



**CALL FOR EVIDENCE ON THE GOVERNMENT'S REVIEW OF THE BALANCE OF COMPETENCES
BETWEEN THE UNITED KINGDOM AND THE EUROPEAN UNION**

Semester 4

SUBSIDIARITY AND PROPORTIONALITY

Foreign and Commonwealth Office

Opening date: 27 March 2014

Closing date: 30 June 2014

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1. Introduction

- 1.1 The Foreign Secretary launched the Balance of Competences Review in Parliament in July 2012, taking forward the Coalition commitment to examine the balance of competences between the UK and the European Union. The review will provide an analysis of what the UK's membership of the EU means for the UK national interest. It aims to deepen public and Parliamentary understanding of the nature of our EU membership and provide a constructive and serious contribution to the national and wider European debate about modernising, reforming and improving the EU in the face of collective challenges. It will not be tasked with producing specific recommendations or looking at alternative models for Britain's overall relationship with the EU.
- 1.2 The review is broken down into a series of reports on specific areas of EU competence, spread over four semesters between autumn 2012 and autumn 2014. The review is led by Government but will also involve non-governmental experts, organisations and other individuals who wish to feed in their views. Foreign Governments, including our EU partners and the EU Institutions, are also being invited to contribute. The process will be comprehensive, evidence-based and analytical. The progress of the review will be transparent, including in respect of the contributions submitted to it.
- 1.3 This call for evidence sets out the scope of the review which will cover the EU principles of Subsidiarity and Proportionality, as well as Article 352 of the Treaty on the Functioning of the European Union (TFEU) (the so-called "flexibility clause"). The report will look at the principles of Subsidiarity and Proportionality, how they developed, and how they are used today, assessing what this means for the UK and its national interest, as well as where future challenges and developments may lie.
- 1.4 As Subsidiarity and Proportionality are fundamental principles rather than distinct areas of competence, the scope of the report is expected to be broad, and to assess the impact of the principles in different policy areas. It will therefore draw heavily on previous work in this area, including previous Balance of Competences reports. Full details of the programme as a whole can be found at: <http://www.gov.uk/review-of-the-balance-of-competences>.

2. EU competence and principles

- 2.1 For the purposes of this review, we are using a broad definition of competence. Put simply, competence in this context is about everything deriving from EU law that affects what happens in the UK. That means examining all the areas where the Treaties give the EU competence to act, including the provisions in the Treaties giving the EU institutions the power to legislate, to adopt non-legislative acts, or to take any other sort of action. But it also means examining areas where the Treaties apply directly to the Member States without needing any further action by the EU institutions.
- 2.2 The EU's competences are set out in the EU Treaties, which provide the basis for any actions the EU institutions take. The EU can only act within the limits of the competences conferred on it by the Treaties, and where the Treaties do not confer competences on the EU they remain with the Member States.
- 2.3 There are different types of competence: exclusive, shared and supporting. Only the EU can act in areas where it has exclusive competence, such as the customs union and common commercial policy. In areas of shared competence, such as the single market, environment and energy, either the EU or the Member States may act, but the Member States may be prevented from acting once the EU has done so. And in other areas covered by the EU Treaties, the primary responsibility for action rests with Member States, with the EU playing a supporting role; action by the EU does not prevent the Member States from acting. In other areas, the EU has no competence.
- 2.4 The table below sets out the current state of EU competence after the changes made by the Treaty of Lisbon.

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Exclusive Competence	Shared Competence	Supporting Competence
<ul style="list-style-type: none"> • Customs union • Competition policy within the internal market • Monetary policy for eurozone members • Conservation of marine biological resources • Common commercial policy 	<ul style="list-style-type: none"> • Internal market • Social policy • Economic, social and territorial cohesion • Agriculture and fisheries • Environment • Consumer protection • Transport • Trans-European networks • Energy • Area of freedom, security and justice • Common safety concerns in public health matters 	<ul style="list-style-type: none"> • Protection and improvement of human health • Industry • Culture • Tourism • Education, vocational training, youth and sport • Civil Protection • Administrative cooperation

2.5 Subsidiarity and Proportionality are not types of competence, but rather fundamental principles which must be followed by the EU when it is exercising competence. The EU must act in accordance with fundamental rights as set out in the Charter of Fundamental Rights (such as freedom of expression and non-discrimination) and with the principles of Subsidiarity and Proportionality. Under the principle of Subsidiarity, where the EU does not have exclusive competence, it can only act if it is better placed than the Member States to do so because of the scale or effects of the proposed action. Under the principle of Proportionality, the content and form of EU action must not exceed what is necessary to achieve the objectives of the EU treaties.

2.6 Considering how these principles, as existing Treaty mechanisms to regulate EU action, work in practice is an essential starting point for considering future reform to how the EU operates and when it acts.

2.7 Both principles are “legal” principles in that the EU institutions are bound by them and cannot legally act in breach of them. However, given their nature, they require significant political judgment as to whether proposed action can better be achieved by Member States, or whether specific EU action is necessary in order to meet a given objective. As considered in section 4 below, the EU courts have to date not struck down an EU law on the grounds that it breaches the principle of Subsidiarity.

2.8 Article 352 TFEU is similarly not a free-standing area of EU competence, and cannot be used to extend EU competence but rather provides a power for the EU to take action in support of EU objectives when other Treaty Articles do not suffice.

