

Explanatory Memoranda



A guide for Scottish Government officials

European Relations Division
Directorate for Culture, Europe & External Affairs
The Scottish Government

(March 2016)



Table of Contents

Part 1: Early Influencing by Explanatory Memoranda.....	3
<i>What are Explanatory Memoranda?</i>	3
<i>The Role of the Scottish Parliament</i>	3
Part 2: Handling Explanatory Memoranda.....	5
<i>The process</i>	5
<i>What do I do when I receive an EM request?</i>	5
<i>Assessing Subsidiarity</i>	7
<i>Assessing Proportionality</i>	7
<i>Consultation</i>	8
<i>What happens next?</i>	8
<i>Tips for dealing with EMs</i>	9
Annex A: The Subsidiarity & Proportionality Principles	10
<i>Background – the legislative competence of the EU</i>	10
<i>The Subsidiarity Principle</i>	11
<i>The Proportionality Principle</i>	11
Annex B: Example of an EU proposal breaching subsidiarity.....	12

Part 1: Early Influencing by Explanatory Memoranda

What are Explanatory Memoranda?

1. Explanatory Memoranda **are the briefing mechanism used by the UK Government to inform and/or flag potential issues to the UK and Devolved Parliaments of EU legislative proposals** and other activity that might lead to EU legislation, such as European Commission consultation papers.
2. They describe the general effect of the EU document, provide an explanation of the issue and an outline impact assessment, looking at financial, legal and policy implications and the implications for the Devolved Administrations (DAs).
3. Paragraphs **B4.32 – B4.34 of the Concordat on Co-ordination of EU Policy** in the Memorandum of Understanding on Devolution¹ provides that DAs should be consulted when an Explanatory Memorandum (EM) is being prepared so that they can advise whether the proposal would have any impact in an area of devolved competence, and where appropriate, provide suitable text for inclusion in the EM.
4. **The EM process thus offers the Scottish Government an invaluable opportunity to comment on EU legislation and influence the UK's negotiating position at an early stage.**

The Role of the Scottish Parliament

5. Under the Lisbon Treaty's 'yellow/orange card' procedure, national parliaments have an opportunity to object to legislative proposals with a view to having them amended or withdrawn, by submitting a reasoned opinion.
6. Such an objection may only be made on the grounds that the **proposal does not comply with the subsidiarity principle**. This principle requires *both* that the objectives of the proposed action cannot be sufficiently achieved by the Member States acting on their own, *and* that they can be better achieved by action on the part of the EU. For further information on the subsidiarity principle and where it applies, please see **Annex A**.
7. The House of Commons and House of Lords have one 'vote' each² and thus both have the opportunity to issue a reasoned opinion in respect of the proposal, within an eight week period to the institution proposing the draft document, outlining why it does not comply with the principle of subsidiarity.
8. Whilst the Scottish Parliament does not have a vote, it is able to feed in its views to the reasoned opinions and influence both chambers of the UK Parliament

¹ The Memorandum of Understanding and Supplementary Agreements Between the United Kingdom Government, the Scottish Ministers, the Welsh Ministers, and the Northern Ireland Executive Committee (October 2013)
(https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/316157/MoU_between_the_UK_and_the_Devolved_Administrations.pdf)

² Protocol (No 2) on the application of the principles of subsidiarity and proportionality, Article 7

on the draft proposal where there are concerns over the implications of the proposal in devolved matters.

9. Therefore, the key question for the Scottish Parliament, in consultation with relevant stakeholders, is **whether the EU is attempting to legislate in an area which is in the legislative competence of the Scottish Parliament and the objectives of the relevant proposal can be better achieved by the Scottish Parliament acting alone.**

10. To do this, the Scottish Parliament often takes advice from Scottish Government officials about new EU proposals through EMs. It is therefore essential that policy officials respond to EMs as soon as possible, to enable the Scottish Parliament to influence the reasoned opinions of the UK Parliament.

