Reporting Issues under Standing Order Nos. 21.2 or 21.3

Offerynnau sy'n Cynnwys Materion i'w Codi gyda'r Cynulliad o dan Reolau Sefydlog Rhifau  
21.2 neu 21.3  
Instruments that Raise Issues to be Reported to the Assembly under Standing Order Nos. 21.2  
or 21.3

Cynnig Drafft yr Undeb Ewropeaidd ar gyfer Cyfarwyddeb ar Gaffael Cyhoeddus—Mater  
Posibl i'w Drafod yn Ymwneud â Sybsidiaredd  
European Commission Draft Proposal for a Directive on Public Procurement—Possible  
Subsidiarity Issue

Dyddiad y Cyfarfod Nesaf  
Date of the Next Meeting

Cofnodir y trafodion hyn yn yr iaith y llefarwyd hwy ynddi yn y pwyllgor. Yn ogystal,  
cynhwysir cyfieithiad Saesneg o gyfraniadau yn y Gymraeg.

These proceedings are reported in the language in which they were spoken in the committee.  
In addition, an English translation of Welsh speeches is included.

**Aelodau'r pwyllgor yn bresennol**  
**Committee members in attendance**

Jocelyn Davies	Plaid Cymru (yn dirprwyo ar ran Simon Thomas) The Party of Wales (substitute for Simon Thomas)
Suzy Davies	Ceidwadwyr Cymreig Welsh Conservatives
Julie James	Llafur Labour
David Melding	Y Dirprwy Lywydd a Chadeirydd y Pwyllgor The Deputy Presiding Officer and Committee Chair
Eluned Parrott	Democratiaid Rhyddfrydol Cymru Welsh Liberal Democrats

**Swyddogion Cynulliad Cenedlaethol Cymru yn bresennol**  
**National Assembly for Wales officials in attendance**

Steve George	Clerc Clerk
Gwyn Griffiths	Uwch-gynghorydd Cyfreithiol Senior Legal Adviser
Gregg Jones	Pennaeth Swyddfa'r Undeb Ewropeaidd Head of the European Union Office
Olga Lewis	Dirprwy Glerc Deputy Clerk

*Dechreuodd y cyfarfod am 2.29 p.m.*  
*The meeting began at 2.29 p.m.*

**Cyflwyniad, Ymddiheuriadau, Dirprwyon a Datganiadau o Fuddiant**  
**Introduction, Apologies, Substitutions and Declarations of Interest**

[1] **David Melding:** Good afternoon, everyone, and welcome to this meeting of the Constitutional and Legislative Affairs Committee. We do not expect a routine fire drill this afternoon, so, if you hear the bell, please follow the instructions of the ushers who will help us to leave the building safely. Headsets are available, as these proceedings will be conducted in Welsh and English. When Welsh is spoken, interpretation is available on channel 1, and amplification of proceedings is available on channel 0. Please switch off all mobile devices completely as they can interfere with our broadcasting equipment.

[2] We have received apologies from Simon Thomas. I am pleased to welcome Jocelyn Davies, who is substituting for him this afternoon. Jocelyn, you have had a lot of experience on this committee over the years, so we look forward to your contributions this afternoon.

2.30 p.m.

**Offerynnau nad ydynt yn Cynnwys Unrhyw Faterion i'w Codi o dan Reolau**  
**Sefydlog Rhifau 21.2 neu 21.3**  
**Instruments that Raise No Reporting Issues under Standing Order Nos. 21.2 or**  
**21.3**

[3] **David Melding:** Does any Member have any query? There are nine of these. Gwyn

will just explain a point of good practice on CLA88, the Seed Marketing (Wales) Regulations 2012.