3. A brief history of the EU Treaties

3.1 The Treaty on the European Economic Community (EEC) was signed in Rome on 25 March 1957 and entered into force on 1 January 1958. The EEC Treaty had a number of economic objectives, including establishing a European common market. Since 1957 a series of treaties has extended the objectives of what is now the European Union beyond the economic sphere. The amending treaties (with the dates on which they came into force) are: the Single European Act (1 July 1987), which provided for the completion of the Internal Market by 1992; the Treaty on European Union – the Maastricht Treaty (1 November 1993), which covered matters such as justice and home affairs, foreign and security policy, and economic and monetary union; and the Treaty of Amsterdam (1 May 1999), the Treaty of Nice (1 February 2003) and the Treaty of Lisbon (1 December 2009), which made a number of changes to the institutional structure of the EU.

3.2 Following these changes, there are now two main treaties which together set out the competences of the European Union:

- The Treaty on European Union (TEU); and
- The Treaty on the Functioning of the European Union (TFEU).

4. Subsidiarity

4.1 The EU can only act (or “exercise competence”) where it has been given the power to do so by its 28 Member States, in one of its Treaties. This is known as the principle of conferral – the powers the EU has are ones conferred on it by its Member States.

4.2 In areas where the EU and Member States share the right to act, how is it to be decided which of them should act? This is where the principle of Subsidiarity comes in, to clarify at which level decisions should be taken.

Subsidiarity is a principle which governs the choice of who should act, in situations where potentially more than one actor is able to act.

The concept of Subsidiarity is not unique to the EU context. For instance, it is also found in federal States. Wherever there are multiple levels of decision-makers, there is a choice to be made about the appropriate level for decision-making. In the domestic UK context, which policy areas should local authorities or Devolved Administrations be responsible for, and which central government?

4.3 Subsidiarity is a cross-cutting principle in the EU context, applicable whenever there is a choice between EU and national (or regional or local) action. It regulates the exercise of powers at EU level. In areas of shared or supporting competence, the EU should act only where action at EU level is more effective than action taken at national, regional or local level. Article 5(3) of the Treaty on European Union provides:

“Under the principle of Subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.”

Where these conditions are not met, it would be contrary to the principle of Subsidiarity for the EU to act.

4.4 As successive Treaties have given the EU powers to act in more policy areas, the principle of Subsidiarity has arisen in more contexts. These are considered in case studies below.

4.5 It is important to note that the principle of Subsidiarity does not apply to areas of **exclusive EU competence**. In these areas, only the EU is entitled to act. And so the issue of the objective being better met by Member States simply does not arise.

4.6 The principle of Subsidiarity might be understood as having the following aims:

- Seeks to protect the powers of Member States;
- Seeks to limit EU action to cases where it is really needed;
- Focuses attention on the best level for action to achieve objectives;
- Ensures that actions are taken by the appropriate actor and that decisions are taken as closely as possible to citizens.

4.7 Some indicative understandings of Subsidiarity may be useful:

- Decisions should be taken as close as possible to the citizen.
- *“European when necessary; national when possible”*¹
- a presumption that, where there is a choice, action should be taken by Member States except where EU action can add value
- *“For me, Subsidiarity is not a technical concept. It is a fundamental democratic principle. [This]...demands that decisions are taken as openly as possible and as closely to the people as possible.*

*Not everything needs a solution at European level. Europe must focus on where it can add most value. Where this is not the case, it should not meddle. The EU needs to be big on big things and smaller on smaller things - something we may occasionally have neglected in the past. The EU needs to show it has the capacity to set both positive and negative priorities.”*²

¹ Netherlands Subsidiarity Review – June 2013 – expressing the guiding principle of subsidiary.

² José Manuel Durão Barroso, President of the European Commission, State of the Union address, 11 September 2013. http://europa.eu/rapid/press-release_SPEECH-13-684_en.htm

Subsidiarity in the treaties

- 4.8 Subsidiarity as a concept was first introduced in the area of environment, in the Single European Act of 1987. It was made an explicit principle, applying to all areas where both Member States and the EU could act (shared and supporting competence), in the Maastricht Treaty, which entered into force in 1993. The Treaty of Amsterdam (1999) included Protocol (No 2) (with equal legal status to the treaty) on the application of the principles of Subsidiarity and Proportionality. The most recent EU treaty, the Lisbon Treaty, restated the principle of Subsidiarity in Article 5(3) TEU (see above at 4.3 above).
- 4.9 The Treaty of Lisbon also added an explicit reference to the regional and local dimension of the principle of Subsidiarity – it is no longer just about national or European action, but also asks about whether local or regional action could achieve the objective. Another innovation of the Lisbon Treaty was to strengthen the role of national Parliaments in policing compliance with the principle (Protocol (No 2) discussed in more detail from 1.5.9 below).
- 4.10 Subsidiarity as a general principle of EU law can be seen elsewhere in the Treaties. For example, the second paragraph of Article 1 TEU refers to “*decisions [being] taken ... as closely as possible to the citizen*”.

