

Evidence for the UK Government's Review of the Balance of Competences between the UK and the EU: Subsidiarity and Proportionality

The role of National Parliaments as scrutinizers and guardians of subsidiarity

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1. National Parliaments (NPs) are not part of the EU legislature, which is a role confined to the European Parliament and the Council. Unlike their role within Member States, NPs cannot initiate EU legislation themselves. However, there are two key ways in which they can contribute to transparency and accountability in EU decision-making. Firstly, by acting as scrutinizers of draft EU legislation and policies. Secondly, by acting as guardians of the subsidiarity principle when an EU institution seeks to introduce new legislation.
2. These functions are legally based in Articles 5(3) and 12 of Treaty on the European Union (TEU), Protocol 1 on the Role of National Parliaments in the European Union (Protocol 1), and Protocol 2 on the Application of the Principles of Subsidiarity and Proportionality (Protocol 2).
3. The democratic principles listed in Title II of the TEU include involvement of NPs. Protocol 1 is intended to encourage their greater involvement in EU activities, and enhance their ability to express views on draft legislative acts and other matters. NPs enjoy the support and consent of EU citizens providing legitimacy for their role as scrutinizers and guardians of subsidiarity. As these are treaty-based functions, there is that additional layer of legitimacy which potentially could amount to powerful pre-legislative controls on EU decision-making.

Defining subsidiarity

4. Article 5(3) TEU defines subsidiarity as: " ... 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." This indicates that where multiple levels of decision-making authority exist in certain areas, the principle of subsidiarity will operate to determine at which level it is appropriate to take the decision (i.e. local, regional, national or supranational).
5. It is a matter directly related to the extent of EU competences and Member States' agreement to pool sovereignty in order to achieve effective decision-making at the supranational level. Subsidiarity is not relevant in areas where the EU has exclusive competence to take decisions (i.e. customs union; competition law; economic and monetary policy; conservation of marine biological resources; common commercial policy).¹ However, it is of relevance to areas where the EU has shared² or supported³ competence with Member States. In such areas, the EU has a

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¹ Article 3 TFEU.

² Article 4 TFEU: internal market; social policy; economic, social and territorial cohesion; agricultural and fisheries; environment; consumer protection; transport; trans-European networks; energy; area of freedom, security and justice; common safety in public health.

³ Article 6 TFEU: protection and improvement of human health; industry; culture; tourism; education, vocational training, youth and sport; civil protection; administrative cooperation.

duty to comply with subsidiarity and will have to justify any supranational decision against the subsidiarity principle.

6. A further dimension to subsidiarity, which goes beyond issues of competence and pooling of sovereignty, is the need to ensure transparency and democratic accountability in EU decision-making. Thus, under the Preamble and Article 1 paragraph 2 TEU decisions should be taken as openly and as closely as possible to EU citizens. The Preamble to Protocol 2 states as its objective to ensure decisions are taken as closely as possible to EU citizens. This reinforces the idea that democratic accountability is at the heart of subsidiarity.

Two-stage test: necessity and effectiveness

7. Article 5(3) provides a two-stage test of necessity and effectiveness for subsidiarity. Firstly, EU action must be *necessary* because the proposed action's objectives cannot be sufficiently achieved by Member States. Secondly, due to the scale or effects of the proposed action, the objectives would be more *effectively* achieved by the EU.⁴ The effectiveness limb is often referred to as 'EU value added' and has been applied by some NPs.⁵ EU institutions must demonstrate objectives for a proposed action *cannot be sufficiently achieved by Member States*, and the extent or results of the proposed action means it is *better achieved by the EU*. This conforms to the requirement under Article 5 Protocol 2 for subsidiarity appraisal of draft legislative acts, and the oversight role entrusted to NPs under Article 6 Protocol 2.
8. In its reasoned opinion on the Draft Regulation on the establishment of the European Public Prosecutor's Office, the UK House of Commons put forward an interpretation of the necessity limb to include the Commission considering "sufficiency of action 'at regional or local level', particularly important where devolved administrations may have discrete criminal justice systems."⁶ The Commission rejected this view on the basis its assessment of insufficiency of Member State action necessarily includes the regional and local levels.⁷ This is also supported by the test under Article 5(3) which relates to Member States in their entirety and whether action can be "sufficiently achieved by the Member States". Devolved powers are a matter for each state's constitutional framework. Where constitutional structures within Member States devolve certain decision-making powers to regional governments, it is the responsibility of the Member State to consult accordingly during the scrutiny process.⁸
9. Necessity and effectiveness must both be satisfied so that EU action may be a matter of degree rather than absoluteness. For example, where a shared competence area does include Member

