

**THE LISBON TREATY**  
**APPLICATION OF THE PRINCIPLE OF SUBSIDIARITY**  
**NOVEMBER 2009 UPDATE**

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**INTRODUCTION**

1. This briefing note supplements an earlier (May 2008) briefing note on the application of the principle of subsidiarity under the provisions of the Lisbon Treaty. Amongst other things, that note highlighted comments from the House of Lords European Union and Constitution Committees regarding subsidiarity and devolved legislatures. Since preparation of the May 2008 paper, a number of European Committees have addressed the Lisbon Treaty in general or the issue of subsidiarity in particular. This paper draws on the work of these committees and provides additional information on the application of the principle of subsidiarity. In addition, this paper contains information on a number of subsidiarity checks which COSAC has co-ordinated amongst Member States' national parliaments.

**HOUSES OF THE OIREACHTAS - JOINT COMMITTEE ON EUROPEAN AFFAIRS  
THE LISBON REFORM TREATY<sup>1</sup>**

2. In May 2008, the Oireachtas Joint Committee on European Affairs published a report on the Lisbon Treaty. The report contained the following short comment on the impact of the provisions relating to the role of national parliaments:

The Committee rejects suggestions that the increased powers accorded to National Parliaments are not real or substantial. The Treaty contains a new title on democratic provisions which will, for the first time, give National Parliaments a formal standing within the EU's institutional architecture.

According to Article 5, National Parliaments will become the guardians of the principle of subsidiarity, which is formulated to ensure that the EU only acts within the limits of the powers conferred on it by the Member States. This new power for National Parliaments is spelt out in detail in a Protocol to the Treaty. Under it, one third of the National Parliaments – in some cases a quarter – can oblige the European Commission to re-think its proposal and, with the support of the Council of Ministers or of the European Parliament, can actually defeat a proposal from the Commission.

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<sup>1</sup> Houses of the Oireachtas Joint Committee on European Affairs  
Second Report The Lisbon Reform Treaty (May 2008)  
<http://euaffairs.ie/publications/PDF-Version-in-Booklet-form.pdf>

National Parliaments will also be accorded a role in any future proposals for Treaty change, including the power to block certain proposals, and will be involved in the oversight and evaluation of the implementation of the EU's policies in the area of freedom, security and justice. The Committee considers that these new provisions are one of the outstanding features of the Treaty because, for the first time National Parliaments will be accorded a formal role in the EU decision-making process.<sup>2</sup>

### **HOUSE OF COMMONS - EUROPEAN SCRUTINY COMMITTEE SUBSIDIARITY, NATIONAL PARLIAMENTS AND THE LISBON TREATY<sup>2</sup>**

3. In October 2008, the House of Commons European Scrutiny Committee published its report titled *Subsidiarity, National Parliaments and the Lisbon Treaty*. In the report, the committee concluded that:
- The substance of the subsidiarity Article in the Lisbon Treaty is the same in its effect as the existing Article in the EC Treaty.
  - Examination of EU proposals for compliance with the principle of subsidiarity is a long-established and fundamental part of the scrutiny process of the European Scrutiny Committee of the House of Commons.
  - Whether a proposal does or does not comply is a matter of political judgement and is unlikely to be capable of an entirely objective assessment.
  - It is very rare for the whole of a proposal to be inconsistent with the principle. It is less rare for one of the provisions not to comply. We see no reason to expect that this will change, although the extension of the EU's competence under the Lisbon Treaty will offer additional areas for subsidiarity disputes if that Treaty is ratified.
  - Where we have concerns, we presently draw them to the attention of the Government and, where it shares our assessment, Ministers take up the concerns with the Commission and other Member States. Again, we see no reason to expect that this will change.
  - We expect the Commission to listen to the views of national parliaments even if the number of opinions does not reach the levels set for the yellow and orange cards. We warmly welcome Commissioner Wallström's statement that the Commission should listen to the views of national parliaments even if the number of votes does not reach the threshold.
  - For these reasons, we doubt whether the Lisbon Treaty's new subsidiarity provisions about the role of national parliaments would make much practical difference to the influence presently enjoyed by the UK Parliament.