11. The European Relations Division will flag any subsidiarity concerns raised in an EM to the Scottish Parliament's European and External Relations Committee, which will refer to the relevant subject committee for consideration. If the committee agrees with the concerns, it is required to report to the Scottish Parliament, which will debate and agree on (or otherwise) the motion to transmit its views to the European Committees at the House of Commons and the House of Lords.

12. **The EM process is, therefore, a vital mechanism in notifying the Scottish Parliament of EU proposals which relate to devolved matters.**

13. The next step then hinges on the action of the national parliaments of other EU Member States. A 'yellow card' will be raised, if a third or more of EU national parliaments submit reasoned opinions – the threshold drops to a quarter for legislation in the field of cooperation in criminal matters – the originating institution is usually bound to review its proposal with a view to maintaining, amending or withdrawing it.

14. To raise an 'orange card', more than half the Member States must submit reasoned opinions and if the originating institution decides to maintain the proposal, it must submit a reasoned opinion in support of this decision to the Council of the EU and the European Parliament, each of which can strike down the proposal.

Part 2: Handling Explanatory Memoranda

The process

15. Whenever an EU institution publishes a proposal for new legislation or another policy document, it appears in the [Official Journal](#) and officials in the UK Permanent Representation to the EU (UKRep) transmit the details to the Foreign and Commonwealth Office (FCO). The FCO deposits the documents at Westminster, and the Cabinet Office sends an EM request (also known as a commissioning minute) to the lead Whitehall department(s).

16. The Whitehall lead officials then have **10 working days** to produce an EM.

17. Whenever an EU document relates to an area of devolved competence, the Scottish Government should be consulted in the drafting of the EM. It is, therefore, essential that all policy officials in the Scottish Government who have responsibility for implementing EU obligations know the identity of the main contact in their counterpart Whitehall Department and maintain good working relations with them.

18. The Scottish Government [EM inbox](#) will be sent a copy of all commissioning minutes to the Whitehall leads on day one of the 10 day process. The European Relations Division logs the request onto a database and categorises them according to subject matter: 1) devolved; 2) reserved and with devolved interest or; 3) fully reserved.

19. Where the EM concerns a devolved matter or has a devolved interest, the European Relations Division forwards it to the most appropriate policy lead. It is important to note that **this process is complementary and should not be used as a substitute to direct contact between Scottish Government and UK Government officials.**

20. In all cases, please ask your UK Government counterpart to copy in the EM inbox (EM.scotexec@gov.scot) so that we can see that you are dealing with the request.

What do I do when I receive an EM request?

21. The key question for policy leads is whether the proposed EU action is, or will be, in accordance with the **subsidiarity and proportionality principles**. For more guidance on assessing this, please see **paragraphs 23 – 31**.

Step 1 – Upon receiving an EM, you should first check that the subject matter of the EU proposal is devolved and falls within your policy area.

- Consult SGLD if you have any queries about its devolved status.
- If the EM is for you, go to step 2.
- If it's not for you, please forward to a more appropriate recipient and notify the EM Mailbox of the new contact as soon as possible.

Step 2 – Read and consider whether the EU legislative proposal, or anything possibly giving rise to a legislative proposal, is in accordance with **the subsidiarity**

and proportionality principles. For further guidance, please see paragraphs 23 – 31.

- If you have a subsidiarity or proportionality concern, go to step 3.
- If you have no concerns about subsidiarity or proportionality, go to step 4.

Step 3 – You should flag your concern to the European Relations Division and email the Whitehall lead immediately to outline the Scottish Government’s position, copying in the EM inbox.

Step 4 – Consider whether there is anything raised in the document that you would like to comment on.

