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Clerk of the Parliaments

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The President
European Commission
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Belgium

11 November 2013

Dear Mr President

COM(2013) 619, 13857/13: Proposal for a Regulation of the European Parliament and of the Council on New Psychoactive Substances

COM(2013) 618, 13865/13: Proposal for a Directive of the European Parliament and of the Council amending Council Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking, as regards the definition of drug

On 11 November 2013 the House of Lords of the United Kingdom Parliament resolved as follows:

> "that this House considers that the Commission proposal for a Regulation of the European Parliament and of the Council on New Psychoactive Substances (COM(2013) 619, Council Document 13857/13) and the Commission proposal for a Directive of the European Parliament and of the Council amending Council Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking, as regards the definition of drug (COM(2013) 618, Council Document 13865/13) do not comply with the principle of subsidiarity, for the reasons set out in the 6th Report of the European Union Committee (HL Paper 73); and, in accordance with article 6 of the Protocol on the application of the principles of subsidiarity and proportionality, instructs the Clerk of the Parliaments to forward this reasoned opinion to the Presidents of the European institutions."

I have the honour so to do. I enclose the report referred to.

Yours sincerely

David Beamish

David Beamish
Clerk of the Parliaments

HOUSE OF LORDS

European Union Committee

6th Report of Session 2013–14

Subsidiarity Assessment: New Psychoactive Substances

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The European Union Committee

The Committee considers EU documents in advance of decisions being taken on them in Brussels, in order to influence the Government's position and to hold them to account.

The Government are required to deposit EU documents in Parliament, and to produce within two weeks an Explanatory Memorandum setting out the implications for the UK. The Committee examines these documents, and 'holds under scrutiny' any about which it has concerns, entering into correspondence with the relevant Minister until satisfied. Letters must be answered within two weeks. Under the 'scrutiny reserve resolution', the Government may not agree in the EU Council of Ministers to any proposal still held under scrutiny; reasons must be given for any breach.

The Committee also conducts inquiries and makes reports. The Government are required to respond in writing to a report's recommendations within two months of publication. If the report is for debate, then there is a debate in the House of Lords, which a Minister attends and responds to.

The Committee has six Sub-Committees, which are:
Economic and Financial Affairs (Sub-Committee A)
Internal Market, Infrastructure and Employment (Sub-Committee B)
External Affairs (Sub-Committee C)
Agriculture, Fisheries, Environment and Energy (Sub-Committee D)
Justice, Institutions and Consumer Protection (Sub-Committee E)
Home Affairs, Health and Education (Sub-Committee F)

Our Membership

The Members of the European Union Committee are:

Lord Boswell of Aynho (Chairman)	Lord Foulkes of Cumnock	The Earl of Sandwich
Lord Bowness	Lord Hannay of Chiswick	Baroness Scott of Needham Market
Lord Cameron of Dillington	Lord Harrison	Lord Tomlinson
Lord Carter of Coles	Lord Maclennan of Rogart	Lord Tugendhat
Baroness Corston	Lord Marlesford	Lord Wilson of Tillyorn
Lord Dear	Baroness O'Cathain	
Baroness Eccles of Moulton	Baroness Parminter	

The Members of the Sub-Committee on Home Affairs, Health and Education, which conducted this inquiry, are:

Baroness Benjamin	Lord Hannay of Chiswick (Chairman)	Lord Sharkey
Lord Blencathra	Lord Judd	The Earl of Stair
Viscount Bridgeman	Lord Morris of Handsworth	Lord Tomlinson
Lord Faulkner of Worcester	Baroness Prashar	Lord Wasserman

Information about the Committee

Our homepage is http://www.parliament.uk/hleu which contains our publications, along with press notices, details of membership and forthcoming meetings, and other information about the ongoing work of the Committee and its Sub-Committees (each of which has its own web pages).

Sub-Committee Staff

The current staff of the Sub-Committee are Chris Atkinson (Clerk), Paul Dowling (Policy Analyst) and Alice Ryder (Committee Assistant).

Contacts for the European Union Committee

Contact details for individual Sub-Committees are given on the website. General correspondence should be addressed to the Clerk of the European Union Committee, Committee Office, House of Lords, London, SW1A 0PW. General enquiries 020 7219 5791. The Committee's email address is euclords@parliament.uk

Subsidiarity Assessment: New Psychoactive Substances

13857/13: Proposal for a Regulation of the European Parliament and of the Council on New Psychoactive Substances

13865/13: Proposal for a Directive of the European Parliament and of the Council amending Council Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking, as regards the definition of drug

Recommendation

1. We recommend that the House of Lords should issue the reasoned opinion set out below (in paragraphs 9–14), concluding that the proposed Regulation and Directive do not comply with the principle of subsidiarity; and should send it to the Presidents of the European Parliament, the Council and the Commission, in accordance with the provisions of the European Union (EU) Treaties, before the expiry of the prescribed period on 13 November 2013.