[4] **Mr Griffiths:** Rwy'n meddwl ei bod yn werth tynnu sylw'r pwyllgor at y rheoliadau hyn, gan eu bod yn disodli nifer o reoliadau blaenorol yn ymwneud â hadau. Roedd y rheini yn rhai maith, tua 100 o dudalennau'r un, ac oherwydd hynny cawsant eu gwneud yn Saesneg yn unig. Byddwch wedi gweld bod y rheoliadau hyn yn ddwyieithog ac maent yn ganlyniad llawer o waith gan y cyfieithwyr ym mharc Cathays yn datblygu geirfa am hadau at ddibenion deddfwriaethol. Felly, mae hynny'n rhywbeth i'w groesawu ac i dynnu sylw'r pwyllgor ato.

**Mr Griffiths:** I think that it is worth drawing the committee's attention to these regulations, as they replace a number of previous regulations involving seeds. Those were very lengthy, at around 100 pages each, and, as a result, they were made in English only. You will have seen that these regulations are bilingual and they are the result of a great deal of work by the translators in Cathays park to develop vocabulary relating to seeds for legislative purposes. So, that is to be welcomed and deserves to be noted by the committee.

[5] **David Melding:** We can note it, certainly. Should I write a letter and commend the—

[6] **Jocelyn Davies:** Is this a consolidation of a number of regulations? You said that it replaced a number of regulations, so it is a consolidation and bilingual.

[7] **Mr Griffiths:** I think that it is a simplification, because this one set is as long as one of the others, and there were five previously. So, they have tidied it up generally, so it is a good job all around.

[8] **Julie James:** It would be nice to congratulate them, Chair.

[9] **David Melding:** I think so. We will send a letter to the relevant Minister. Is there anything else on this item? I see that there is not.

2.31 p.m.

**Offerynnau sy'n Cynnwys Materion i'w Codi gyda'r Cynulliad o dan Reolau  
Sefydlog Rhifau 21.2 neu 21.3  
Instruments that Raise Issues to be Reported to the Assembly under Standing  
Order Nos. 21.2 or 21.3**

[10] **David Melding:** There are only negative resolution instruments under this item today. On CLA92, the Carers Strategies (Wales) (Amendment) Regulations 2012, you will notice that we propose a merits report. It commends the Deputy Minister for agreeing with an earlier report that we made. We could possibly do this by letter, but it is important that we acknowledge when something is done. You may remember that the Deputy Minister said in Plenary, when the Orders were discussed, that she intended to address the point that we raised about the translation. Perhaps we need not issue another report; shall we do it by letter instead?

[11] **Eluned Parrott:** Yes. The Deputy Minister was quick and happy to respond to our report in the first instance, so it is nice to recognise that and thank her.

[12] **David Melding:** Thank you. I agree.

[13] The other instrument is CLA95, the Disabled Persons (Badges for Motor Vehicles) (Wales) (Amendment) Regulations 2012. There are just technical points; I do not think that

we need any further elaboration unless Members have any queries. I see that you do not, but Gwyn does not want to miss his moment. *[Laughter.]*

[14] **Mr Griffiths:** Dim ond i gadarnhau, gan nad oes ymateb ffurfiol gan y Llywodraeth, y cawsom drafodaethau anffurfiol gyda'r Llywodraeth. Mae'n cydnabod y dylai'r gair hwn fod wedi ei fewnosod yn y drafft ac mae'n bwriadu ei gywiro wrth gyhoeddi, sy'n ateb derbyniol.

**Mr Griffiths:** Just to confirm, because there has been no formal response from the Government, that we have had informal discussions with the Government. It acknowledges that this word should have been inserted into the draft and it intends to correct it in publishing, which is an acceptable response.

[15] **David Melding:** So, we are clear about and content with that.

2.34 p.m.