- Remember that this is **an invaluable opportunity to comment on EU legislation and flag Scottish Government concerns to the UK Government at an early stage.**
- Cabinet Office guidance outlines what should be included in the EM, along with the standard template for completion. A copy of their standing advice on consulting the DAs is available on request from the European Relations Division.
- If you do have comments or concerns, go to step 5.
- If you have no comments, go to step 6.

Step 5 – Email the Whitehall lead with your comments and ask for sight of the draft EM before it is issued for clearance.

- Engage with your Whitehall counterpart as soon as possible to ensure that Scottish interests are represented in the EM.
- Copy the EM inbox into all correspondence to keep the European Relations Division informed.
- If you become aware of any subsidiarity concerns expressed by your Whitehall counterpart at any stage in the drafting process, **please contact the European Relations Division immediately.**

Step 6 – Issue a nil return to the Whitehall lead, thanking them for the opportunity to comment. You may also wish to request sight of the draft EM before it is submitted to a UK Minister for clearance.

- Engage with your Whitehall counterpart as soon as possible to ensure that Scottish interests are represented in the EM.
- Copy the EM inbox into all correspondence to keep the European Relations Division informed.

22. Do not hesitate to contact the European Relations Division for advice if you have any queries about any part of this process.

Assessing Subsidiarity

23. The key question for policy leads is whether the proposal breaches the subsidiarity principle. **This principle aims to ensure that decisions are taken as closely as possible to citizens of the EU.**

24. It requires *both* that the objectives of the proposed action cannot be sufficiently achieved by the Member States acting on their own, *and* that they can be better achieved by action on the part of the EU.

25. Please note that the principle of subsidiarity only applies **to the shared and supporting legislative competence of the EU**. If the proposal falls in an area of exclusive EU competence (for example, competition rules), then the question of subsidiarity does not arise – Member States have agreed that the Union should take all action in this area. For an overview of the legislative competence of the EU, please see **Annex A**.

26. To assess whether the proposal is in accordance with the subsidiarity principle, you should consider the following:

- Does the issue under consideration have transnational aspects which cannot be satisfactorily regulated by action of Member States acting separately?
- Would action by Member States alone, or lack of Union action, conflict with the requirements of EU Treaties (e.g. the need to correct distortion of competition)?
- Would a lack of Union action significantly damage Member State's interests?
- Would action at Union level produce clear benefits by reason of its scale or effects, compared with action at the level of the Member States alone?

27. **It's important not to confuse subsidiarity with disagreement with the action.** The questions we are answering on subsidiarity are whether a policy cannot be sufficiently achieved by Member States and whether it is better achieved at the EU level (because of the scale or effects). Where you think that policy issues can be addressed sufficiently by Member States, you should explain why.

28. If the issues at hand are particularly sensitive or complex, seek advice from SGLD.

Assessing Proportionality

29. Once you have completed the subsidiarity check, the next step is to examine proportionality. Under the proportionality test, the '*content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.*'³ For more information, please see **Annex A**.

30. To assess whether the proposal is in accordance with the proportionality principle, you should consider:

- Whether the EU measure has left as much scope as possible for national decision making;

³ Article 5(4) TFEU

- Whether the proposed legislation imposes on national, regional or local authorities or on civil society any constraints which are illogical, superfluous or excessive given the objective and;
- Whether the proposals respect well established national arrangements and the working of Member States' legal systems.

31. Remember that national parliaments **cannot** object to EU proposals on the grounds that they go beyond what is proportionate to achieve the given objective alone. However, this is another **invaluable opportunity for the Scottish Government to represent Scottish interests and influence the UK negotiating position at an early stage.**

Consultation

32. Where the proposal may confer powers or responsibilities, or will have implications for local government, you should consult and engage with representative bodies of local government, including COSLA, where possible. You should be aware that on issues of key importance for local government, it is likely that politically agreed positions and impact assessments, including on subsidiarity concerns, are available from them well before the final draft legislation is tabled, so it may be prudent to get in touch with them before the EM is made.