The Commission's proposals

2. The stated purpose of the proposed Regulation is to improve the functioning of the internal market regarding legal uses of new psychoactive substances by reducing obstacles to trade and increasing legal certainty for economic operators. At the same time, it seeks to reduce the availability of substances that pose health risks to the general population through swifter, more effective and, what the Commission considers to be, more proportionate EU action.

3. The proposed Regulation is based on Article 114 of the Treaty on the Functioning of the European Union which creates a competence for the EU to adopt measures "for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market". It proposes that:

   - the European Monitoring Centre for Drugs and Drug Addiction (EMCDDA) and Europol will produce a joint report on a new psychoactive substance;
   - the joint report will form the basis on which the Commission, acting on further advice from the EMCDDA, would take a decision to:
     (i) take no further action in respect of a substance assessed as low risk;
     (ii) restrict the sale of a new psychoactive substance to consumers across the EU in respect of substances assessed as medium risk; or

(iii) introduce a comprehensive prohibition, including on the production, import, export, transportation and marketing of a substance assessed as high risk; and

- it will be possible for the Commission to take immediate steps to protect public health for a period of up to 12 months if the circumstances warrant.

4. The Commission considers the proposal to be consistent with the principle of subsidiarity because Member States alone cannot reduce the problems caused to the internal market given their divergent responses to new psychoactive substances. It also argues that EU-level action is necessary to ensure that potentially harmful new psychoactive substances can be identified, assessed, and, if necessary, withdrawn quickly from the market across all Member States.

5. The proposed Directive would amend the existing Framework Directive 2004/757 (which lays down minimum provision on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking) to require the criminalisation of psychoactive substances assessed as high risk under the proposed Regulation.

Scrutiny reserve

6. This report was prepared by the Home Affairs, Health and Education Sub-Committee of the House of Lords EU Select Committee whose members are listed in the Appendix. It does not complete the scrutiny of these proposals.

Scrutiny history

7. In March 2012, the EU Committee published *The EU Drugs Strategy* (26th Report, Session 2012–12, HL Paper 270). The report focussed on many areas of relevance to the current proposals and concluded that "decisions about banning such [new psychoactive] substances are, in most cases, best left to individual Member States".

8. At its meeting on 16 October 2013, the Committee scrutinised Explanatory Memorandums from the Government and heard oral evidence from Norman Baker MP, Minister of State for Crime Prevention, Home Office, on the Commission's proposals.

Reasoned opinion

9. We share the Commission's concerns about the risk of harm to the health and safety of EU citizens posed by the creation, availability and use of new psychoactive substances. We consider that the EU has an important role to play, where possible strengthening and adding value to the actions of Member States in tackling the negative effects of these substances.

10. The report of this House's EU Committee, *The EU Drugs Strategy*,[1] welcomed and endorsed the high esteem in which the European Monitoring Centre for Drugs and Drug Addiction (EMCDDA) is held, and supported the continuation of its work towards common definitions and common data collection practice. The report also supported the Director of Europol's efforts to improve the use of Europol's unique databases and facilities in the fight against drug trafficking. We support the Commission in its wish to strengthen the role of these two organisations in assisting Member States and the EU as a whole to deal with these substances.

11. We do not, however, share the Commission's assessment that the *Proposal for a Regulation on New Psychoactive Substances* and the *Proposal for a Directive amending Council Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking, as regards the definition of drug* satisfy the principle of subsidiarity. This principle provides that, in policy areas which do not fall within the exclusive competence of the European Union, but where competence is shared with the Member States, the Union can act "only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States".[2] The two proposals in question, in our view, include some provisions which are best left to Member State action and so are not consistent with the principle of subsidiarity.

12. In its Explanatory Memorandum covering the proposed Directive, the Commission asserts that the EU is better placed than the Member States to take action to restrict the availability in the internal market of harmful new psychoactive substances because Member States cannot address effectively and sustainably the rapid emergence and spread of these substances. In its Explanatory Memorandum covering the proposed Regulation, the Commission asserts that Member States alone cannot reduce the problems caused by both the spread in the internal market of harmful new psychoactive substances and by the proliferation of divergent national responses; and that therefore EU-wide action is required.

