

COMMITTEE OF THE REGIONS 6th SUBSIDIARITY CONFERENCE

Bundesrat, Berlin

Round Table: Experiences of subsidiarity monitoring from national parliaments

Contribution of

**Paul Hardy, Counsel for European Legislation, House of Commons of
the United Kingdom**

1. Outline of the House of Commons approach

1.1 The European Scrutiny Committee of the House of Commons is tasked with reviewing all EU legislative and policy proposals for legal and/or political importance.

1.2 Within ten days of the publication of the document in English the UK Government must deposit in Parliament an Explanatory Memorandum setting out the its views on it, including whether it thinks the proposal complies with the principle of subsidiarity.

1.3 The Committee's staff make their assessment of the document and write a draft Report on it for the Committee's consideration. If a Reasoned Opinion (RO) is recommended, one of the two legal advisers to the Committee drafts the RO: we consider the decision to recommend an RO to the Committee is predominantly a legal one. Once the Committee adopts the RO, it has to be agreed to by the House, usually after a debate in plenary, before being sent to the EU institutions.

1.4 The Committee's approach to issuing ROs is selective: it has issued 12 in four years.

1.5 There is a strong argument for increasing the eight-week deadline for the submission of ROs. It would lead to more thorough analyses by national and regional parliaments and the opportunity for further cooperation between national and regional parliaments, for further dialogue with government before issuing an RO, and for further consensus building between national parliaments on the issuing of ROs.

2. Content of an RO

2.1 We do not consider the proportionality of a proposal in an RO, because of the terms of Protocol No, 2.

2.2 We look first at procedural requirements, and have consistently argued that the Commission fails to fulfil essential procedural requirements:

- By virtue of Article 5 of Protocol (No 2) “any draft legislative act should contain a detailed statement making it possible to appraise compliance with the principles of subsidiarity and proportionality”. The requirement for the detailed statement to be within the draft legislative act implies that it should be contained in the Commission’s explanatory memorandum, which forms part of the draft legislative act and which, importantly, is translated into all official languages of the EU. The fact that it is translated into all official languages of the EU allows the detailed statement to be appraised for compliance with subsidiarity (and proportionality) in all the national parliaments of Member States of the EU, in conformity with Article 5 of Protocol (No 2). This is to be contrasted with the Commission’s impact assessment, which is not contained within a draft legislative act, and which is not translated into all the official languages of the EU.
- In most of the Commons’ ROs it has concluded that the Commission has not provided sufficient qualitative and quantitative substantiation *in the explanatory memorandum* of the necessity for action at EU level. It argues that this omission is a failure on behalf of the Commission to comply with essential procedural requirements in Article 5 of Protocol (No 2).

2.3 We then look at whether the proposal is necessary: if there is insufficient evidence of a necessity to act we are likely to find a breach of the principle of subsidiarity.

2.4 If there is evidence of a necessity to act, we then look at whether the greater benefits test of EU rather than Member State action is met. If there are clear cross-border aspects, we are unlikely to disagree with the Commission’s assessment, with one exception: where there the proposal would have a dramatic effect on the legal or administrative order of the UK. One example was the draft Directives on procurement entities¹ which required the establishment of a single national oversight body, in which we cooperated closely with the National Assembly for Wales in issuing an RO; another was the draft Regulation on the European Public Prosecutor’s Office (EPPO),² which would interfere with the discretionary model of prosecution decision-making in the UK by making it mandatory for EPPO offences.

Flaws in the way the subsidiarity early-warning mechanism in Protocol 2 was designed

2.5 There are two inherent flaws. First, the thresholds are too high. National Parliaments need to collaborate with each other to a significant degree to reach even the yellow card

¹ COM 2011 (895) and (895)

² COM 2013 (534)

threshold, and there is a limit to how far such collaboration can go, particularly in eight weeks. The fact that the yellow card has only been raised twice in four years is illustrative of this.

2.6 Secondly, even where a yellow card is raised, it is the institution that has proposed the legislative act, the Commission, which decides whether to withdraw it. There is, then, an appearance of unfairness, a lack of impartiality, in the design of the early warning mechanism – the institution which has worked, perhaps for years, on a proposal decides whether it should be maintained, abandoned, or reviewed.

3. Problems compounded by practice

3.1 The European Scrutiny Committee has come to question the value of the early warning mechanism, and the political dialogue with the Commission, for the following reasons.

3.2 In the responses to the 12 ROs submitted by the Commission there has not been one concession made to the validity of any of the subsidiarity concerns the House of Commons has raised.

3.3 In the Commission's Communication in response to the 14 ROs received on the EPPO proposal³ there is not one concession about the validity of any of the subsidiarity arguments raised by 14 national parliaments.

3.4 The Commission has restricted the scope of the subsidiarity principle in the above Communication, excluding certain arguments from coming within the subsidiarity principle. We do not think it should do this – we are closer to national interests than the Commission, so from our perspective the Commission should consider all of our subsidiarity concerns.

3.5 Even when the Monti II proposal was withdrawn after a yellow card, we thought it was particularly unfortunate that the Commission did not accept there were any subsidiarity concerns, such as the necessity for any action, but withdrew the proposal for “political” reasons.

4. Solutions?

4.1 The following are personal suggestions rather than the views of the Committee or the House.

4.2 The eight-week deadline for the submission of an RO should be extended.

4.3 The thresholds should be lowered.

4.4 The consequence of a yellow card should not be decided by the institution that proposed the legislation.

³ COM(2013) 851

4.5 In terms of democratic mandate and oversight by national parliaments, Government ministers in the Council are better placed to decide on a yellow card.

4.6 There is a strong argument for a red card – it is for the national parliaments to determine their own subsidiarity concerns, so if the highest of the thresholds is met the proposal should be withdrawn.