

## **European and External Affairs Committee**

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### ***EUR(3)-05-11 : Paper 3 : 22 March 2011***

#### **Purpose**

1. The purpose of this paper is to update the Committee on:
  - the process of monitoring the Explanatory Memoranda in the Assembly, and the extent of information provided by the Welsh Government to assist the responsible Committee(s) of the National Assembly for Wales with this exercise;
  - proposed changes to the Assembly's Standing Orders in relation to the Subsidiarity monitoring process, to come into effect for the Fourth Assembly;
  - the degree of co-operation between the Devolved Legislatures and the Houses of Parliament in the Subsidiarity Early Warning System, including details of reasoned opinions submitted by the Houses of Parliament to the European Commission.

#### **Background**

2. The Committee previously considered this issue on 9 February 2010 (paper EUR(3)-03-10:p2), 20 April (paper EUR(3)-06-10:p5) and 6 July (paper EUR(3)-11-10:p2).

#### **Action for the Committee:**

3. Members are invited to consider the issues outlined in the paper and agree any further action or recommendations to make for the 4<sup>th</sup> Assembly, e.g. in correspondence or via the Committee's legacy report.

## **Subsidiarity Monitoring: Review of Developments**

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### **Scrutiny procedures in Wales: Monitoring of Explanatory Memoranda**

4. When giving evidence to the European and External Affairs Committee on 4 May 2010, the First Minister undertook to provide the Committee with copies of Explanatory Memoranda (EMs) for European legislative proposals on which the Welsh Government has been consulted by the UK Government. The action arising noted that this information was to be forwarded to the Committee in a timely manner within the 8 week window for raising concerns in accordance with the Protocol.

5. Following very constructive discussions between officials of the Welsh Government and National Assembly, a system began operation in September 2010 whereby the Welsh Government forwarded final explanatory memoranda, including its views on proposals, to the Members' Research Service via a managed e-mail in-box.

6. The Members' Research Service (MRS) has carried out an exercise to record and monitor the flow of information from the UK Parliament and the Welsh Government in order to provide the Committee with a detailed analysis of how this "co-operation" and sharing of information works in practice. The period covered in this analysis is three months, from November 2010 to February 2011.

7. During this period Foreign and Commonwealth Office (FCO) notified MRS of 329 European documents (the "batch lists") that had been sent to them by the EU Institutions for consideration. This figure does not include Commission Staff Working documents, which are not "formal" communications from the European Commission.

8. During this same period MRS received a total of 273 EMs from either the House of Lords or the Welsh Government.

9. Of these 273 EMs, a total of 216 related to documents on the batch lists during this period, whilst 57 either related to earlier batch lists or were not on a batch list (e.g. Commission Staff Working documents). MRS carried out a filtering process of the 273 EMs to identify those considered of relevance to the Assembly. The filtering does not focus exclusively on "legislative proposals" (which would be the case with a strict focus on compliance with the "subsidiarity" principle), as this would exclude consideration of EMs of

strategic importance to Wales in line with the European and External Affairs Committee's strategic approach to European issues. For example, the EU Budget Review, the Fifth Cohesion Report, the various flagship initiatives published as part of the Europe 2020 Strategy, and Communication on the Future of the Common Agriculture Policy are all (at this stage) non-legislative proposals of strategic significance.

10. An illustration of the types of proposals that have been filtered out is shown in the list below:

- **Codification of existing legislation:** where the Commission proposed a simplifying exercise to legislation already in place, aimed at bringing it in line with recent developments at EU level. For example EM16787/10 concerning COM(2010) 610: Proposal for a Directive of the European Parliament and of the Council on roll-over protection structures mounted in front of the driver's seat on narrow-track wheeled agricultural and forestry tractors (Codification).
- **Proposals considered not to be relevant to the work of the Assembly:** for example where the actions relate to a specific EU country (or area of the EU) or concern external trade issues. Examples of this include: (i) EM17354/10 concerning COM(2010) 705: Proposal for a Council Decision on the conclusion by the European Union of the International Cocoa Agreement 2010; (ii) EM5143/11 concerning a Joint Proposal for a Council Regulation amending Regulation (EC) No.560/2005 imposing certain specific restrictive measures directed against certain persons and entities in view of the situation in Côte d'Ivoire; (iii) EM17003/10 concerning COM (2010) 693: Proposal for a Council Regulation (EU) fixing for 2011 the fishing opportunities for certain fish stocks applicable in the Black Sea.
- **Proposals in areas that are not devolved matters and where there are no obvious reasons why the Assembly would wish to express a view.** This would include areas like Justice, Freedom and Security, foreign policy etc. It would not include issues like the future of EU Cohesion Policy, which although a reserved matter, is of particular relevance to Wales. Proposals might nevertheless be considered if there could be effects on the use of the Welsh language.
- **Information reports on issues not considered relevant to the work of the Assembly.** For example: EM16727/10 on a Report on the annual accounts of the Euratom Supply Agency for the financial year 2009 together with the Agency's replies.