⁴ The Report of the European Commission on Subsidiarity and Proportionality 2007, COM(2008) 586 final, at p. 2.

⁵ Commission Impact Assessments Guidelines, 15 January 2009, SEC(2009) 92, p.22. See for example, House of Lords Sub-Committee B Letter to Minister for Immigration on Proposal for a Directive on Free Movement of Workers, 4 September 2013.

⁶ House of Commons Reasoned Opinion on Draft Regulation on the establishment of the European Public Prosecutor's Office, 22 October 2013, para. 15.

⁷ Communication from the Commission to the European Parliament, the Council and the National Parliaments on the Review of the Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office with regard to the principle of subsidiarity, in accordance with Protocol No 2, 27 November 2013, COM(2013) 851 final, p.7.

⁸ Article 6 Protocol 2 states: "It will be for each national Parliament or each chamber of a national Parliament to consult, where appropriate, regional parliaments with legislative powers."

State action this may be insufficient to tackle the cross-border dimension (e.g. the Draft Regulation on the Right to Collective Strike intended to tackle cross-border dimensions to the right to collective action in relation to the freedom of establishment and the freedom to provide services).⁹

Differing views of the Commission and Member States

10. The Commission published guidelines for inter-institutional practice in assessing subsidiarity using the two-stage test.¹⁰ However, it also acknowledges that although NPs regard subsidiarity a legal principle, they consider it subject to different interpretations.¹¹ There is some use of the pre-Lisbon European Council guidelines to subsidiarity monitoring.¹² NPs recognise the benefit of having standard compliance criteria but want to maintain a margin of discretion in interpreting and applying subsidiarity. This is most evident in the tendency to conflate subsidiarity monitoring with proportionality. For example, the Dutch *Eerste Kamer* and the Czech *Senát* favour a broad approach to scrutiny to include assessing proportionality and presumes against EU action.¹³ The House of Commons and House of Lords fall into this category.
11. Treaty provisions mentioned in paragraph 2 above support a more restrictive approach with NPs granted an oversight role only for subsidiarity and not proportionality. The Swedish *Riksdag* has used the Protocol 2 title (Application of the Principles of Subsidiarity and Proportionality) to suggest NPs have a scrutiny role in both.¹⁴ But legal rights and obligations do not flow from a legal instrument's title. The actual substantive provision containing NPs' scrutiny powers and the power to object to EU proposals, Article 6 Protocol 2, clearly states it is only in relation to subsidiarity.
12. There are good reasons for this divide. Firstly, proportionality is a principle which all EU institutions are obliged to apply throughout their decision-making, subject to review by the European Court of Justice (ECJ). Secondly, NPs may not be sufficiently independent to remove themselves from operating purely within a national political context. Scrutiny of proportionality may lead to politically expedient calculations to protect national interests, not necessarily in the wider interest of EU citizens. Thirdly, there is a danger NPs will not address the actual subsidiarity question of Commission proposals, instead using proportionality to stymie the legislative process.

NPs as informed scrutinizers of draft EU legislation and policies

13. Article 12(a) TEU provides that NPs contribute actively to the good functioning of the EU by being informed of and receiving draft legislative acts. In this regard, EU institutions are obliged

⁹ Proposed Monti 2 Regulation, Commission Explanatory Memorandum at p.8. For the background to this proposal see, Monti, A New Strategy for the Single Market (9 May 2010); Commission Communication of 27 October 2010, Towards a Single Market Act. For a Highly Competitive Social Market Economy, COM(2010) 623.