13. We disagree. The proliferation of new psychoactive substances is influenced by regional, national, and international forces, and these manifest themselves differently in different Member States depending on the speed at which the substances become available and the severity of their impact on public health. Member States have different systems for dealing with harmful drugs in general and for addressing new psychoactive substances, and require flexibility to respond to local situations. It is therefore Member States which

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[1] House of Lords European Union Committee, *The EU Drugs Strategy* (26th Report, Session 2012–12, HL Paper 270).

[2] Article 5(3) of the Treaty on European Union.

are best placed to decide how to respond to the proliferation of these substances in a manner that best fits the circumstances in their jurisdictions. Action at EU-level may in some circumstances bring added value, for example in the area of information-sharing and in the provision of analysis by Europol and the EMCDDA, but it is of the utmost importance that Member States retain their ability to decide what action should be taken in their jurisdictions regarding new psychoactive substances. This would not preclude EU-wide action being taken by the Council with respect to a particular substance or group of substances.

14. In addition, the Commission asserts that EU-level action is necessary in order to avoid hindrance to the legal trade in psychoactive substances, to prevent the displacement of harmful substances from one Member State to another, and to avoid problems in co-operation between national judicial authorities and law enforcement agencies. However, the Commission's impact assessment, which accompanies the proposal, states that comprehensive information about the scale of the legal trade in new psychoactive substances in the EU is not available.[3] Evidence from the UK Government set out in their Explanatory Memorandum on the Regulation and the Directive leads us to conclude that legal trade in psychoactive substances is not sufficiently extensive to warrant the Commission's proposed action, which is thus a disproportionate response.[4] Furthermore, any problems concerning displacement or lack of cooperation could be adequately addressed through the provisions for information exchange in the proposed Regulation, strengthened if necessary, thereby facilitating effective enforcement of national decisions. The House of Lords therefore does not agree that these matters justify transferring Member States' decision-making power in respect of new psychoactive substances to the Commission.

3 European Commission Impact Assessment, SWD(2013) 320 final, page 5.

4 Home Office Explanatory Memorandums 13865/13 COM (2013) 618 and 13857/13 COM (2013) 619.

APPENDIX: LIST OF MEMBERS AND DECLARATIONS OF INTEREST

The Members of the Sub-Committee that conducted this inquiry were:

Baroness Benjamin
Lord Blencathra
Viscount Bridgeman
Lord Faulkner of Worcester
Lord Hannay of Chiswick (Chairman)
Lord Judd
Lord Morris of Handsworth
Baroness Prashar
Lord Sharkey
Earl of Stair
Lord Tomlinson
Lord Wasserman

Declarations of Interest

Lord Hannay of Chiswick (Chairman)
Member, Advisory Board of the Centre for European Reform
Member, The Future of Europe Forum, the proactive advisory board for the Centre for British Influence through Europe

Baroness Benjamin
No relevant interests

Lord Blencathra
No relevant interests

Viscount Bridgeman
No relevant interests

Lord Faulkner of Worcester
No relevant interests

Lord Judd
Member, All Party Parliamentary Group on Human Rights
Member, All Party Parliamentary Group on Penal Affairs
Member, All Party Parliamentary Group on Police
President, Hospice at Home West Cumbria
Trustee, Saferworld

Lord Morris of Handsworth
No relevant interests

Baroness Prashar
Member of the Committee appointed to consider UK's involvement in Iraq
Governor and Member of Management Committee, Ditchley Foundation
Deputy Chair, British Council
Patron, Runnymede Trust
Trustee, Cumberland Lodge
President, Royal Commonwealth Society
President, Community Foundation Network
Vice Chair, All-Party Parliamentary Group for the Commonwealth
President, UK Council for International Student Affairs

Lord Sharkey
Governor, Institute for Government

Earl of Stair
No relevant interests

Lord Tomlinson
No relevant interests

Lord Wasserman
No relevant interests

The following were Members of the European Union Select Committee when the report was approved:

Lord Boswell of Aynho (Chairman)
Lord Bowness
Lord Cameron of Dillington
Lord Carter of Coles
Baroness Corston
Lord Dear
Baroness Eccles of Moulton
Lord Foulkes of Cumnock
Lord Hannay of Chiswick
Lord Harrison
Lord Maclennan of Rogart
Lord Marlesford
Baroness O'Cathain
Baroness Parminter
The Earl of Sandwich
Baroness Scott of Needham Market
Lord Tomlinson
Lord Tugendhat
Lord Wilson of Tillyorn

A full list of Members' interests can be found in the Register of Lords Interests:

http://www.parliament.uk/mps-lords-and-offices/standards-and-interests/register-of-lords-interests/