The roles of different EU institutions in upholding Subsidiarity

- 4.11 The principle of Subsidiarity applies to all the EU institutions. The rule has practical significance for legislative procedures. Inter-institutional agreements among three of the major EU institutions (the Council, Parliament and the Commission) in 1993 and 2003 (on Better Law-making³) set out how these institutions are to support application of the principle of Subsidiarity.
- 4.12 The **European Commission**, the body which proposes most EU legislation, must explain for each proposal why it thinks EU action is justified. It does this in the recitals to the act, in an explanatory memorandum, and in impact assessments. In order to do this effectively the European Commission's Impact Assessment Board routinely assesses the quality of Commission Subsidiarity assessments. In this way, Subsidiarity is also part of the European Commission (and UK's) drive for Better Regulation and high quality Impact Assessments.
- 4.13 The European Commission also draws up an annual report on the observance of the principle⁴. The European Commission and the European Parliament have also, in a framework agreement of 2010, undertaken to cooperate with national parliaments in order to facilitate the exercise by national parliaments of their power to scrutinise compliance with the principle of Subsidiarity.

The EU legislative process

EU legal acts such as Regulations and Directives are generally adopted by what, after the Lisbon Treaty, is known as the '**ordinary legislative procedure**' (formerly known as the 'co-decision procedure').

In most cases, only the European Commission can **propose** a new legal act. For the proposal to become law, it must be it is **jointly adopted** by the **Council** (which is composed of Ministers from each Member State) and the **European Parliament**. Under this procedure, the Council acts on the basis of qualified majority voting (QMV), where a specified majority of votes is required, with the share of votes of each Member State reflecting its population size.

The Treaties also set out a small number of cases where EU legal acts are adopted under different procedures (referred to as '**special legislative procedures**'). For example, acts in some areas can only be adopted if the Council acts unanimously, so the act will not be adopted if a Minister from any one Member State vetoes it.

³ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2003:321:0001:0005:EN:PDF>

⁴ http://ec.europa.eu/smart-regulation/better_regulation/reports_en.htm

Respecting subsidiary in the legislative process

The Treaty requirement to respect the principle of Subsidiarity applies to **all EU actors**, including Member States in the Council. EU institutions must ensure they act in accordance with the principle of Subsidiarity by:

- checking what kind of power the EU has, and if it is shared or supporting competence,
- if so, assessing whether the objectives of the proposed action can be sufficiently achieved by the Member States; and
- assessing whether the action can, by reason of its scale or effects, be implemented more successfully by the EU.

The Treaties give specific roles to:

- **the proposer of legislation*** and
- **national parliaments.**

The proposer of legislation is obliged to:

- **consult widely** before proposing legislation (except in exceptional urgency);
- **explain why** the legislation complies with the principles of Subsidiarity and Proportionality, including by:
 - assessing the financial impact ,
 - using qualitative and, wherever possible, quantitative evidence;
- **send the draft to national parliaments** when published;
- take account of views of **national parliaments** which question compliance with Subsidiarity.

National parliaments can:

- Consult with regional parliaments on draft legislation;
- Object if they think that the draft does not comply with the Subsidiarity principle; and
- Request their government to take a case to the Court of Justice on their behalf where they believe a new EU law infringes the principle of Subsidiarity.

This is considered in more detail below.

* Normally the European Commission. It could be also be an initiative from a group of Member States or the European Parliament, a request from the Court of Justice or the European Investment Bank, or a recommendation from the European Central Bank.

Subsidiarity in the EU courts

- 4.14 Member States and EU institutions⁵ can bring challenges to new EU legislation in the Court of Justice of the EU (CJEU) in Luxembourg if they believe it does not comply with the principle of Subsidiarity. The Committee of the Regions, a consultative body which represents regions of EU Member States, can also bring challenges against legislation if it is on areas where the Treaties require them to be consulted.
- 4.15 When a challenge is brought in the EU courts to EU legislation on grounds of breach of Subsidiarity, the court will examine:
- Process: has the legislator sufficiently explained why it considers action at the EU level is justified in to achieving a desired policy objective?
 - Substance– is action at the EU level justified to achieve a desired policy objective?
- 4.16 Courts may also use the concept of Subsidiarity as an interpretative tool where EU legislation is ambiguous and needs to be settled in favour of either greater or lesser scope for Member State action.
- 4.17 To date, there have been few cases and the Court of Justice of the EU (CJEU) has not struck down any legislation for breach of the principle.
- 4.18 On **process**, in the *Deposit Guarantee Schemes Directive* case⁶, the CJEU was asked by Germany to consider a breach of Subsidiarity in respect of a piece of legislation which was alleged not to have set out why action at the EU level was justified. However, the Court was of the view that whilst Subsidiarity was not specifically referred to in the legislation, the legislation did explain why the proposed action could not be taken by Member States acting alone. As such, the Court decided that the EU had fulfilled the need to explain compliance with the principle of Subsidiarity.
- 4.19 On **substance**, in the *Working Time Directive* case⁷, the UK challenged a piece of EU legislation (that regulated the maximum working week) on the basis of a breach of the principle of Subsidiarity. The CJEU, however, was satisfied that, once the Council had found that action at the EU level was justified to meet the objectives of the EU, that would be sufficient to meet the requirements of Subsidiarity. In essence, the CJEU found that the political judgment of the EU legislature was that action at the EU level was sufficient to meet the test of Subsidiarity.

⁵ Challenges to EU action on grounds of breach of Subsidiarity can also come before the EU courts in cases brought by people and legal persons (such as companies) in certain limited circumstances.

⁶ C-233/94 *Germany v Parliament and Council (Deposit Guarantee Schemes Directive)* [1997] ECR I-2405.

⁷ C-84/94 *United Kingdom v Council (Working Time Directive)* [1996] ECR I-5755.