¹⁰ Commission Impact Assessments Guidelines, *supra* note 5.

¹¹ Report from the Commission: Annual Report 2012 on Subsidiarity and Proportionality, COM(2013) 566, at pp. 3-4 and 10.

¹² European Council in Edinburgh, 11-12 December 1992, Conclusions of the Presidency, Annex 1.

¹³ See COSAC 18th Bi-annual Report: Developments in European Union Procedures and Practices Relevant to Parliamentary Scrutiny, 27 September 2012.

¹⁴ House of Lords, European Union Committee, 9th Report of Session 2013-14, The Role of National Parliaments in the European Union, 24 March 2014, para. 76.

to provide the following information: (i) Commission consultation documents, annual legislative programme, and any other instrument of legislative planning or policy; (ii) draft legislative acts (including Commission proposals; initiatives from a group of Member States; initiatives from the European Parliament; requests from the ECJ; recommendations from the European Central Bank; and requests from the European Investment Bank); (iii) agendas for and outcome of Council meetings, including minutes of meetings on draft legislative acts; and (iv) Court of Auditors annual report.¹⁵

14. In theory, the Commission, European Parliament and the Council may introduce new legislation. In practice, it tends to be the Commission as it has a treaty-based prerogative power to initiate legislation under Article 17(2) TEU, with administrative capacity and specialist and technical knowledge of EU-wide issues. The Commission steers EU-wide standard-setting by making legislative proposals which may become legislative acts adopted by the European Parliament and Council.¹⁶ The European Parliament, composed of MEPs representing EU citizens, has legislative powers shared with the Council, which consists of ministerial representatives of governments of Member States.¹⁷

15. In proposing new legislation, EU institutions are obliged to appraise its conformity with subsidiarity and forward the proposal to all NPs with a detailed statement of the following: compliance with subsidiarity and proportionality; assessment of financial impact; in the case of directives, implications for rules to be put in place by Member States, including regional legislation; reasons for concluding an EU objective can be better achieved at EU level, with qualitative and, where possible, quantitative indicators; any financial or administrative burden on the EU, national governments, regional or local authorities, economic operators and citizens, to be minimized and commensurate with the objective to be achieved.¹⁸

The need for a pro-active approach

16. If we take the scrutiny role specifically in relation to draft legislative acts, once these are received it is a matter for each NP to decide how to scrutinize and whether to comment. It does, nevertheless, require a pro-active approach in assuming the role of scrutinizer and setting up scrutiny mechanisms, rather than acting as a mere repository. National court decisions have called for greater involvement of legislatures in scrutinizing EU legislation and to act as guardians of the balance of power between Member States and the EU.¹⁹

17. Treaty provisions do not specifically state NPs *must* act as informed scrutinizers. But it would be counter-productive for democratically elected representatives not to take up this opportunity as a means to ensure transparency and accountability in decision-making. Depending on the resources available, political interests and importance placed on scrutiny, each NP's role and level of scrutiny will vary.²⁰ However, it demonstrates how EU decision-making is subject to a

¹⁵ Articles 1, 2, 5 and 7 Protocol 1.

¹⁶ Article 17(1) and (2) TEU.

¹⁷ Articles 14(1) and 16(1) TEU.

¹⁸ Articles 4 and 5 Protocol 2.

¹⁹ Czech Constitutional Court, Case PI US 19/08, *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community – Lisbon I*, judgment 26 November 2008 at para. 165; Case PI US 29/09 *Treaty of Lisbon II*, judgment of 3 November 2009; German Constitutional Court, Case 2BvE 2 & 5/08, *Lisbon Treaty Decision*, 30 June 2009 at para. 409.

²⁰ *Supra* note 11 p. 3.

degree of multi-layered accountability²¹ through elected representatives of Member States. NPs acting as informed scrutinizers offer a degree of accountability and help shape public understanding of how the EU operates.

