

**EUROPEAN UNION COMMITTEE****Call for Evidence on the Government's Review of the Balance of Competences  
between the UK and the EU****Semester 4 - Subsidiarity and Proportionality****Submission of evidence by the House of Lords European Union Select  
Committee**

1. The Government's Call for Evidence addresses the principles of subsidiarity, proportionality and Article 352 TFEU, the flexibility clause.
2. This submission is limited to two aspects of the principle of subsidiarity.
3. This Committee's recent report, *The Role of National Parliaments in the European Union*,<sup>1</sup> is directly relevant to other aspects covered in the Call, such as changes to the Reasoned Opinion procedure and inter-parliamentary co-operation on subsidiarity. We trust the evidence received in the course of that inquiry, and the conclusions drawn, will be taken into account by the Government as part of its review of the evidence received for this Call. We do not repeat those conclusions here.

***1. Assessment of compliance with subsidiarity in Government Explanatory Memorandums***

4. Within ten days<sup>2</sup> of the deposit of an EU document in Parliament the Minister with lead responsibility for the document is obliged to deposit an Explanatory Memorandum (EM), setting out the Government's policy on the document. The EM is essential to how well Parliament scrutinises Government policy on the EU. Where subsidiarity is a relevant consideration, each EM should contain an assessment of a proposal's compliance with it.
5. In the Committee's experience the quality of subsidiarity assessments in government EMs fluctuates markedly, and is at times unacceptably low. The Committee has criticised this on several occasions, yet the quality continues to fluctuate. (Experience to date also shows that EMs are often deposited late; this is considered in the above-mentioned report.). We provide the following examples of poor subsidiarity assessments.

---

<sup>1</sup> 9<sup>th</sup> Report of Session 2013-14 (HL Paper 151).

<sup>2</sup> However, a shorter deadline of eight working days is attached to those EMs on JHA proposals which are subject to the UK's opt-in decision.

---

- *Example 1*

6. In the Government's EM on the proposed Regulation on a Financial Transaction Tax,<sup>3</sup> which was two weeks overdue, the subsidiarity assessment was limited to the following statement:

"The Government has concerns that introducing a financial transactions tax through enhanced cooperation does not meet the conditions of subsidiarity."

7. The Committee replied as follows:

"We regret that we have to complain once again about failures in the scrutiny process in relation to this important proposal. The Commission proposal was published on 14 February and an EM was due on 4 March 2013. Yet it was not received until 19 March, over two weeks late. This meant that we were not able to take it into account in our evidence session on 19 March, and, given the paucity of information you provide in relation to your concerns on subsidiarity, means that it will not be possible for us to give due consideration to the use of the Reasoned Opinion procedure before the deadline of 16 April."<sup>4</sup>

- *Example 2*

8. In the Government's EM on the proposed Regulation on Indices used Benchmarks in Financial Instruments and Financial Contracts,<sup>5</sup> the subsidiarity assessment was limited to the following statement:

"The Government is concerned that this proposal and its scope may raise subsidiarity issues."

9. Under the heading of "policy implications", the Government raised contradictory concerns which appeared to relate to subsidiarity, prompting the following reply from the Committee:

"We note that you raise concerns relating to subsidiarity. On the one hand you state that action in relation to benchmarks can be more effectively taken at national level but on the other you state that benchmark reform is an international issue given the use of many benchmarks across borders. Can you clarify at what level you think it is best to legislate in relation to benchmarks? Does it depend on the type of benchmark, for instance if it were to operate across borders? If so, we would welcome more detail on which types of benchmarks you believe should be dealt with at national level and which are best dealt with at international level."<sup>6</sup>

- *Example 3*

---

<sup>3</sup> 6442/13, HM Treasury, 19 March 2013.

<sup>4</sup> Letter from the Chairman of 26 March 2013.

<sup>5</sup> 13985/13, HM Treasury, 14 October 2013.

<sup>6</sup> Letter from the Chairman of 29 October 2013.