4.20 However, in some recent cases concerning challenges to the Biotechnological Inventions Directive⁸, the Second Tobacco Labelling Directive⁹ and the Food Supplements Directive¹⁰, the CJEU asked - in greater detail than in previous cases - whether the measures that were being challenged were justified. It concluded on its own assessment that the relevant objectives could not satisfactorily be achieved by Member States acting alone, thus requiring action to be taken by the EU.

4.21 For the most part, cases before the CJEU have concerned measures relating to the EU's internal market where, once it is established that the EU has competence to act at all, the Subsidiarity question is relatively easy to answer given that there is normally a strong justification for action to be taken at the EU level given the cross-border impact. The CJEU's approach to the principle of Subsidiarity in respect of areas where there is not necessarily a cross-border element (such as environmental or social policies) remains to be seen.

The role of national parliaments

4.22 National parliaments play a vital role in ensuring that the principle of Subsidiarity is respected in the EU legal order.

Scrutiny

4.23 Different Member States have different processes for involving their national parliaments in the EU legislative process. In the UK, the Government has a system of Parliamentary scrutiny involving the two European committees of the House of Commons¹¹ and House of Lords¹². The lead Whitehall department writes an explanatory memorandum explaining the draft legislation to help inform Parliament's consideration. This memorandum also sets out the Government's view of whether the draft legislation complies with Subsidiarity.

4.24 Some Member States operate in a similar manner to that of the UK, whereby their Parliament will scrutinise most EU legislative proposals in specialist European Affairs Committees. Others handle their scrutiny in sectoral committees, meaning that where a piece of proposed EU legislation relates to the environment, it is the environment committee which considers it. And in other Member States, Parliaments will focus their

⁸ C-377/98 *Netherlands v European Parliament and Council* [2001] ECR I-7079.

⁹ C-491/01 *ex parte British American Tobacco* [2002] ECR I-11453.

¹⁰ C-154/04 and C-155/04 *Alliance for Natural Health* [2005] ECR I-6451.

¹¹ <http://www.parliament.uk/documents/upload/TheEuroScrutinySystemintheHoC.pdf>

¹² <http://www.parliament.uk/documents/lords-committees/eu-select/Lords-EU-scrutiny-process.pdf>

scrutiny on specific proposals identified in the Commission Work Programme identified as potentially raising Subsidiarity concerns, rather than scrutinising all draft legislation.

Reasoned opinions

4.25 The Treaty of Lisbon in 2009 enhanced the role of national parliaments with respect to Subsidiarity. Now national parliaments can formally object, via a “**reasoned opinion**” to the Presidents of the European Commission, the Council and European Parliament, if they consider that draft EU legislation does not comply with the principle of Subsidiarity. The timings are tight. Reasoned opinions must be produced within **eight weeks** of publication of the draft legislation.

4.26 The Treaty sets down rules on the consequences of reasoned opinions, based on the number of votes coming from national parliaments. Over certain thresholds, these are called “yellow” and “orange cards.”

- **Votes:** In EU Member States with two chambers of parliament, as in the case of the UK, each chamber’s opinion counts for one vote. If there is only one chamber, as in the case of Ireland, the reasoned opinion counts for two votes. At present, there are a total of 56 votes (28 Member States).

- **Yellow card:** If national parliaments representing at least one-third¹³ of the total votes issue Reasoned Opinions on a draft, it must be reviewed. The institution which produced the draft legislative act may maintain, amend or withdraw it.

- **Orange card:** If national parliaments representing a simple majority challenge an ordinary legislative procedure proposal on grounds of Subsidiarity but the Commission maintains its proposal, it will be referred to the legislator (European Parliament and the Council). The proposal can be rejected by 55% of the members of the Council or a majority of European Parliament votes.¹⁴

4.27 Since the entry into force of the Treaty of Lisbon, two yellow cards have been issued but no orange cards (see text box below).

4.28 The Lisbon Treaty also introduced new provisions which allow national parliaments to request their Government to take a case to the Court of Justice on their behalf where they think there has been a breach of the Subsidiarity principle. The UK Government and

¹³ Reduced to one quarter for proposals in the field of police and judicial cooperation in criminal matters.

¹⁴ See “National parliaments and EU law-making: how is the ‘yellow card’ system working? - Commons Library Standard Note”, 12 April 2012 | Standard notes SN06297 at <http://www.parliament.uk/briefing-papers/SN06297/national-Parliaments-and-eu-lawmaking-how-is-the-yellow-card-system-working>

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the European Committees in both Houses of Parliament have signed a Memorandum of Understanding to set out the procedures by which the UK Parliament may make use of these new powers. These new provisions have not yet been used in the UK, or in any other Member State.