11. During the 3 month period this filtering exercise resulted in a total of 62 out of 273 EMs being identified as having some relevance to the National Assembly , and meriting further analysis.

12. Of these 62 EMs, 54 were received from the House of Lords and 31 from the Welsh Government. Breaking this down further, of the 62 EMs, 31 were received **only** from House of Lords and 8 **only** from the Welsh Government, whilst 23 from sent **by both** the House of Lords and the Welsh Government. It is therefore useful to receive EMs from both sources in order to check, as far as possible, that nothing of importance to Wales is missed.

13. Looking at the 23 EMs that were sent by both Parliament and WAG, the e-mail from House of Lords was received earlier in 20 cases, the e-mail from the Welsh Government was received earlier on one occasion, whilst on two occasions the e-mail was received from both bodies on the same day.

14. From the review of the 62 EMs, and narrowing this down to the “legislative proposals”, there have been **no subsidiarity concerns** identified for the Committee to consider in further detail.

15. The EMs have been used to identify emerging UK Government positions on a number of key strategic priorities on the agenda of the Committee (and other Assembly Committees such as Rural Development Sub-Committee). Examples of this are the EMs on the Fifth Cohesion Report (EM16336/10), EU Budget Review (EM15285/10), the Communication on the Future of the Common Agriculture Policy (EM16348/10), the Milk Reform Package (EM17825/10), Agricultural Quality Product Package (EM17672/10), and the Europe 2020 flagship initiative on the European Platform Against Poverty (EM18111/11), which was used to inform preparation of Christine Chapman’s draft opinion on this initiative for the Committee of the Regions.

16. Of the 62 EMs analysed in further detail, only three have contained specific references to Welsh Government’s input. These three all relate to authorisation to place certain Genetically Modified Organisms (GMOs) on the market in the EU, and the Welsh Government is noted as “abstaining” from the proposals. The authorisations are part of a standard procedure adopted in accordance with Regulation (EC) N° 1829/2003, whereby the Commission submits for a Council decision authorisation of GMOs that have been through a scientific assessment by the European Food Safety Authority (EFSA) and given the all clear in terms of passing the established environmental and health safety standards. The UK Government formally presents the UK viewpoint at this meeting. The Welsh Government indicates its views on whether or not the GMOs authorisation should be agreed by the Council, so

that these are brought to the attention of the UK Minister who presents the UK position in Council. In the case of these three authorisations, although the EMs state that the Welsh Government abstains, there is no further explanation as to what “abstaining” entails, and there is no indication of the precise subsidiarity concerns being raised by the Welsh Government on these proposals. As regards the Council’s decision on the relevant dossiers, should it fail to reach the required qualified majority, the decision is referred back to the European Commission, which has the authority to decide to approve the authorisation based on the EFSA assessments.

17. Looking at the other Devolved Administrations, there are explicit references to views of the Northern Ireland Executive and the Scottish Executive within three of the 62 filtered EMs – and for each of these there is no input from the Welsh Government. These are:

- EM17565/10 on COM(2010)712: Reaping the benefits of electronic invoicing for Europe. The Scottish Government note that public procurement is a reserved matter and pick up a number of substantive points related to this.
- EM 18150/10 on COM(2010)744: Towards interoperability for European public services: both Northern Ireland and Scotland make comments, with regard to delivery mechanisms.
- EM 18135/10 on COM(2010)743: European eGovernment Action Plan 2011-2015: again comments from both Northern Ireland and Scotland regarding clarification on how elements in the action plan will be taken forward in the UK, as well as underlining support for a number of elements covered in the Commission Communication.

18. The Committee’s attention is drawn to the absence of explicit comments or references to the views of the Welsh Government, Scottish Executive and Northern Ireland Executive in the EMs on the Fifth Cohesion Report, the future of the Common Agriculture Policy (CAP), and the EU Budget Review. These are all areas where the Devolved Administrations have a particular interest in ensuring that the UK Government negotiating position reflects their concerns.

19. This raises a number of questions as to how the Devolved Administrations engage in the preparation of EMs, and how they ensure that their views are reflected in the final version presented by the UK Government. EM16348/10 on the future of CAP sets out the UK Government position, and notes that the devolved administrations had been “informed of the content” of the EM. This contrasts with the language used in other EMs, which describes the devolved administrations as having been “consulted” in the preparation of

the EM. The devolved administrations have made their position on the future of CAP clear in a joint statement published in January, which calls for a different approach from the UK Government in the negotiations on the future of CAP to that presented in EM16348/10 and in subsequent statements by the Secretary of State, Caroline Spelman.

20. Further clarification could be sought from the Welsh Government as to how they are feeding their views into the preparation of the EMs, particularly in areas considered of key importance to Wales, and the importance that they place on this formal process, in comparison to the other direct lines of communication between Welsh Ministers/officials and the UK Government

### **Responding on behalf of the Assembly – changes to Standing Orders**

21. The procedures of both the House of Commons and the House of Lords require any Reasoned Opinion proposed by the respective committees to be approved by the relevant House.