Scrutiny by the UK Houses of Parliament

18. Scrutiny undertaken by the House of Commons European Scrutiny Committee (ESC) and the House of Lords European Union Committee (EUC) shows how mechanisms can be set up to ensure early participation in EU decision-making. The ESC is an all-party Select Committee, composed of 16 members, whose work is supported by three European Committees with specialisms according to government departments.²² It receives around 1,000 documents per year of which 500 are deemed politically or legally important and are reported on. Around 40 documents are recommended for debate in the ESC and around 3 documents recommended for formal debate in the House of Commons.²³
19. The EUC, a permanent Select Committee with membership of 19 drawn from party groupings and cross benches, is supported by six subject-specific sub-committees.²⁴ In 2012 it received 800 documents of which more than half were cleared from scrutiny. The EUC has clear objectives to: inform the work of the House of Lords; influence and hold to account the government; influence and engage the Commission and other EU institutions; and engage widely with stakeholders.²⁵ Its terms of reference include: considering EU documents deposited in Parliament by the government; considering “other matters relating to the EU”; assisting the House of Lords in its role in monitoring compliance with the subsidiarity principle; and representing the House of Lords in inter-parliamentary cooperation within the EU.²⁶

Improving aspects of scrutiny – concentrated expertise or capacity-building?

20. The ESC has no power to compel the House of Commons to debate a given matter, and any debate must be agreed by government. In addition, although MPs can attend ESC debates they cannot vote during these sessions. These represent limitations on parliamentary scrutiny of government work and EU proposals. The fact that in practice only a small number of issues reach full debate in the House does raise concerns about the quality and level of scrutiny undertaken by elected representatives.²⁷ Even accepting the efficacy of having a filtering

²¹ See Czech Constitutional Court, Case PI US 19/08, *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community – Lisbon I*, judgment 26 November 2008, at para. 173; Czech Constitutional Court, Case PI US 29/09, *Treaty of Lisbon II*, judgment of 3 November 2009, at para. 138.

²² Committee A: energy and climate change; environment, food and rural affairs; transport; communities and local government; forestry commission. Committee B: treasury; work and pensions; foreign and commonwealth office; international development; home office; justice. Committee C: business, innovation and skills; children, schools and families; innovation, culture, media and sport; health.

²³ The European Scrutiny System in the House of Commons: a short guide for Members of Parliament by the staff of the European Scrutiny Committee, July 2009, p.14.

²⁴ Sub-Committees A (economic and financial affairs); B (internal market, infrastructure and employment); C (external affairs); D (agriculture, fisheries, environment and energy); E (justice, institutions and consumer protection); F (home affairs, health and education)

²⁵ The European Scrutiny System in the House of Lords: a short guide by the staff of the European Union Committee, 2013, p.4.

²⁶ Ibid p.5.

²⁷ European Committee B raised concerns with the Minister for Europe about the lack of parliamentary debate on subsidiarity and proportionality. See Relations between the European Commission and National

process to avoid trivial matters and wasting parliamentary time, there is an argument for greater transparency of scrutiny by all MPs debating more EU issues. At the very least, it would enable capacity-building through more MPs being familiar with EU matters and, more specifically, with draft EU legislation.

21. Having a dedicated team of MPs and staff specifically focused on scrutinising EU draft legislative acts and policies has its advantages. A body of expertise is built up around how various EU institutions work, and the types of documents they produce, as well as the EU legislative process. It could also result in keener scrutiny of the government's position towards a proposed legislative act. Just on the basis of the EUC's purpose and remit, it seems more fully and effectively engaged to take up the role as informed scrutinizer of EU draft legislation and policies. Moreover, it has a specific mandate to consider subsidiarity.
22. But such dedicated scrutiny teams can also lead to concentration of knowledge at the expense of wider and routine parliamentary scrutiny. This criticism is also levelled at the lack of engagement in EU affairs by Departmental Select Committees, who may consider it outside their remit or expertise.²⁸ If Departmental Select Committees were to treat EU matters as part of their general scrutiny duties, this could lead to better overall scrutiny and formulation of UK policies. One solution may be to require new Select Committee members to undertake a short EU training course covering: EU institutions; their composition and competences; the EU legislative process and the importance of subsidiarity; different types of EU legislative acts and their impact on the UK; and departmental scrutiny of EU matters and how this can feed into the ESC's work, possibly leading to a reasoned opinion.
23. Capacity-building and transparency in scrutiny can also be improved by a formal consultative role for devolved administrations. Currently, the Scottish Parliament, Welsh Assembly and Northern Ireland Assembly are consulted on Commission proposals relating to devolved areas. They receive proposals and undertake their own scrutiny. But there is no formal constitutional arrangement for consultation and the UK government is not obliged to put forward the devolved administrations' positions at the Council of Ministers. Consultation is somewhat diminished if devolved administrations cannot exercise the 'scrutiny reserve' to prevent the government agreeing to proposals before completion of their own scrutiny process.²⁹
24. The time for change may be right as both the ESC and EUC have produced recent reports supportive of wider scrutiny processes. The ESC states "it is clear to us that without broader analysis conducted across the Departmental Select Committee system the scrutiny process is incomplete."³⁰ The EUC recognises scrutiny work as "core business, not the preserve of a group of specialists", and the importance of the whole House debating, questioning and scrutinising legislation.³¹