---

10. The Government's EMs in January of this year on the package of Commission proposals on procedural safeguards in criminal proceedings were both deposited late and lacked sufficient subsidiarity assessments. This meant the Committee was unable to complete its own subsidiarity assessment, and prompted a request for the Secretary of State for Justice to give evidence to explain his Department's conduct:<sup>7</sup>

"I regret that the Sub-Committee was unable to make progress in its scrutiny of these documents because of inadequacies in the EMs. In view of the very tight timetable by which the Committee is bound, in order to consider the questions of compliance of the Commission's proposals with the principle of subsidiarity and whether to recommend that the UK opt in to any of the proposals, I have asked my officials to contact yours seeking the appearance of a Minister from your Department at the next meeting of the Sub-Committee, on 22 January, to give evidence to assist the Sub-Committee's deliberations.

"Among the matters which the Sub-Committee will wish to discuss are the following:

- The EMs which you submitted did not comply with the timetable of ten working days for submission of EMs following deposit of the documents;
- Although the Communication forms part of this package of measures and present a summary of the proposals, no signed EM covering it has been submitted at the time of writing;
- None of the EMs covering the proposals gave information as to the Government's approach to the proposals, or of the Government's view on the compliance or otherwise of the proposals with the principle of subsidiarity; and
- None of the EMs set out any view on the factors which you would take into account in deciding whether or not to opt in to the proposals.

"We regard these failings as unacceptable and tending to show a disregard for the process of Parliamentary scrutiny."

11. There are, of course, examples of good government practice, where the subsidiarity assessment in the EM has helped the Committee formulate an opinion on compliance with subsidiarity within the eight-week timeframe. The Government's EM on the draft Directive on the supervision of occupational retirement schemes is a recent example.<sup>8</sup> But this does not detract from the Committee's principal concern: that the standard fluctuates too much.

12. A good subsidiarity assessment in the Government's EM is crucial to this Committee's role in monitoring EU proposals for compliance with subsidiarity. This is because the Government is often better placed and resourced to assess whether a legislative measure is more appropriately dealt with at national level and to assess domestic impact — better placed because it has national and international oversight of the policy area in question; better resourced because a larger number of officials will be working on the policy area in question. The Committee, in contrast, has a much smaller staff and is faced

---

<sup>7</sup> Letter from the Chairman of 16 January 2014

<sup>8</sup> Doc. 8633/12, HM Treasury, 30 April 2014.

---

by a demanding eight-week deadline. Thus whilst the Committee forms its own opinion on compliance with subsidiarity, which can often differ from the Government's, the Government's assessment is a vital first point of reference.

13. We recommend that the Government considers as a priority how to ensure greater consistency across Whitehall in the quality of the subsidiarity assessments in EMs deposited in Parliament. We suggest a central team of officials with sufficient expertise in each Department, rather than the team leading the policy, should have ultimate responsibility for assuring the quality of subsidiarity assessments in that Department's EMs.

## ***2. The soft power of a Reasoned Opinion in the Council***

14. The Committee is currently unable to assess the informal impact, if any, in the Council of a Reasoned Opinion issued by the House. It is not known, for example, to what extent the Government relies on a Reasoned Opinion issued by the House to support its position in negotiations, nor to what extent it may share it with other Member States to garner support.
15. Given the amount of Parliamentary time vested in agreeing to issue a Reasoned Opinion, the Committee is keen to know whether the Reasoned Opinion procedure should be seen as being limited to the question of thresholds alone, or whether it can influence the negotiation positions of Member States in the Council.
16. The 'soft power' of a Reasoned Opinion is arguably as important as the consequences of the yellow card being met, given the high thresholds required for the latter. Indeed, even where the threshold has been met but the proposal not withdrawn, as was the case with the proposal for a European Public Prosecutor's Office, it would be helpful to know the extent to which the Reasoned Opinions issued by national parliaments influenced the Council's negotiations, and ultimately the decision of the Greek Presidency to table an alternative text.
17. We therefore recommend that the Government should report back to the Committee on the impact, if any, in the Council of a Reasoned Opinion issued by the House.
18. The Committee's Report on The Role of National Parliaments applied a similar logic to national parliaments' input to Commission policy-making, concluding in several instances that the Commission "should make clear when and how national parliaments have influenced the development of policies"<sup>9</sup>. The Report does not, however, address the impact of Reasoned Opinions in the Council.

---

<sup>9</sup> Paragraph 40; see also paragraphs 35 and 48.