22. On 6 July 2010 the European and External Affairs Committee considered whether the Assembly should follow the UK Parliament’s approach, i.e. to pursue a change to Standing Orders that would require any Welsh position on subsidiarity to be formally endorsed by the whole Assembly, or whether making representations to both Houses of Parliament should be regarded as part of the terms of reference of the EEAC to:

“consider and report on any matters relevant to the exercise by the ...Assembly of any of their functions relating to the European Union...”<sup>1</sup>

23. The Committee took a pragmatic approach, recognising the practicalities of how to express a view on behalf of the National Assembly within the very short time frame allowed by the Protocol – only 8 weeks in the case of Parliament and so considerably less for the Assembly. It was agreed to request that, as part of its Review of Standing Orders, the Business Committee consider i) recognition of powers for the European and External Affairs Committee to submit formal views to the UK parliament on subsidiarity matters on behalf of the National Assembly for Wales, and ii) a recognised procedure to be adopted to cover those occasions when the 8-week consultation timeframe coincides with Assembly recess periods, thereby preventing normal consideration.

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<sup>1</sup> SO 18.1

24. Amendments to Standing Orders to give effect to these two proposals were agreed in principle by the Business Committee in autumn 2010, and agreed in plenary on 16 March 2011. The new Standing Orders, effective from 5 May 2011, will mean that the responsible committee(s) of the 4<sup>th</sup> Assembly will be in a position to report any subsidiarity concerns to the Houses of Parliament on behalf of the National Assembly for Wales within the 8-week timeframe provided for by the Subsidiarity early warning system.

25. In December 2010 the Scottish Parliament agreed in principle to the introduction of an early warning system for the scrutiny of EU legislative proposals, coordinated by the European and External Relations Committee (EERC) but with an enhanced scrutiny role for subject committees, which would be responsible for appointing 'EU Reporters' and for scrutinising EU legislative proposals within their area. The system is being operated on a pilot basis from January 2011 until dissolution on 22 March. The Scottish Parliament's EU strategy proposes that any subsidiarity concern expressed by a Committee should be reported to the Parliament for debate on a motion to agree transmission of those views on to Westminster. There is also provision, in the case of the Scottish Parliament not sitting, or when views need to be provided in advance of the motion being considered, for the EERC Convener to convey those views directly to both Houses of Parliament. These proposals will require changes to be made to the Scottish Parliament's Standing Orders in its next session.

### **Early Warning System across the UK – co-operation with both Houses of Parliament and the other devolved legislatures**

26. Following the General Election in May 2010 the Committee sought assurances from the incoming European Committee Chairs of both Houses of Parliament that those Committees would continue to take account of views of the National Assembly for Wales on subsidiarity issues, in the absence of a formal protocol with the devolved legislatures. The responses received in November 2010 confirmed that the positions set out in the Committees' previous reports on the application of the Lisbon Treaty had not changed.

27. The House of Commons European Scrutiny Committee has stated that, because of the time constraints for issuing a reasoned opinion, it should place the onus on the National Assembly for Wales to "obtain draft legislation, vet it and tell the Committee as soon as possible if they have objections", and that the National Assembly would only be consulted on draft opinions giving reference to a matter on which it had expressed a view.

28. The Chair of the House of Lords EU Select Committee noted that “Our commitment to notify your staff when subsidiarity concerns arise here, and to take account of any views received if time allows, still stands and is now in operation.” When the Committee Clerk receives notification of a potential subsidiarity issue from the House of Lords, this is then forwarded to the Head of the Assembly’s EU Office and the Committee’s Legal Adviser for further consideration. There has also been consultation by the House of Lords on potential subsidiarity issues arising from scrutiny of the European Commission’s Annual Legislative and Work Programme. The paper on the European Commission’s Work Programme that was considered by the European and External Affairs Committee on 8 March identified proposals expected in the coming months that will require monitoring for subsidiarity. This paper, and the Committee’s legacy report, will be supplied to staff in the other UK legislatures.

29. The Committee has recognised the importance of continuing close collaboration with counterparts in Scotland and Northern Ireland to ensure a consistent approach to dealing with devolved subsidiarity issues. Liaison between officials in the devolved legislatures continues, with clerks consulting their counterparts in the other legislatures on subsidiarity concerns raised by their respective Committees. The arrangements for handling notifications will need to be reviewed in the 4<sup>th</sup> Assembly in line with the EU scrutiny arrangements agreed by the Business Committee.

30. It is important to note that a proposal that one legislature considers to be a potential breach of subsidiarity may not be judged as significant by another legislature, whether it is a reserved matter or not. An example is the Draft Instrument 13453/10 concerning the revision of existing regulations on the ‘distribution of food products to the most deprived persons in the Union’. A note on this was presented to the European and External Affairs Committee on 8 March, stating that the House of Lords had decided to issue a Reasoned Opinion on this proposal and the Scottish Parliament’s Rural Affairs and Environment Committee had sought the Scottish Government’s view and subsequently written in support of the UK and Scottish Government positions. There was no reference in the original explanatory memoranda to the devolved administrations, including the Welsh Government, having specifically expressed a view.

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