Parliaments, Parliamentary Debates, House of Commons Official Report, European Committee B, 30 January 2014, pp.14-15.

²⁸ Ibid pp.7-9.

²⁹ Only the UK Parliament can exercise the scrutiny reserve. See Parliamentary Scrutiny of European Documents: Guidance for Departments, Cabinet Office, August 2013, paras. 2.4.6, 3.1.2-3, 3.1.6, 3.2.4, 6.1.3.

³⁰ Reforming the European Scrutiny System in the House of Commons, House of Commons European Scrutiny Committee, 24th Report of Session 2013-14, 28 November 2013, para. 205.

³¹ The Role of National Parliaments in the European Union, House of Lords European Union Committee, 9th Report of Session 2013-14, 24 March 2014, para. 25.

NPs as guardians of subsidiarity

25. Under Articles 5(3) and 12(b) TEU and Protocol 2, NPs act as guardians of subsidiarity by ensuring EU draft legislation complies with subsidiarity under the procedure set out in Protocol 2. This procedure combines the ability to review and scrutinize for compliance, and a mechanism for opposing draft legislation. NPs have 8 weeks to scrutinize the draft legislative act, affording a degree of pre-legislative control over EU decision-making. During this period the Council is not permitted to place the draft legislative act on its provisional agenda for adoption. After 8 weeks, a further period of 10 days must elapse between placing the draft legislative act on the Council's provisional agenda and the adoption of a position. In cases of urgency where it is necessary to agree within the 8-week period, the Council must give reasons for its position.³²

Reasoned opinions

26. If a NP considers the draft legislation does not comply with subsidiarity, it must submit 'a reasoned opinion stating why it considers that the draft in question does not comply with the principle of subsidiarity' to the Presidents of the European Parliament, the Council, and Commission, depending on who initiated the draft.³³ Thus, objection to EU action takes the form of a reasoned opinion, which counts as a vote. Each NP has two votes. The UK's bicameral parliamentary system means the House of Commons has one vote and the House of Lords another.
27. One of the problems with reasoned opinions is that there are no legal requirements on format or substantive content, except that they be submitted in one of the official languages and within the 8-week period. Unlike the detailed statement expected from EU institutions for draft legislative acts, NPs are not required to provide detailed explanations for finding a breach of subsidiarity. Reasoned opinions can vary in substantive content and interpretation of subsidiarity.³⁴ To an extent, such a wide margin of discretion for NPs counters arguments about inability to scrutinize. Minimal resources can be put to review legislation and produce short statements of objection. It may also help foster horizontal political dialogue between NPs to coordinate reasoned opinions. But this is not satisfactory for domestic accountability of NPs and does not lead to improved subsidiarity monitoring through adequate scrutiny and detailed reasoning for any objections.

Yellow card procedure

28. A sufficient number of objections will automatically lead to a review of the proposal under the yellow card procedure contained in Article 7(2) Protocol 2. If at least one third of all votes from NPs, in the form of reasoned opinions, object to the proposal then the proposing EU institution is obliged to review it. Under Article 7(1) Protocol 2, the proposing institution is obliged to "take account of reasoned opinions" but not to follow them. This means that whilst there is an obligation to review once the threshold votes is met, there is no obligation to withdraw the proposal after review.