**Cynnig Drafft yr Undeb Ewropeaidd ar gyfer Cyfarwyddeb ar Gaffael  
Cyhoeddus—Mater Posibl i'w Draffod yn Ymwneud â Sybsidiaredd  
European Commission Draft Proposal for a Directive on Public Procurement—  
Possible Subsidiarity Issue**

[16] **David Melding:** This is the most substantial item on this afternoon's agenda. The issue of subsidiarity is one that we have looked at. We have examined our procedures to ensure that we can respond to issues, as they occur, that raise problems relating to issues of subsidiarity. This draft proposal is now being discussed by the Enterprise and Business Committee, and I think that you are on its task and finish group, Julie. We have been copied into correspondence from the Chair of the committee, Nick Ramsay, and—I beg your pardon, it is jointly signed. As I see it, there are two issues. One is the issue that the Enterprise and Business Committee has looked at, and which has been the subject of a letter to the Minister. The committee also commends us to make some sort of statement on the subsidiarity issue about whether this should proceed with a Europe-wide policy of having some sort of overarching body in each member state to look at procurement. The British Government has done this to date through the courts, and probably with some level of success. However, other countries have not been as diligent. So, that is quite an issue.

[17] Julie, would you like to speak to the letter and on how you think that we can proceed this afternoon?

[18] **Julie James:** Yes. The first point relates to the transposition of the directive into UK law. The directive offers the possibility for the whole thing not to be transposed. The task and finish group was concerned about that and wants to urge for a full transposition. That is set out in our legal advice, and I suggest that we ask for all three elements of it. We would like to see the whole thing transposed into UK law. If the UK proposes not to do that, we would like a say in it and we would like the chance for Wales to do it separately, as Scotland can. I think that that is a good paraphrase of where we are. So, our preference would be that the UK as a whole transposes the entire directive. My understanding is that it is likely to do so. However, it was raised in evidence with us that it might not. So, we wanted to add our voice to that. It is probably not controversial, actually, but, in any event, were there to be a decision not to transpose the whole thing, Wales wants a say in that, and we possibly want to be able to do that ourselves, as Scotland can. So, that is that point.

[19] On the national oversight body, there are two separate points. The first is the issue of subsidiarity at UK level, which you have just set out. Basically, it mixes civil and criminal remedies together. That is not often done in British law, although it can be done. Secondly,

and more importantly for Wales, it proposes a single national oversight body, so it takes no account of the devolution settlement. So, effectively, we would have no say in it. Thirdly, I think that it is fair to say that the committee as a whole felt that it did not approve of it as a proposition in the first place, no matter how it is implemented. With one exception, which was the evidence from the Federation of Small Businesses, all of the evidence in front of us was that no-one welcomed it. So, the Federation of Small Businesses—I think that it was that organisation—or one of the business organisations thought that that would hold public authorities to account. However, everyone else thought that it was just a very bureaucratic way of looking at it. I cannot remember: was it the Federation of Small Businesses, or another organisation?

[20] **Mr Griffiths:** I think that it was the housebuilders' organisation or an organisation in the construction industry.

[21] **Julie James:** It was one of the employers' federations, was it not? I cannot remember which one it was, but pretty much everyone else thought that it was a job already being done by the British courts. They thought that this was an added layer of bureaucracy and that it did not take any account of the devolution settlement. Those were our points, and we invite the committee to take a view.

[22] **David Melding:** That confirms that the issue for us, which is a narrower but still important issue, is whether we want to make any representations on the issue of subsidiarity. We could make a short report saying that if there is to be a Europe-wide requirement to have a state-wide body—we will not say whether we think that that is a good or a bad idea—it should be able to reflect the requirements of devolution and at the moment it would not. That is the point for us, which I would like Members to explore. I will just ask Gregg Jones, our European adviser, whether there is anything that we have missed in setting out that as our framework for discussion. Is that a fair summary of what we need to do this afternoon?

[23] **Mr Jones:** I think so, Chair. We could perhaps explain how this fits into the broader picture, but maybe we could come back to that—it depends upon how you would like to play it—with regard to what the next step is if the committee decides to raise this, and the process through which that would go.

[24] **David Melding:** That is important—

[25] **Jocelyn Davies:** I just have a quick question. Julie mentioned that Scotland can do this itself. Is there any intention to do that? Is it possible to do part of a state?

[26] **David Melding:** The issue of Scotland does not relate to the issue that we want to look at.