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<sup>2</sup> House of Commons European Scrutiny Committee *Subsidiarity, National Parliaments and the Lisbon Treaty* Thirty-third Report of Session 2007–08 HC 563 Published on 21 October 2008  
<http://www.publications.parliament.uk/pa/cm200708/cmselect/cmeuleg/563/563.pdf>

4. Commenting on the role of devolved Assemblies, the report stated that:

The European Scrutiny Committee would not be in a position to act on behalf of the devolved assemblies in spotting what — for them — might be objectionable proposals. It might not be apparent that a proposal contained objectionable material until the EM arrived or that a proposal contained material which was likely to be objectionable to one of the devolved Assemblies or Parliaments but not to others (for example, because there was a conflict with Scottish law but not with that of England and Wales). The Committee considers therefore that it:

should place the onus on the devolved Assemblies or Parliaments to obtain draft legislation, vet it and tell the Committee as quickly as possible if they have objections; and

should invite the comments of the devolved Assemblies or Parliaments on the Committee's drafts of opinions where the draft includes reference to a matter on which one or more devolved assemblies have expressed a view.

If a devolved Assembly or Parliament were not ready to express its views until after the Committee's Motion had been proposed, or if the Committee disagreed with the views, the Assembly or Parliament should be invited to send its views to the Committee for onward transmission to the Government.<sup>3</sup>

**NATIONAL ASSEMBLY FOR WALES EUROPEAN AND EXTERNAL AFFAIRS COMMITTEE  
REPORT OF INQUIRY INTO SUBSIDIARITY<sup>4</sup>**

5. In March 2009, the National Assembly for Wales European and External Affairs Committee published its *Report of Inquiry into Subsidiarity*. The report contained the following proposed actions and recommendations.

**Actions for the European and External Affairs Committee**

Action 1: The Committee will explore establishing a formal protocol between the House of Commons, House of Lords and with the Devolved Legislatures regarding the 8-week consultation to enable devolved legislatures to flag up concerns on the basic principle of subsidiarity

Action 2: The Committee will take a more selective approach to monitoring European proposals in Wales, focusing on key issues relevant to the Assembly including policy content, the ability to influence proposals and the timing of their impact

Action 3: The Committee will table a report at each meeting of the European and External Affairs Committee highlighting those new legislative proposals published since the previous meeting that are considered relevant to Wales, with a brief

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<sup>3</sup> As above para 46

<sup>4</sup> National Assembly for Wales - European and External Affairs Committee *Report of Inquiry into Subsidiarity* (March 2009)

<http://www.assemblywales.org/cr-ld7434-e.pdf>

explanation of why. The Committee will, on the basis of this information, agree whether or not to follow up on these issues

Action 4: The Committee will lead a proactive formal monitoring and alerting role, including a co-ordinating role in channelling issues to other Assembly Committees where appropriate

Action 5: The Committee will refer European issues of significance to Wales to other committees of the National Assembly for consideration

#### **Recommendations to the National Assembly:**

Recommendation 1: The Committee recommends that the National Assembly for Wales continues to use the subsidiarity monitoring network of the Committee of the Regions in as far as this provides positive support to the monitoring work of the Assembly's Committees

Recommendation 2: The Committee encourages joint working and networking with members of the CALRE, and other EU networks or regions, where they may be of benefit to the Assembly

#### **Recommendations to the Welsh Assembly Government:**

Recommendation 3: The Committee recommends the Assembly Government should provide regular updates to the European and External Affairs Committee on its short-term, medium-term and long-term European priorities in the context of the annual work and legislative programmes of the Commission

Recommendation 4: The Committee recommends the Assembly Government should make available in a timely manner all UK Government Explanatory Memoranda on European legislative and policy proposals of relevance to Wales

Recommendation 5: The Committee recommends the Assembly Government should produce for the Committee a Welsh Assembly Government version of each Explanatory Memorandum, explaining its views on all new proposals that have devolved consequences and the implications they will have for Wales

### **SCOTTISH PARLIAMENT – EUROPEAN AND EXTERNAL RELATIONS COMMITTEE INQUIRY INTO THE IMPACT OF THE LISBON TREATY**

6. At its meeting on 18th March 2008, the Scottish Parliament's European and External Relations Committee agreed to conduct an inquiry into the impact of the Lisbon Treaty. The Committee agreed a remit for the inquiry at its meeting on 13th May 2008.<sup>5</sup> The remit covered consideration of: new competencies; institutional/procedural change; changes to the area of Freedom, Security and Justice; and subsidiarity. In relation to protocol on subsidiarity, the inquiry was to address the following questions:

How and to what extent will the Protocol on the application of the principles of subsidiarity and proportionality impact on the role of regional parliaments?