Yellow Cards in Practice

Monti II

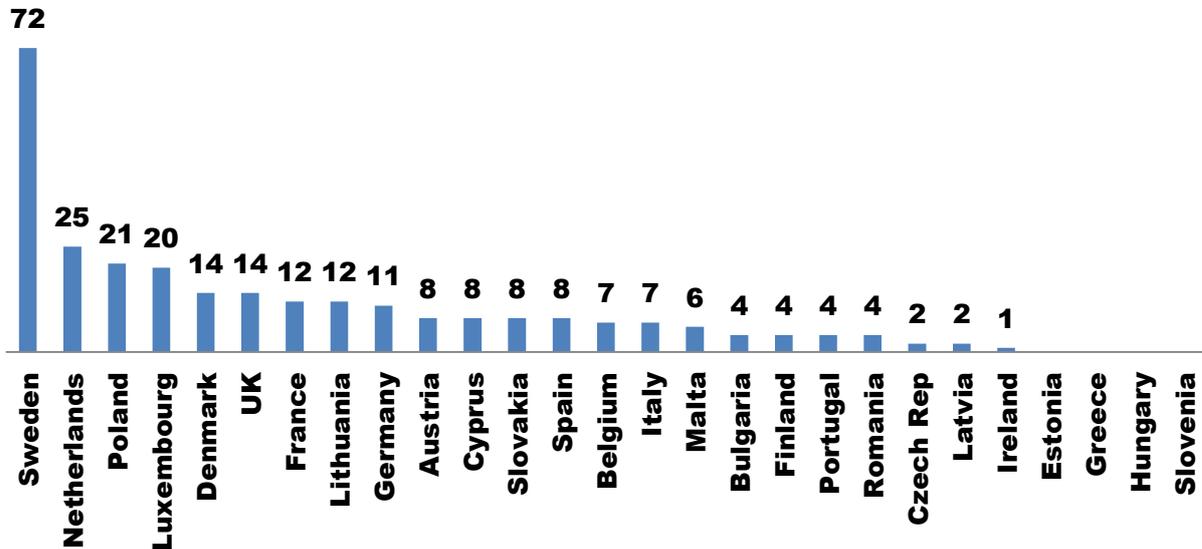
- The first instance of a 'yellow card' came in relation to the Monti II proposal, which attempted to strike an EU-wide balance between the right to strike and the freedom of companies to offer services across the EU.
- Twelve chambers of national parliaments (totalling 19 votes), including the House of Commons, objected on Subsidiarity grounds. As this represented objections from more than a third of the possible votes, this triggered a 'yellow card' requiring the European Commission to reconsider.
- The European Commission withdrew the proposal, although it asserted that the proposal did not breach Subsidiarity.
- The UK Government was disappointed with the Commission's reasoning but welcomed the withdrawal of the proposal.

European Public Prosecutor's Office (EPPO)

- National parliaments delivered a second 'yellow card' in 2013 on a draft legislative proposal to establish a European Public Prosecutor's Office (EPPO); with a total of nineteen votes from Parliaments in eleven Member States. The proposed EPPO would be able to prosecute fraud against the EU budget directly in national courts.
- The Commission published its response on 2 December 2013, announcing that the proposal would remain unchanged.
- The Lords European Union Committee and the Commons European Scrutiny Committee both wrote to the Commission to express their concern at the swiftness with which the decision had been made to retain the proposal and the lack of consideration given to other options. They suggested that there had been a failure to engage properly in the review process and to address the concerns raised by national parliaments. They were also concerned by the very narrow view of Subsidiarity set out by the Commission. The Commission has not yet responded.
- It should be noted that the UK has not opted in to this proposal (which is covered by an opt-out) and so would not automatically be bound by it were adopted. Under the terms of the EU Act 2011, any British government which wished this country to take part in the EPPO would require an Act of Parliament and approval in a referendum to do so.

Reasoned Opinion votes

■ Total votes 2010-2012



4.24 The latest available figures show that in 2012, 70 Reasoned Opinions were submitted to the Commission on 34 proposals¹⁵. The UK Parliament issued five Reasoned Opinions in 2012. The House of Commons European Scrutiny Committee has to date issued 13 Reasoned Opinions during the life of the current Parliament (2010-15)¹⁶ and the House of Lords EU Committee has issued seven Reasoned Opinions to date.¹⁷

Co-ordination among EU Member States Parliaments

COSAC is a twice-yearly meeting of EU Member States' national parliaments' European affairs committees. It also includes Parliaments of candidate countries (that is, those applying for EU membership) and members of the European Parliament. It is supported by the COSAC Secretariat which is based in the European Parliament building in Brussels and consists of permanent officials, officials from the European Parliament and officials from the countries holding the former, current and future rotating EU presidencies.

Further co-ordination among national parliaments could help to increase the number of yellow and orange cards.

See: <http://www.cosac.eu/>.

COSAC is an acronym of 'Conférence des Organes Spécialisés dans les Affaires Communautaires'.

¹⁵ Croatia became a Member State of the EU on 1 July 2013, and is therefore not included in this table.

¹⁶ <http://www.parliament.uk/business/committees/committees-a-z/commons-select/european-scrutiny-committee/scrutiny-reserve-overrides/>

¹⁷ <http://www.parliament.uk/business/committees/committees-a-z/lords-select/eu-select-committee/committee-work/parliament-2010/Subsidiarity/>

5. Proportionality

5.1 Proportionality is the principle that where the EU acts, it should do no more than is necessary to achieve the objectives behind the action. Specifically, Article 5(4), paragraph 1 TFEU states:

“Under the principle of Proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.”

This means that, where the EU acts, that action must be suitable to achieve the desired objective, and that the action should not go beyond what is necessary in order to achieve that objective. This includes a requirement that where there are differing ways to achieve an objective, the least onerous should be taken.

Essentially this principle aims to prevent EU actions going beyond what is necessary to achieve the intended outcome.

Proportionality is not unique to EU law.