[27] **Jocelyn Davies:** I see.

[28] **David Melding:** Scotland would be frozen out of this as well if there is a state-wide body, that is, a single UK body to oversee procurement and implement EU law.

[29] **Jocelyn Davies:** That is because, geographically, it would have to cover the entire member state.

[30] **David Melding:** Yes. Presumably, they would have the same concerns about subsidiarity as we would. However, it is up to them to make representations. This is about the other point that Julie explained, namely that, at the moment, they have their own mechanism. Does any Member think anything other than that we should make some representations that if this proceeds, subsidiarity needs to be applied, and there needs to be a way to allow the

Assembly to have a role in overseeing the procurement rules?

[31] **Julie James:** Chair, I think that it is worth our making the point that the body potentially breaches subsidiarity rules at a UK level. We can add our voice to that. I certainly think that it breaches those rules and I think that there is a universal view that it does. So, in the first place, we would like them to take into account that it breaches those in the first place, but if it is minded to go ahead anyway, we want the devolution—

[32] **David Melding:** Okay.

[33] **Julie James:** I think that I would want to see a two-stage response.

[34] **David Melding:** That is a bit stronger than what I suggested, but I am very happy with that if that is the view of Members.

[35] **Suzy Davies:** My view is that there is a question about whether this is a matter for the European Union at all. The principle of subsidiarity means that member states are incapable of putting this in place themselves voluntarily. Clearly, they are capable. If they really want this, they can do it, so why do they need the European Union element of it?

[36] **David Melding:** I think that the politics of it—

[37] **Suzy Davies:** No, that is not politics; that is law.

[38] **David Melding:** It is not the situation in the UK that has led to this being proposed for a European initiative, but the fact that procurement is perhaps more loosely administered in some other member states, I would guess, although I do not know.

[39] **Julie James:** Nevertheless, it is obviously a good point that, normally, transposition is left to member states, including implementation, and this breaches it. Personally, in the first place I would like the committee to add its voice to those saying that the proposal breaches the subsidiarity concept in the first place. The second point is the one you made, Chair, which is that, if it is minded to go ahead anyway, it does not take account of any devolutionary settlement. That will be a problem in many other member states.

[40] **David Melding:** We clearly have unanimity on this, so I do not think that we need to prolong the discussion any further. We will make that report more broadly, as Julie said, to indicate that we think that the whole policy is in breach of the subsidiarity principle but that, if it is applied, the state-wide mechanisms need to be able to respond to our devolved constitution. Gregg, do you want to say something about how we take this forward and with whom we remonstrate or whatever?

[41] **Mr Jones:** Gwyn might want to add to this as well. In terms of the process, it is set out in article 5 of the Treaty of Lisbon and there is a protocol attached to that that explains how subsidiarity and proportionality are applied. We are categorised as a regional parliament and any challenges on subsidiarity, to be recognised formally by the European Commission, must go via the national parliament, which in our case would mean the House of Commons or the House of Lords, both of which formally take part in this process. There has been contact with them to alert them to the fact that this may be raised as a concern by this committee.

[42] Once they submit a reasoned opinion—if they do—it will go to the European Commission, which will consider it and respond formally. In this case, ‘formally’ means on behalf of the college of commissioners—the politicians who run the European Commission. If it receives sufficient numbers of reasoned opinions from other national chambers, there are two types of action that can take place. If a third of national chambers challenge it, it has to

review the proposal, although not necessarily change it, and it has to give an explanation as to why it is going ahead with it or changing it. It has to justify its action. If it gets a simple majority—above the 50% threshold—of the votes submitted by national chambers, the proposal has to be reviewed. Then, if the Commission decides to go ahead with it as it stands, it has to justify that, and its views are then submitted to the Council of Ministers and the European Parliament—the legislator in this process—which has the ability to stop it.

2.45 p.m.