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<sup>5</sup> European and External Relations Committee, 10<sup>th</sup> Meeting, 2008 (Session 3) 13 May 2008 Clerk's Paper EU/S3/08/10/5 Inquiry into the impact of the Lisbon Treaty – approach paper <http://www.scottish.parliament.uk/s3/committees/europe/papers-08/eup08-10.pdf>

How can the Scottish Parliament work with the UK Parliament and devolved assemblies in respect of the subsidiarity provisions of the Lisbon Treaty?

Are there examples of protocols and/or mechanisms developed by other regional parliaments with legislative powers from which the Scottish Parliament could learn?

7. At its meeting on 24<sup>th</sup> June 2008, the Committee agreed to monitor developments in connection with the Lisbon Treaty following the Irish Referendum and to review the position in respect of its own inquiry in September. At its meeting on 13<sup>th</sup> February 2009, the Committee agreed to review its position in respect of its own inquiry in autumn 2009. On Tuesday 3<sup>rd</sup> November 2009, the Committee agreed to consider a revised approach to its inquiry at its next meeting

### **COSAC SUBSIDIARITY CHECKS**

8. COSAC (Conference of Community and European Affairs Committees of Parliaments of the European Union) was created in May 1989. On 1<sup>st</sup> May 1999, the Protocol on the Role of the National Parliaments in the EU (Amsterdam Treaty) came into force – this officially acknowledged COSAC's capacity to address EU institutions regarding legislative activities of the EU.<sup>6</sup>
9. In 2004, COSAC agreed to carry out a 'pilot project' to give national parliaments an opportunity to develop their procedures for undertaking subsidiarity checks. COSAC selected the Commission's 3rd Railway Package for the pilot.<sup>7</sup> On the basis of this pilot project, COSAC criticised the failure of the Commission to supply adequate justifications as to how the proposal complied with the principle of Subsidiarity.<sup>8</sup> COSAC also contended that more effort had to be made to develop the distinction between the principles of subsidiarity and proportionality.
10. In subsequent subsidiarity checks, COSAC identified the following difficulties:
  - The eight week consultation period
  - Distinguishing between subsidiarity and proportionality
  - Poor quality translations
  - Lack of inter-parliamentary co-operation
  - Interpretation of the meaning of the principle of subsidiarity
  - Complexity of the proposals
11. The most frequently reported difficulties related to the eight week consultation period and interpretation of the meaning of the principle of subsidiarity. The consultation period caused particular difficulties when it overlapped with parliamentary recesses, with some parliaments being unable to undertake consultation and complete the check on time. Concerning the apparent lack of common understanding of subsidiarity amongst national parliaments, the Oireachtas Joint Committee on European Scrutiny warned that this could impact

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<sup>6</sup> <http://www.cosac.eu/en/cosac/>

<sup>7</sup> <http://www.cosac.eu/en/meetings/Haag2004/>

<sup>8</sup> As above

on the ability to achieve the necessary thresholds to trigger early warning systems (yellow and orange cards).<sup>9</sup>

12. Table 1 below lists six subsidiarity checks carried out by COSAC and notes if either the House of Commons European Scrutiny Committee or House of Lords European Union Committee found a breach of the principle of subsidiarity. Additionally, the table details any consultation Westminster had with the devolved legislatures. The table also provides information on the involvement of the Oireachtas in these checks.