In many legal systems, legislators and executives have to balance many different interests when making decisions or laws. Sometimes people and groups will be unhappy with their decisions. When will a court allow challenges to decisions of law makers and Governments? And on what basis? Proportionality is one way to assess decision-making – a test of “good governance”.

5.2 Like Subsidiarity, the principle of Proportionality binds the EU institutions. Unlike Subsidiarity, it also applies to EU Member States when they act within the scope of EU law. So challenges can be brought in national courts to national actions which give effect to EU law.

5.3 Proportionality dates back to the establishment of what is now known as the EU, in the 1957 Treaty of Rome.

How the Court of Justice approaches Proportionality

5.4 The Court has considered a number of challenges to EU (and Member State) actions on the grounds of breach of the principle of Proportionality, but the Court has been cautious in using Proportionality to annul legislation.

5.5 For example, in a challenge to EU legislation which banned the use of some substances having a hormonal action in livestock farming (the *Fedesa* case¹⁸), it was argued that a

¹⁸ C-331/88 *R v Minister for Agriculture, Fisheries and Food, ex p Fedesa* [1990] ECR I-423.

total ban of those substances was disproportionate to the objective. The Court found that the decision taken by the EU legislator was proportionate, even taking into account the substantial negative financial consequences for some traders, and that the Court would only interfere in such policy judgments on grounds of Proportionality where the action was manifestly inappropriate.

5.6 Similarly, in the *Affish*¹⁹ case, the EU Decision banning the importation of Japanese fish into the EU on health grounds was challenged as being disproportionate to the objective of protecting health. It was argued that not all Japanese fish factories had hygiene issues, and that banning all fish imports from Japan went too far. However, the Court held that because it would not be practical to check the hygiene standards of all Japanese fish factories and that a reasonably representative sample had been checked, it was proportionate to ban all Japanese fish imports.

5.7 A good example of where the Court has found an EU measure to be disproportionate is the *ABNA*²⁰ case. This concerned an EU Directive which required manufacturers of animal feed to indicate, at a customer's request, the exact composition of the feed. The Court found that this requirement impacted seriously on the economic interests of the manufacturers of animal feed, and that this obligation could not be justified by the objective of protecting health, and went beyond what was necessary to attain that objective. The Court annulled the legislation on the grounds of Proportionality.

5.8 In the context of review of Member State action, the Court held in *Kreil*,²¹ that a rule requiring all armed units in the German armed forces had to be male was disproportionate. And in *Canal*²² the Court found that Spanish legislation which requiring operators of certain television services to register details of their equipment was disproportionate where it duplicated controls already carried out in that state or another Member State.

¹⁹ C-183/95 *Affish BV v Rijksdienst voor de Keuring van Vee en Vlees* [1997] ECR I-4315.

²⁰ Joined Cases C-453/03, C-11/04, C-12/04 and C-194/04 *ABNA Ltd and Others v Secretary of State for Health and Others* [2005] ECR I-10423.

²¹ C-285/98 *Kreil v Bundesrepublik Deutschland* [2000] ECR I-69.

²² C-390/99 *Canal Satellite Digital SL v Administracion General del Estado and Distribuidora de Television Digital SA (DTS)* [2002] ECR I-607.

Comparison of Subsidiarity and Proportionality

5.9 Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality is of equal legal status to the Lisbon Treaty. It establishes that all EU institutions shall have *'constant respect for the principles of Subsidiarity and Proportionality'* and gives specific roles to certain institutions.

5.10 However, there are differences in the powers given to national parliaments in relation to their capacity to monitor legislative proposals on the grounds of Proportionality and Subsidiarity. Although national parliaments are able to issue reasoned opinions, which can trigger yellow and orange cards, on the grounds of Subsidiarity concerns, no such mechanism explicitly exists for parliaments to register their Proportionality concerns formally.

5.11 Nonetheless, national parliaments can and do record Proportionality concerns in their reasoned opinions and in their general political dialogue with the European Commission. For example, in its 2012 annual report on Subsidiarity and Proportionality the European Commission highlights the importance national parliaments place on considering questions of Proportionality, and their views on the interplay between the two principles.²³ According to a survey conducted by COSAC, the inter-Parliamentary forum for EU Parliaments, most national parliaments are of the view that Subsidiarity monitoring is not effective unless Proportionality monitoring also takes place²⁴. Some commentators have called for the scope of reasoned opinions to be extended to include Proportionality.²⁵

5.12 The Commission is required to produce an annual report for the European Council, European Parliament, the Council and national parliaments on the application of Article 5 of the TFEU which covers both Proportionality and Subsidiarity. This report is also sent to the Economic and Social Committee and the Committee of the Regions. The most recent report (for 2012):

- sets out the Commission's views on democratic accountability and how this can be increased through political dialogue between national parliaments and the Commission.
- notes the important role played by COSAC.

²³ See Report from the Commission, Annual Report 2012 on Subsidiarity and Proportionality

²⁴ See COSAC Eighteenth Bi-annual Report: Developments in European Union Procedures and Practices Relevant to Parliamentary Scrutiny, 27 September 2012

²⁵ See From Subsidiarity to Better EU Governance: A Practical Reform Agenda for the EU | Clingendel Report March 2014

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- argues for greater strengthening of scrutiny at national and European parliamentary levels, and for more cooperation between national parliaments and the European Parliament.
- notes that in 2012, 663 written opinions (an increase of 7% compared to 2011) on legislative and non-legislative documents were received from national parliaments, of which 70 were reasoned opinions (on 34 proposals) up from 64 in 2011.
- notes that six policy areas accounted for more than half of the opinions: internal market and services; justice; home affairs; mobility and transport; employment; and health.
- notes that Portugal, Italy and Germany’s parliamentary chambers were the most active in issuing opinions. The UK issued 22: 16 from the House of Lords; and 6 from the House of Commons.