33. You should also consider whether the EU proposal may affect the Scottish islands and rural communities in a particular way and ensure that the appropriate bodies are consulted.

34. However, be wary that deadlines to respond to EM requests are extremely tight and consultation may not always be possible.

What happens next?

35. Once the EM has been finalised and cleared by the relevant UK Minister, the Whitehall lead will circulate it for information. The European Relations Division will forward on the finalised documents to the policy lead and to the Scottish Parliament.

36. Policy leads should file the EM in the relevant policy file in objective.

37. The European Relations Division will flag subsidiarity concerns raised in an EM to the Scottish Parliament's European and External Relations Committee, which will refer to the relevant subject committee for consideration. The committee will then come to a view on whether it agrees with the subsidiarity concern.

38. The clerks will usually contact the Scottish Government policy lead to ask them to explain the issues and may ask your portfolio Minister to give evidence on the proposals. **Please be aware that there may be a tight deadline for response in order to meet Committee timetables.** An example of such a response is available on request.

39. Therefore it is essential that your Minister is kept abreast of all key developments and your Whitehall counterparts are aware that the Scottish Parliament will be considering the proposals.

40. If the committee disagrees with your assessment that subsidiarity and/or proportionality is breached, no further action need be taken.

41. However if it is agreed that there is a concern, the committee will report to the Scottish Parliament, which will debate and agree on (or otherwise) the motion to transmit its views to the European Committees at the House of Commons and the House of Lords.

Tips for dealing with EMs

- **Establish good relationships with your Whitehall counterparts.** We hope that through early engagement and good communication in a spirit of mutual respect, we will ensure that where the Scottish Government has comments to make, these will be taken fully on board. This is something the European Relations Division will monitor closely and raise with Cabinet Office if necessary. Please flag any concerns you have regarding communication with Whitehall.
- **Remember that EU legislative proposals are not designed with devolution in mind.** This being the case, you should be careful to consider if there are any requirements which will prove particularly difficult to implement in Scotland.
- **Bear in mind that your desk officer in Brussels is in a good position to influence EU proposals** (particularly at the earlier stages of the formal legislative process). When you receive a document highlighting particular implications for Scotland, it is worth contacting Brussels officials to agree a course of action and register your interest/concerns with UK Government counterparts. For more information, please see Influencing EU Policy Guidance for Policy Officials available at:
<http://www.gov.scot/Topics/International/Europe/Policies/Strengthening-Relationships/Obligations/Influencing-EU-Policy>

Annex A: The Subsidiarity & Proportionality Principles

Background – the legislative competence of the EU

1. The EU shall act only within the limits of the legislative competences conferred upon it by Member States in the Treaty of the European Union (TEU) and Treaty of the Functioning of the European Union (TFEU).⁴

2. Only the EU can act in areas where it has **exclusive competence**, such as the customs union, competition and common commercial policy. In areas of **shared competence**, such as energy, the Single Market and environment, either the EU or the Member States may act, but the Member States may be prevented from acting once the EU has done so. In areas of **supporting competence**, such as culture, tourism and education, both the EU and the Member States may act, but action by the EU does not prevent the Member States from taking action of their own.

Which areas fall within each type of competence?

Exclusive competence	Shared competence	Supporting competence
<ul style="list-style-type: none">• the customs union• the establishing of the competition rules necessary for the functioning of the internal market• monetary policy for the Member States whose currency is the euro• the conservation of marine biological resources under the common fisheries policy• common commercial policy• concluding international agreements<ul style="list-style-type: none">○ when their conclusion is required by a legislative act of the EU○ when their conclusion is necessary to enable the EU to exercise its internal competence○ in so far as their conclusion may affect common rules or alter their scope.	<ul style="list-style-type: none">• the internal market• social policy, for the aspects defined in the TFEU• economic, social and territorial cohesion• agriculture and fisheries, excluding the conservation of marine biological resources• environment• consumer protection• transport• trans-European networks• energy• the area of freedom, security and justice• common safety concerns in public health matters, for the aspects defined in the TFEU• research, technological development and space• development cooperation and humanitarian aid	<ul style="list-style-type: none">• the protection and improvement of human health• industry• culture• tourism• education, youth, sport and vocational training• civil protection (disaster prevention)• administrative cooperation