[43] The European Parliament can stop it by a simple majority and the Council of Ministers can stop it by a majority of 55% of its members. In that case, the wording is that the legislative proposals shall not be given further consideration. That is the formal process. It has not happened yet; it has never reached the one-third threshold on any of the dossiers so far. I have checked the IPEX website, which is the inter-parliamentary exchange for national parliaments across the EU to share information on different proposals. Eight or nine have progressed that and noted it on the website. None have raised any subsidiarity concerns so far.

[44] We cannot say at this stage what the final result will be and whether we will get sufficient numbers to challenge it. However, I would say that it is unlikely that we would reach that level. So, in a sense, the committee would be raising and submitting its objections, but, in practical terms, the second option that you have identified would probably come into play, assuming that the reasoned opinion does not reach the threshold. There is another course of action, which is a more informal route. This committee can also write to the European Commission to express its concerns and the European Commission will respond. In December, we met with the unit responsible for this. However, the formal response will come from the secretariat-general on behalf of the college of commissioners. They will read it and take note of the concerns raised.

[45] Another route for changing the proposals is to go down the amendments route. This is purely an objection on the grounds of subsidiarity, but it still goes through a legislative process, which means the European Parliament and the Council of Ministers, so there may be scope to add in some wording that makes it more favourable, perhaps something along the lines of saying, ‘respecting the institutional arrangements of member states’, which has been used in other legislation. I do not know whether Gwyn wants to add anything.

[46] **Mr Griffiths:** Nid oes gennyf lawer i'w ychwanegu. Mae Gregg wedi amlinellu'r broses ffurfiol. O ran ein Rheolau Sefydlog ni, Rheol Sefydlog Rhif 21.9 sydd yn pennu mai'r broses fydd anfon

**Mr Griffiths:** I do not have much to add. Gregg has outlined the formal process. In terms of our own Standing Orders, Standing Order No. 21.9 specifies that the process will be to send

[47] ‘sylwadau ysgrifenedig, ar ran y Cynulliad, i bwyllgor perthnasol Tŷ'r Cyffredin neu Dŷ'r Arglwyddi’.

‘written representations, on behalf of the Assembly, to the relevant committee of the House of Commons or the House of Lords’.

[48] Dyna'r broses o ran y pwyllgor hwn. Yr unig beth y byddwn yn ychwanegu i'r hyn a ddywedodd Gregg yw y byddai gwneud sylwadau, hyd yn oed os nad yw'r gwrthwynebiad yn cyrraedd y trothwy sydd wedi'i bennu yn y ddeddfwriaeth, yn rhoi cefnogaeth i sefyllfa Llywodraeth y Deyrnas Unedig, sydd eisoes yn gwrthwynebu hyn ar y sail nad oes ei angen a'i fod yn trosglwyddo swyddogaethau o'r barnwyr a'r

That is the process for this committee. The only thing that I would add to what Gregg said is that to make representations, even if the opposition does not reach the threshold specified in the legislation, would support the UK Government's position, which is already opposing this on the grounds that it is unnecessary and transfers functions from judges and courts to an administrative body that is less accountable to the bodies that

llysoedd i gorff gweinyddol sy'n llai atebol have to deal with the issues.  
i'r cyrff sydd yn gorfod delio â'r materion.

[49] **David Melding:** What are Members' views on that?

[50] **Eluned Parrott:** There is a value in pursuing both the formal and informal route to ensure that our voice is as clearly heard as possible. If we are not successful then we ought to seek to amend this particular proposal because, in principle, the idea of an oversight body is not necessarily a bad one, but the mixture of judicial and administrative functions would not be seen as appropriate in the UK. How it is implemented ought to be down to the local parliaments.

[51] **Jocelyn Davies:** Do we need to get the Assembly's permission to write on its behalf, or is the authority to write on behalf of the Assembly delegated to this committee?

[52] **Mr Griffiths:** Yes, that is contained in the Standing Order.

[53] **Jocelyn Davies:** Okay, then I think that we should pursue that.