³² Articles 3 and 4 Protocol 1.

³³ Article 6 Protocol 2.

³⁴ Reasoned opinions on the Monti 2 Regulation proposal are a prime example of this. See also 2012 Commission Report *supra* note 11.

29. A recent report by the EUC recommends a number of changes to the yellow card procedure, one being the requirement that the Commission either withdraws or substantially amends its proposal.³⁵ This is contrary to Article 7(2) Protocol 2 and undermines the Commission's treaty-based role to initiate proposals. It would pre-empt and pre-judge any review undertaken by the Commission after receiving the threshold reasoned opinions and, therefore, distort the subsidiarity review process. It would also undermine transparency and accountability in decision-making by NPs prematurely abdicating scrutiny and subsidiarity monitoring roles without engaging in ongoing dialogue with the Commission to inform any amendments. The Commission could also be held hostage to 'protest' votes from NPs.
30. Interestingly, the EUC does recognise that such a drastic change would require formal treaty revision. But it suggests this can be overcome by the Council and Commission agreeing "a package of improvements", and NPs, the Council and the Commission making "undertakings" to operate on that basis.³⁶ What appears to be suggested here is a voluntary code of conduct or non-legally binding good practice; once invoked by a sufficient number of participants over a sufficient period of time, it becomes established practice forming part of the law. However, as such a change goes to the heart of the role and function of an EU institution, it is ultimately an unsatisfactory and opaque way of introducing change. Far from improving transparency and accountability in decision-making, it would prevent EU citizens knowing exactly how the Commission would re-appraise a proposal and relieve NPs of proper and thorough scrutiny duties.

Orange card procedure

31. A more advanced level of objection can be instituted under the orange card procedure, contained in Article 7(3) Protocol 2, which leads to withdrawal of the proposal. If a proposed legislation under the ordinary legislative procedure is deemed non-compliant by a simple majority of votes of NPs, the Commission must review the proposal. If it decides to maintain it, it must be subject to further scrutiny by the European Parliament and the Council. If either institution decides by a threshold number (55% of Council members or a majority of votes in the European Parliament) that the proposal is non-compliant, it is withdrawn.
32. NPs do not have a direct veto on any proposed EU legislation and this has been a point of criticism made by the UK.³⁷ Recent proposals have been discussed in the UK and made by the Dutch.³⁸ A veto power could frustrate decision-making without adding any value to its effectiveness at the appropriate level. It may also exacerbate weak monitoring due to lack of time and resources. More stringent scrutiny requirements, including those for reasoned opinions, would be necessary to counter positions of the Council and the European Parliament in order to prevent legislation passing, potentially affecting the separation of powers within Member States. Maintaining an institutional balance between the EU executive, legislature and judiciary is key. When the Working Group IV on the Role of National Parliaments considered the question of a 'red card', it found this could lead to a mechanism for legislative delays and

³⁵ *Supra* note 31 paras. 92-95.

³⁶ *Ibid* paras. 70-71.

³⁷ Subsidiarity, National Parliaments and the Lisbon Treaty, UK House of Commons European Scrutiny Committee, HC 563 2007-8, para. 36.

³⁸ Relations between the European Commission and National Parliaments, UK House of Commons Parliamentary Debates, European Committee B, 30 January 2014, p.5.

considered it more important for NPs to focus on ensuring effective early participation in scrutinising legislation.³⁹