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<sup>9</sup> [http://www.cosac.eu/en/info/earlywarning/organ\\_donation.pdf/report.pdf](http://www.cosac.eu/en/info/earlywarning/organ_donation.pdf/report.pdf)

**Table 1**

<b>Subsidiarity check</b>	<b>Did HoC find a breach</b>	<b>Did HoL find a breach</b>	<b>SP consulted</b>	<b>NWA consulted</b>	<b>NIA consulted</b>	<b>Did Oireachtas find a breach</b>
<i>Draft Council Framework Decision on the right to interpretation and to translation in criminal proceedings</i>	No	No	Consulted but unable to consider the matter within the timetable set by COSAC owing to their summer recess <sup>i</sup>	The European and External Affairs Committee of the National Assembly for Wales provided a response <sup>ii</sup>	Unable to consider due to summer recess <sup>iii</sup>	Yes <sup>iv</sup>
<i>Proposal for a Directive of the European Parliament and of the Council on Standards of Quality and Safety of Human Organs Intended for Transplantation</i>	No	No	Yes <sup>v</sup> HoC&HoL	Yes <sup>vi</sup> HoC&HoL	Yes <sup>vii</sup> HoL	No
<i>Proposal for a Council Directive on Implementing the Principle of Equal Treatment between Persons Irrespective of Religion or Belief, Disability, Age or Sexual Orientation</i>	No	No	Yes <sup>viii</sup> HoC&HoL	Response received from National Assembly for Wales on 15 <sup>th</sup> July 2008, who considered that the justification lacked detail <sup>ix</sup>	No	No response available
<i>Commission proposal for the full accomplishment of an Internal Market on Postal Services</i>	No	No	Yes <sup>x</sup> HoL	Yes <sup>xi</sup> HoL	No	No

Subsidiarity check	Did HoC find a breach	Did HoL find a breach	SP consulted	NWA consulted	NIA consulted	Did Oireachtas find a breach
<i>Commission proposal for a Regulation on the applicable law and jurisdiction in divorce matters</i>	No reply	Yes <sup>xii</sup>	Submitted opinion to European Scrutiny Committee and HoL EU Committee <sup>xiii</sup>	Yes <sup>xiv</sup> HoC&HoL	No	No
<i>Draft Framework Decision amending Framework Decision on combating terrorism</i>	Yes <sup>xv</sup>	No	No	No	No	No

<sup>i</sup> <http://www.cosac.eu/en/info/earlywarning/criminalpr.pdf/annex.pdf/>

<sup>ii</sup> <http://www.cosac.eu/en/info/earlywarning/criminalpr.pdf/annex.pdf/>

<sup>iii</sup> <http://www.cosac.eu/en/info/earlywarning/criminalpr.pdf/annex.pdf/>

<sup>iv</sup> <http://www.cosac.eu/en/info/earlywarning/criminalpr.pdf/annex.pdf/>

<sup>v</sup> [http://www.cosac.eu/en/info/earlywarning/organ\\_donation.pdf/annex.pdf/](http://www.cosac.eu/en/info/earlywarning/organ_donation.pdf/annex.pdf/)

<sup>vi</sup> [http://www.cosac.eu/en/info/earlywarning/organ\\_donation.pdf/annex.pdf/](http://www.cosac.eu/en/info/earlywarning/organ_donation.pdf/annex.pdf/)

<sup>vii</sup> [http://www.cosac.eu/en/info/earlywarning/organ\\_donation.pdf/annex.pdf/](http://www.cosac.eu/en/info/earlywarning/organ_donation.pdf/annex.pdf/)

<sup>viii</sup> <http://www.cosac.eu/en/info/earlywarning/anti-discrimination.pdf/annex.pdf/>

<sup>ix</sup> <http://www.cosac.eu/en/info/earlywarning/anti-discrimination.pdf/annex.pdf/>

<sup>x</sup> <http://www.cosac.eu/upload/application/pdf/b078b980/compilation%20of%20answers.pdf>

<sup>xi</sup> <http://www.cosac.eu/upload/application/pdf/b078b980/compilation%20of%20answers.pdf>

<sup>xii</sup> <http://www.cosac.eu/en/info/earlywarning/doc/results/responses.pdf/>

<sup>xiii</sup> <http://www.cosac.eu/en/info/earlywarning/doc/results/responses.pdf/>

<sup>xiv</sup> <http://www.cosac.eu/en/info/earlywarning/doc/results/responses.pdf/>

<sup>xv</sup> <http://www.cosac.eu/en/info/earlywarning/Test/reldoc/annex.pdf/>