

SUBMISSION FROM PROFESSOR DREW SCOTT

This written evidence addresses a specific question set out by the Committee, viz.:

What is your view on the Scottish Government's proposal that Scotland needs more influence in European Union negotiations and particularly in the Council of Ministers? What lessons can be learned from arrangements in other Member States?

1. My understanding is that the Scottish Government is seeking to amend the Scotland Bill so as to entrench a statutory obligation on the UK Government to include a Minister from the Scottish Government on all UK delegations to the EU Institutions, including the Council of the European Union (hereafter Council of Ministers), when a devolved policy is under EU-level legislative consideration or policy discussion.
2. The EU Institutions were designed in the presumption of a unitary member state. The European Parliament comprises (since 1979 directly) elected representatives from member states. The Council of Ministers – initially the EU's sole legislative body – consists of Ministerial representatives drawn from the national governments of the member states. While the Council of Ministers originally dominated the EU legislative process, as a consequence of a swathe of EU treaty reforms since 1985 the European Parliament has emerged as an equal co-legislator with the Council of Ministers for the vast majority of EU laws.
3. The Council of Ministers is the legislative forum at which the 'national' interests of member states are represented by the relevant Minister. Each member state will have a pre-agreed national negotiating position designed to ensure its interests are reflected in the legislative proposal agreed. However as one would expect national positions frequently are adjusted as the negotiations develop, albeit 'red line' issues are unlikely to be reconsidered. It is a truism that regardless of which member state Minister attends the relevant EU-level meeting, s/he must adhere to her/his agreed negotiating brief. Any indication that the national position does not command the support of all members of a member state delegation would undermine its negotiating position.
4. At the time of its inception in 1958, Germany was the EU's only federal state. This changed with (i) the 1986 accession of Spain with its autonomous communities; (ii) the regionalisation of Belgium in 1992; (iii) the accession of the Federal Republic of Austria in 1995; (iv) devolution in the UK from 1999. In the context of its on-going devolution process Italy might be considered an addition to this group of federal or quasi-federal EU members.
5. Once consequence of political decentralisation in a number of EU member states has been increasing demands by sub-state governments (SSGs) for enhanced legislative and policy representation at the EU level. This is because the constitutional and legislative authority of SSGs has been (and continues to be) eroded due to the progressive expansion of Treaty-based EU competences into policy areas for which they, rather than the member state government, have

domestic constitutional authority. This has occurred through reforms to the EU Treaties that have extended the reach of EU legislation, via the enactment of EU Directives and Regulations deemed necessary to give effect to the objectives of the EU Treaties, and sometimes as a consequence of rulings by the European Court of Justice.

6. Areas of sub-state legislative competence now routinely subject to EU law and policy include education, media, culture, research and development, agriculture, fisheries, regional economic development, the environment, and (in the UK at least) justice.
7. The development of EU legislative and policy authority has compromised the law-making authority of sub-state legislatures *and* sub-state governments in *two* senses. The first is because domestic (including sub-state) laws cannot conflict with EU laws. Therefore whenever the EU legislates in a matter of sub-state legislative competence the legislative authority of sub-state parliament is directly eroded. Neither national nor sub-state parliaments can enact (different) laws in that specific area because in any conflict between domestic and EU law then domestic law must yield. EU laws therefore routinely interfere with the internal constitutional order of member states. It is this which SSGs across the EU (including Scotland's government) have sought to tackle. Second, because the EU is a union of member states it falls to national governments to represent the national interest of the country in EU legislative negotiations even when the prospective legislation impacts on a policy for which the national government has no domestic competence – i.e. where the policy is “devolved” to sub-state governments. In effect this means that, notwithstanding the internal division of legislative competence, whenever the EU acquires power to legislate over a “devolved” policy matter then domestic competence over that segment of the policy effectively reverts to national government regardless of prevailing domestic arrangements. Understandably this outcome is contested by SSGs and sub-state parliaments.
8. These developments at EU level, and their domestic (quasi-)constitutional implications, led to increasing calls (initially in Germany and Belgium but later in Spain and the UK) to reform *both* national EU policy-making procedures *and* EU-level policy-making in order to enhance the role of sub-state governments and parliaments in policy areas for which they had competence but were now subject to EU legislation.
9. At the EU level initial attempts to meet sub-state concerns were made by revisions to the EU treaties enacted in 1993. The Treaty on European Union (TEU) made the following changes: (i) under a revised Article 146 TEU (now Article 9C, TEU) Ministers from sub-state governments were permitted to attend all Council meetings and were empowered to commit the government of the member state in question to an EU obligation; (ii) the principle of subsidiarity was entrenched in a Protocol to the Treaty and has since been developed, most recently in revisions set out in the Treaty of Lisbon; (iii) the consultative Committee of the Regions was established. While permitting Ministers from SSG to participate in – and indeed lead – member state delegations was welcomed

and has worked smoothly, neither the principle of subsidiarity nor the Committee of the Regions can be considered successes in this regard to date – although reforms to subsidiarity agreed in the Treaty of Lisbon ultimately might be useful.