	Subsidiarity	Proportionality
General principle of EU law	✓	✓
Binds European Commission	✓	✓
Binds European Parliament	✓	✓
Binds Council	✓	✓
Binds EU Member States when implementing EU law	✗	✓
Can be challenged in Court of Justice of the EU	✓	✓
Can be basis for Reasoned Opinion of national parliament – leading to yellow or orange card	✓	✗
Covered in annual Commission report	✓	✓

6. Article 352 – a broad enabling or flexibility clause

6.1 Article 352 TFEU provides a power that can be used to fill the gap where no specific provisions of the Treaty confers express or implied powers to act, if such powers appear none the less to be necessary to enable the Union to carry out its functions with a view to attaining one of the objectives laid down by the Treaty. It says:

If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures. Where the measures in question are adopted by the Council in accordance with a special legislative procedure, it shall also act unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament.

6.2 This provides a potentially wide and flexible legal basis that could extend to anything coming within EU competence, as defined by its tasks and activities in Articles 3 TEU and 3, 4 and 6 TFEU. However, the powers in Article 352 TFEU are not unlimited, and cannot be used to extend EU competence.

6.3 As this is a sensitive power with potentially wide-ranging application, any proposal made must secure the unanimous agreement of the Council and, following the entry into force of the Lisbon Treaty, the consent of the European Parliament. Some national parliaments also play a role. The case of the UK is described below at paragraph 6.14. The German government may not support the use of Article 352 without seeking prior legislative approval from both houses of parliament, following an important decision²⁶ by its Constitutional Court on the compatibility of Treaty of Lisbon with the German constitution.

6.4 Article 352's predecessor article (Article 308 of the then Treaty on the European Community) was used as a legal base for hundreds of pieces of legislation. This attracted some criticism for stretching the EU treaties beyond what was originally intended. In many cases, following the use of Article 308 in a particular area, a new Treaty article was adopted in the Lisbon Treaty providing the legal base for action which had been missing before. Thus for example, in the case of sanctions, there are now two Treaty articles, Article 75 and 215, which allow for targeted sanctions against individuals. So it would seem likely that these more specific provisions will be used, and that Article 352 will be used less often. This seems to be the case so far (see examples of legislation adopted since Lisbon below) but may evolve if Member States and the EU institutions wish to agree EU action in new areas.

²⁶ Decision of BVerFG 30 June 2009, 123, 267.

6.5 There have been only a few examples of EU action on the basis of Article 352 TFEU since the entry into force of the Lisbon Treaty:

- legislation to recognise electronic versions of the EU's Official Journal as authentic and legally binding;
- approving the framework of an EU agency on fundamental rights;
- a decision to give EU historical archives at the European University Institute in Florence; and
- a decision to adopt a "Europe for Citizens" programme.

Historical development of Article 352

6.6 The EU Treaties have always contained a catch-all provision like Article 352 TFEU.

6.7 Article 235 of the original Treaty of Rome (1957) specified that the power should be used for "*action by the Community... necessary to attain, in the course of the operation of the common market one of the objectives of the Community*", and this provision remained unchanged up to and including the Treaty of Nice. Prior to the Lisbon Treaty (2009), this clause was last numbered Article 308 of the Treaty on the European Community.

6.8 The Lisbon Treaty has a broader wording to reflect that the scope and objectives of EU action had widened to encompass issues beyond the economic and market-based, such that Article 352 TFEU can now be used for "*action by the Union...necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties*". However, Lisbon amendments also made clear that Article 352 TFEU cannot be used for action in the area of common foreign and security policy²⁷ as an area in which decision-making is for the most part intergovernmental and taken by Member States.

6.9 Another change in the Lisbon Treaty is that the European Parliament must now consent to the use of Article 352 TFEU. Under the previous version (Article 308 TEC), it was merely consulted.

6.10 Upon the adoption of the Lisbon Treaty, the Heads of State or Government adopted two relevant Declarations. Declaration (No 41) specifies that the reference to objectives of the Union in Article 352 is not limited to promoting peace, EU values and the well-being of EU people with respect to external action.

²⁷ See *Foreign Policy report – review of the balance of competences* published 22 July 2013 available at <https://www.gov.uk/review-of-the-balance-of-competences>.

6.11 Declaration (No. 42) on Article 352 of the Treaty on the Functioning of the European Union made clear the view of EU Heads of State or Government on its restricted nature:

“The Conference underlines that, in accordance with the settled case law of the Court of Justice of the European Union, Article 352 of the Treaty on the Functioning of the European Union, being an integral part of an institutional system based on the principle of conferred powers, cannot serve as a basis for widening the scope of Union powers beyond the general framework created by the provisions of the Treaties as a whole and, in particular, by those that define the tasks and the activities of the Union. In any event, this Article cannot be used as a basis for the adoption of provisions whose effect would, in substance, be to amend the Treaties without following the procedure which they provide for that purpose.”