⁴ Article 5(1)-(2) TEU

3. If you are unsure which area of competence your policy falls under, please contact the European Relations Division.

The Subsidiarity Principle

4. The use of EU competences is governed by the principles of subsidiarity and proportionality.

5. Under the principle of subsidiarity, **in areas which do not fall within the exclusive competence of the EU**, the EU shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.⁵

6. This principle aims to ensure that decisions are taken as closely as possible to citizens of the EU, in areas of shared and supporting competence.

7. The key question for the Scottish Parliament is, therefore, **whether the EU is legislating in an area which is in the Scottish Parliament's legislative competence and the objectives of the relevant proposal can be better achieved by the Scottish Parliament acting alone.**

The Proportionality Principle

8. Under the proportionality principle, the '*content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.*'⁶

9. The principle of proportionality is very closely linked to the subsidiarity principle. However, it is important to note that proposals meeting the requirements of subsidiarity may not necessarily be proportionate.

10. The main difference between the two principles is that the subsidiarity test examines *who* should be taking the action and the proportionality test looks at *what* the action should be.

11. National parliaments **can only object to EU proposals on the grounds that they breach the principle of subsidiarity and not on the grounds that they go beyond what is proportionate to achieve the given objective.**

12. Nonetheless, the process offers another invaluable opportunity for the Scottish Parliament to represent Scottish interests and influence the UK negotiating position at an early stage.

⁵ Article 5(3) TEU

⁶ Article 5(4) TFEU

Annex B: Example of an EU proposal breaching subsidiarity

In 2012, the European Parliament and Council issued a Draft Regulation on Establishing a Fund for European Aid to the Most Deprived. This aimed to establish an EU-level fund to support member states in the provision of food banks and goods for the homeless. The proposal thereby related to cohesion, a shared competence between the EU and member states – meaning that the subsidiarity test was applied. The European Commission argued that action to combat poverty at the EU level was necessary, given the level of poverty and social exclusion across the Union. It recognised that the EU economic and fiscal crisis had exacerbated levels of poverty across Member States, and saw the fund as a way of ‘demonstrating the direct solidarity of the Union with poor people’. It argued that the principle of subsidiarity was respected, as the EU would leave it up to Member States to decide how the funds were administered.

However, the UK Parliament argued that it was not necessary to address the issue of poverty at an EU level. Given the different challenges and financial constraints across Member States, it was far more appropriate to take action at a national level. Further, it was unacceptable to bind all Member States into contributing to this fund, when national support in most instances was adequate. The UK Parliament also dismissed the Commission’s argument that the fund would show solidarity with the most deprived people across Europe, stating: ‘the fact that the Commission is anxious to be seen to act (to mitigate its contribution to the economic and financial crisis) does not mean that EU action is necessary or justified’.

Both the House of Commons and the Lords wrote a reasoned opinion to the European Commission and Council (as they were proposing the action), setting out why they thought that the proposal did not accord with the principle of subsidiarity. They were supported by the Riksdag of the Kingdom of Sweden and by the German Bundestag. However, as less than a third of EU national parliaments took issue with the proposals, the Council and Commission were not forced to review them.



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This publication is available at www.gov.scot

Any enquiries regarding this publication should be sent to us at
The Scottish Government
St Andrew's House
Edinburgh
EH1 3DG

ISBN: 978-1-78652-208-5 (web only)

Published by The Scottish Government, March 2016

Produced for The Scottish Government by APS Group Scotland, 21 Tennant Street, Edinburgh EH6 5NA
PPDAS68620 (03/16)

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