10. However more significant have been the consequences of the extension of EU law into areas of sub-state legislative competence for the locus of SSGs in *domestic* EU policy processes – i.e. within member states. What we have seen across a number of member states – Germany, Belgium, Austria, Spain, the UK – has been progressive changes in national EU policy making arrangements to accommodate the interests of sub-state governments in EU legislative and policy outcomes.
11. There are two aspects to these national EU policy processes: (i) greater, and increasingly formalised, input by SSGs to the formulation of the member state negotiating position, (ii) representation by SSGs within member state delegations at all relevant meetings of the Council of Ministers, including preparatory meetings and relevant working groups. The specific arrangements for both types of SSG involvement vary from country to country with Germany having the most formalised provisions and, I would suggest, the UK having the least formalised.
12. It is important to stress that the argument for the involvement of SSG in EU deliberations has never rested on – or insofar as I am aware has it ever revealed – a desire by the SSG to engage in an ‘auxiliary foreign policy’ or ‘parallel diplomacy’. Instead the argument rests on two propositions:
 - (i) First the constitutional proposition that it is formally appropriate for a Minister who represents the government, and is accountable to the parliament, whose legislative prerogatives are being affected by the proposed EU legislation to attend all relevant EU-level meetings;
 - (ii) Second the practical argument that the SSG will bring to EU-level deliberations a specific expertise on these matters of sub-state competence which the national government may well lack.
13. I am aware of no evidence that suggests any of the SSGs from a federal or quasi-federal EU member state routinely attending meetings of the Council of Ministers in all its relevant formats has sought to (ab)use this position as any opportunity to pursue a ‘parallel diplomacy’ or depart from the national negotiating position.
14. To my mind, and based on the evidence from other EU member states, there are persuasive constitutional and practical policy reasons for the devolved Scottish Government being represented at all EU pre-legislative and legislative meetings (in particular the Council of Ministers) when a devolved competence is being discussed.
15. It is I think both unhelpful and highly simplistic to conceptualise this issue as one of narrow political self-interest. In constitutional terms it is entirely to be expected that parliaments everywhere will, and indeed should, seek to protect their legislative prerogatives. That will, in part, be achieved where a Minister

accountable to that Parliament is in attendance and can subsequently be questioned by members of that Parliament. As matters stand the Scottish Parliament has no direct mechanism to hold to account a Minister of the Scottish Government for EU-level decisions that have impacted on its legislative prerogatives. There is a degree of accountability for their role in contributing to the overall UK negotiating position, but this is at best weak and at worst ineffective – principally because of the ‘rules’ surrounding the engagement of the Scottish Government with the UK Government on EU matters. Rules implemented by a Concordat passed without debate by the Scottish Parliament in 1999.

16. Devolution in the UK, as elsewhere, has created two sets of parliamentary prerogatives between which there is some tension – the reserved nature of EU policy (which plays to national parliaments) and the direct impact of EU policies on devolved competences (which impacts on sub-state parliaments). Given that parliamentarians properly will seek to protect their own legislative prerogatives rather than the prerogatives of other parliaments, procedures are required to accommodate both sets of interest where – as in EU legislative activity – a constitutional anomaly is unavoidable. This is the anomaly other EU member states have sought to resolve by facilitating SSG representation on national delegations to EU institutions where appropriate.
17. In practical terms SSG representation can be expected to add value to national delegations. One of the stylised facts of EU negotiations is that a member state decides its national bargaining position ‘at home’ and when it enters the inter-governmental arena in Brussels adheres doggedly to that line. This implies that all that matters is how the national negotiating line is agreed domestically and if that process brings in all relevant interests – including SSGs – then that will be sufficient. However this is somewhat to caricature the EU segment of the legislative process. While national delegations will, on occasion, have established ‘red line’ positions on which they will not budge, more often there will be considerable scope for movement in the course of the negotiations in order to accommodate competing national interests. It is during these inter-governmental bargaining sessions that elements of the pre-arranged national position are vulnerable to re-consideration. To the extent that SSG competences are involved, and/or where the subject is one that is particularly important to the interests of SSG and on which it has a specific expertise, it would seem rather obvious that the member state delegation would be strengthened with the presence of the relevant Minister from a SSG.
18. In my view the debate in Scotland concerning the right of a Minister from the Scottish Government, and indeed this Parliament, to attend inter-governmental meetings of the EU institutions whenever a devolved competence is being discussed echoes similar debates that have been, and are being, conducted across all EU member states with federal or quasi-federal systems of government. To my knowledge in all cases changes have been made to national delegations to accommodate SSG requests in this regard. Of course in all cases – and here the Scottish Government seems no different – the SSGs acknowledge their obligation to represent the agreed national negotiating line.

19. In conclusion it seems to me that in setting out this request that it be given a formal right to participate in EU-level legislative and policy debates whenever a devolved policy is involved, the Scottish Government is making a reasonable and reasoned request. Therefore while there are, in my view, compelling reasons to support the proposition that SSGs should be involved in relevant national delegations to the EU institutions, there are no obvious reasons why they should not be so included.

Biographical Note

I am Professor of European Union Studies, and economist, in the School of Law at the University of Edinburgh. Since 1979 I have taught and researched a wide range of EU issues including monetary union, fiscal federalism, regional economic policy, international trade theory and policy, and EU institutions and EU governance. I have been adviser to the European Commission, the Statistical Office of the European Communities and a number of national and sub-state governments across the EU and beyond. I have participated in many national and international research programmes studying the engagement of sub-state governments in EU legislative and policy processes. Under the aegis of the UK Economic and Social Research Council from 1999-2003 I was part of a UK-wide research team investigating the implications of devolution on UK policy engagement at the EU level.

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