Reasoned opinions by the UK Houses of Parliament

House of Commons' reasoned opinions

33. Since the first reasoned opinion in 2010, there has been a tendency to conflate subsidiarity and proportionality as part of the scrutiny process.⁴⁰ A lack of focus on exactly what subsidiarity means and what sort of test should be applied is also a feature. Only in recent reasoned opinions has there been a shift towards more rigorous analysis of necessity and effectiveness of any draft legislative proposal without reliance on proportionality.
34. Out of 14 reasoned opinions submitted by the House of Commons to date, 12 have declared draft legislative proposals non-compliant with subsidiarity. When we look at the explanations there is a tendency to focus on perceived procedural failures rather than the substantive proposal (e.g. the Commission's failure to provide a detailed statement for the Draft Regulation on a Common European Sales Law;⁴¹ lack of detail in Commission statements on qualitative and quantitative indicators in the Draft Directive on Investor Compensation Schemes,⁴² and the Draft Directive on a Common Consolidated Corporate Tax Base;⁴³ the Commission's failure to consult on a specific aspect of the proposal for Draft Directives on Public Procurement and Procurement by Public Entities⁴⁴). In each case the Commission feels it has not breached a procedural requirement because it has provided detail on where and how it satisfied the detailed statement requirement,⁴⁵ and does not see its duty to consult extending to "each and every aspect of the envisaged proposal. On the basis of the replies received to the consultation, the Commission might well identify other elements which have to be included in the future legislative proposals."⁴⁶
35. In its reasoned opinion on the Draft Regulation on the establishment of the European Public Prosecutor's Office, the House of Commons referred to a procedural failure in the Commission providing a detailed statement in the impact assessment rather than explanatory

³⁹ Final Report of Working Group IV on the Role of National Parliaments, CONV 353/02, paras. 21-26 and 33.

⁴⁰ House of Commons Reasoned Opinion on Draft Directive 7263/11 on a Common Consolidated Corporate Tax, 11 May 2011, paras. 4 and 16; House of Commons Reasoned Opinion on Draft Regulation on Prudential Requirements for Credit Institutions and Investment Firms, 9 November 2011, para. 13.

⁴¹ House of Commons Reasoned Opinion on Draft Regulation on a Common European Sales Law, 23 November 2011, para. 14.

⁴² House of Commons Reasoned Opinion on Draft Directive amending Directive 97/9/EC on Investor Compensation Schemes, 25 October 2010, para. 8.

⁴³ House of Commons Reasoned Opinion on Draft Directive 7263/11 on a Common Consolidated Corporate Tax, 11 May 2011, paras. 22-24.

⁴⁴ House of Commons Reasoned Opinion on Draft Directives on Public Procurement and Procurement by Public Entities, 6 March 2012, para. 16.

⁴⁵ Commission Response to House of Commons Reasoned Opinion on Draft Regulation on a Common European Sales Law, 27 September 2012, pp.2-6. Commission Response to House of Commons Reasoned Opinion on Draft Directive amending Directive 97/9/EC on Investor Compensation Schemes, 21 January 2011, pp.1-2; Commission Response to House of Commons Reasoned Opinion on Draft Directive 7263/11 on a Common Consolidated Corporate Tax, 10 November 2011, pp.1-4.

⁴⁶ Commission Response to House of Commons Reasoned Opinion on Draft Directives on Public Procurement and Procurement by Public Entities, 20 November 2012, p. 1.

memorandum.⁴⁷ But the Commission's impact assessments are detailed and include reasons for proposing the legislation as well as subsidiarity appraisal. In this particular case, it had provided an explanatory memorandum, financial statement, and an impact assessments which it considered sufficient and not in breach of procedural requirements.⁴⁸ This is supported by the ECJ's interpretation of the obligation to provide reasons for legal acts under Article 296 TFEU.⁴⁹

36. The two reasoned opinions which have not declared an outright breach of subsidiarity have settled for compromises. Modifications in content and type of legislative act were suggested for the Draft Regulation on Reducing the Cost of Deploying High-Speed Electronic Communications Networks.⁵⁰ In the case of the Draft Directive on Gender Balance on Corporate Boards, the House of Commons reserved judgement until further evidence was available on the necessity for EU action.⁵¹