[54] **David Melding:** I suggest that we pursue both routes in terms of raising our concerns. On the amendment point, perhaps we could ask Gregg to monitor the situation. The British Government will presumably try to amend it and we may want to feed in and strengthen that core rather than take our own action. I do not know; this is obviously new territory for us.

[55] **Jocelyn Davies:** Will the British Government be making amendments on the point of subsidiarity?

[56] **David Melding:** It may do, when it sees what our concerns are. I presume that, in Scotland, they will be raising similar things. However, there is nothing to amend at the moment, anyway.

[57] **Julie James:** May I make a suggestion? The task and finish group could suggest a series of amendments that, while not relating to subsidiarity necessarily, will relate to the national oversight body, because we have a view. So, we could keep this committee informed so that, if it tips over into this committee's remit, we could have a joint voice or make a referral.

[58] **David Melding:** I will ask the clerks to discuss that. Did you want to come back on what I was suggesting there? At the minute, it is not a done deal in terms of whether it will go ahead. It is only when the Commission says, 'Right, we are going to do this' that any amendments come into play, or do I have it all backwards?

[59] **Mr Jones:** The proposals are out there now, so they are going through the formal process. Both the Council of Ministers and the European Parliament will adopt their own views and positions on the draft proposals. The Commission obviously seeks to defend its proposals, but ultimately there will be some changes. The timing is good on that.

[60] **David Melding:** When you said that the timing is good, did you mean to propose amendments?

[61] **Mr Jones:** Yes, to do that now. I do not think that there is any reason to do it later. Tactically, there may be a reason for doing it later, but the game is open. One point that we have been talking about a lot as officials is how this is managed and how it will work most effectively. Our working assumption is that this is absolutely the right committee to deal with

pure questions of subsidiarity, but once it goes more into issues about the shape and the nature of a proposal, and the way that it is implemented and so forth, that rests with the thematic committees—in this case, the Enterprise and Business Committee and its task and finish groups as appropriate. I suppose that, if the question of pure, formal subsidiarity is rejected in this first stage, maybe it then becomes more a question of proportionality, and the most appropriate way to implement it, which would make it more naturally the home for it—assuming that we have that logic right. We need a political endorsement of that view.

[62] **David Melding:** I think that we have decided to object to the overarching issue of subsidiarity, both on the grounds of what the UK Government has done, and also on how it would apply to us. Then, in the first instance, we could liaise with the Enterprise and Business Committee, because, while we would want to propose amendments in terms of what would apply if these proposals go ahead, it might be better for the Assembly to make one submission, and so we can do it jointly—that will be the best way. Officials will advise us in terms of when we need to make these representations to make them most effective, but we are minded to make them, and we are very clear in terms of our view on behalf of the Assembly. Does that conclude that item? It is important, actually—it is the first time that we have got into the nitty gritty, and you will find that we are even developing best practice at a European level, because I doubt that there are too many regional chambers that are drilling down into this with this sort of rigour and scrutiny.

[63] **Julie James:** To go back to the very first point that we were talking about, on transposition, I do not think that it is an issue at the moment, because we are being told that actually the UK is minded to transpose the whole lot, but I would quite like the committee to keep a watching brief on that, as advised by the task and finish group. If that turns out not to be the case, then we might want to take a view as to whether we will ask about Wales's position generally, and whether we should have the same powers as Scotland. It would be premature to do that now, but I would not want that to be completely off the radar.

[64] **David Melding:** Yes—we could make it less asymmetric than what we have at the moment, and that would be useful.

[65] **Julie James:** As I say, it would be premature to do it now, but I did not want it to go completely off the radar for later on.

[66] **David Melding:** Thank you very much. I thank the officials as well for their expert advice on the way through these thickets.

### **Dyddiad y Cyfarfod Nesaf Date of the Next Meeting**

[67] **David Melding:** I do not propose to convene the committee next week, as long as Members consent. I do not see anyone objecting. We will meet next on 5 March—have I got that right? Yes. That concludes today's business.

*Daeth y cyfarfod i ben am 2.55 p.m.  
The meeting ended at 2.55 p.m.*