House of Lords' reasoned opinions

37. All 6 reasoned opinions submitted by the House of Lords to date have found a breach of subsidiarity. When we look at the detailed explanation there is greater use of the two-stage test to assess compliance. In the first reasoned opinion on the Draft Directive on the Entry and Residence of Third-Country Nationals for the Purposes of Seasonal Employment, a breach was found on the basis that action at EU level was deemed unnecessary, and arguments presented by the Commission seemed unpersuasive.⁵²
38. The second reasoned opinion related to proposed amendments to Regulations on the Distribution of Food Products to Deprived Persons. Here the objection focused on the effectiveness limb of the two-stage test finding that there was no reason why the EU would be better placed to organise the purchase of products from the market than Member States.⁵³ A subsequent proposal on the same matter was considered by the House of Lords' Sub-Committee D to breach subsidiarity by failing to provide an explicit subsidiarity justification, and not meeting the effectiveness requirement.⁵⁴ The Commission provided a detailed impact assessment report and consulted widely with relevant stakeholders. It conducted an online survey for EU citizens, the majority whom favoured a centrally designated and monitored fund to tackle rising levels of poverty in the EU. It subsequently found that subsidiarity was satisfied because "while helping ensure the availability of emergency assistance for most deprived people across the Union ... thus contributing to strengthening social cohesion in the Union, it [the proposal] leaves up to

⁴⁷ House of Commons Reasoned Opinion on Draft Regulation on the establishment of the European Public Prosecutor's Office, 22 October 2013, para. 8.

⁴⁸ Communication from the Commission to the European Parliament, the Council and the National Parliaments on the Review of the Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office with regard to the principle of subsidiarity, in accordance with Protocol No 2, 27 November 2013, COM(2013) 851 final, pp.5-6.

⁴⁹ Case C-233/94, *Germany v Parliament and Council* [1997] ECR I-2405, para. 25.

⁵⁰ House of Commons Reasoned Opinion, 21 May 2013, para. 32.

⁵¹ House of Commons Reasoned Opinion on Draft Directive on Gender Balance on Corporate Boards, 7 January 2013, paras. 22-23.

⁵² House of Lords Reasoned Opinion on the Draft Directive on the Entry and Residence of Third-Country Nationals for the Purposes of Seasonal Employment, 20 October 2010, paras. 8 and 12.

⁵³ House of Lords Reasoned Opinion on amending Regulations 1290/2005 and 1234/2007 on the Distribution of Food Products to Deprived Persons, 3 November 2010, paras. 7-10.

⁵⁴ House of Lords Reasoned Opinion on amending the proposal to amend Regulations 1290/2005 and 1234/2007 on the Distribution of Food Products to Deprived Persons, 28 November 2011, paras. 7-10.

Member States and their lower levels of government decisions that should be taken at their respective levels ... with national authorities initiating the planning and taking the individual decisions leading to the delivery of the assistance through national programmes.”⁵⁵

39. The EUC’s in-depth inquiries on particular legislative proposals also help inform the substantive content of reasoned opinions (e.g. its inquiry and report related to the Draft Directive on Gender Balance on Corporate Boards).⁵⁶

Conclusion

40. NPs should be willing to invoke their treaty-based powers to act as scrutinizers of legislation and guardians of subsidiarity without resorting to venting opposition on the basis of narrow national interests. By assuming the role of informed scrutinizers, NPs can participate early on in EU decision-making by checking draft legislative proposals for potential conflicts with domestic law, and to maintain the balance of power between the EU and Member States. Divergent subsidiarity tests applied by NPs leads to lack of consistency in the reasons given for objecting to any proposed legislation. Those considering proportionality as part of the test are operating outside of their treaty-based role. A common understanding and application of subsidiarity would enable consistent and effective monitoring leading to transparent reasons for objections. Part of the problem is that unlike the Commission’s obligation to provide a detailed statement, there is no requirement for consistency or detail in reasoned opinions. Instead of holding on to a margin of discretion, NPs may be better placed to agree a common standard for reasoned opinions.

41. Please see specific sections above in relation to UK scrutiny mechanisms and reasoned opinions.

⁵⁵ Commission Staff Working Document, Impact Assessment accompanying the document Proposal for a Regulation of the European Parliament and of the Council on the Fund for European Aid to the Most Deprived, 24 October 2012, SWD(2012) 350 final, p.25

⁵⁶ European Union Committee, 5th Report (2012-13), *Women on Boards* (HL Paper 58).