6.12 This is intended to make clear that this article cannot be used to widen the scope of the EU’s powers beyond those already set out in the EU Treaties. It also makes clear that Article 352 TFEU cannot be used to adopt provisions which would have the effect of amending the EU Treaties, as the Treaties themselves already lay down specific procedures for their amendment.

6.13 There is no case-law yet on the use of Article 352 as a legal basis for EU action but past cases show how the EU courts approached its predecessor.

Scope and Interpretation of Article 352 TFEU

In *Opinion 2/94*²⁸ concerning accession by the European Community to the European Convention on Human Rights (ECHR), the Court held that Article 308 TEC, the predecessor of Article 352 TFEU, did not provide a legal basis because accession would have fundamental institutional implications. In particular the Court found that Article 308 cannot serve as a basis for widening the scope of [Union] powers beyond the general framework created by the provisions of the Treaty as a whole and, in particular, by those that define the tasks and the activities of the [Union].

Similarly in *Kadi*²⁹ the Court held that Article 308 TEC, could not be used to pursue objectives relating to the EU's common foreign and security policy. It could only be used to pursue objectives of the European Community (as was) as specified in the EC Treaty.

This restriction on the use of Article 352 has now been made explicit in its paragraph 4, which says,

“This Article cannot serve as a basis for attaining objectives pertaining to the common foreign and security policy”.

However, Article 352 TFEU is available for police and judicial co-operation in criminal matters.

Also, the powers in Article 352 TFEU cannot be used to circumvent restrictions in other, more specific Treaty articles. Indeed, Article 352(3) expressly prohibits the use of Article 352 to harmonise the laws or regulations of Member States where this is excluded by the Treaties. So Article 352 could not be used to circumvent the exclusion of harmonisation in, for example, Articles 165(4) – concerning education, vocational training, youth and sport – or 167(5) TFEU – culture.

Article 352 TFEU or its predecessors have been used to create decision-making agencies, such as the Office for Harmonisation in the Internal Market³⁰ and the Community Plant Variety Office³¹.

The *Pringle* case³² (challenging the legality of the European Stability Mechanism) recently confirmed that the availability of powers for the Union to act under Article 352 TFEU does not imply any obligation to use those powers³³.

²⁸ [Opinion 2/94](#) [1996] ECR I-1759,

²⁹ Cases C-402/05P and C-415/P *Kadi* [2008] ECR I-06351, paragraphs 198-204.

³⁰ Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1).

³¹ Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights (OJ 1994 L 227, p. 1).

³² Case C-370/12, *Thomas Pringle v Government of Ireland, Ireland and The Attorney General*, [2012] ECR - 00000

³³ Paragraph 67, citing Case 22/70 *Commission v Council* ('ERTA') [1971] ECR 263, paragraph 95

Relevant UK legislation

6.14 Section 8 of the European Union Act 2011 (“EU Act”) contains provisions on the rules and procedures applicable in the UK to proposals for EU legislation based in whole or in part on Article 352 TFEU. Under section 8 of the EU Act, a UK Government Minister may not vote in favour of, or otherwise support, a proposal for EU legislation which is based on Article 352 TFEU, in whole or in part, unless the draft legislation has received prior approval by Act of Parliament.

6.15 Where legislation needs to be adopted urgently by the EU based in whole or in part on Article 352 TFEU, section 8(4) of the EU Act makes provision for the following procedure to apply:

- In each House of Parliament, a Minister must move a motion that the House approves the Government’s intention to support a specified draft decision without prior approval by Act, and is of the opinion that the measure concerned is required as a matter of urgency;
- Each House of Parliament agrees to the motion without amendment.

6.16 Section 8(6) of the EU Act sets out a number of circumstances where proposals for EU legislation based in whole or in part on Article 352 TFEU will be exempt both from the requirement for prior approval by Parliament by primary legislation and, unlike the urgency condition, for a motion to be passed in both Houses. The five exemptions are that the proposed measure:–

- i. is **equivalent** to a measure already adopted under Article 352 TFEU;
- ii. only extends or **renews** an existing measure without changing its substance;
- iii. extends existing Article 352 measures to **another Member State or third country**;
- iv. **repeals** an existing measure adopted under Article 352 TFEU; or
- v. **consolidates** existing measures adopted in whole or in part under Article 352 TFEU, without changing their substance.

6.17 The practice has arisen that every year or so the UK Parliament is asked to adopt measures in an annual bill, which, upon adoption, becomes known as the EU (Approvals) Act [YYYY].

6.18 The EU (Approvals) Act 2013 approved two EU decisions adopted under Article 352, providing for:

- the electronic version of the Official Journal of the European Union (OJ) to be the authentic and legally recognised edition of the OJ.
- a new Multiannual Framework for the EU Fundamental Rights Agency to operate from the beginning of 2013 until the end of 2017.

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6.19 Similarly, the EU (Approvals) Act 2014 approved:

- the draft decision to adopt the Council Regulation on the deposit of the historical archives of the institutions at the European University Institute in Florence, and
- the draft decision to adopt the Council Regulation establishing for the period 2014-2020 the programme "Europe for Citizens."

7. How to respond to this Call for Evidence

- 7.1 We would welcome evidence from anyone with relevant knowledge, expertise or experience. We would welcome contributions from individuals, companies, civil society organisations including think-tanks, and governments and governmental bodies. We welcome input from those within the UK or beyond our borders.
- 7.2 Your evidence should be objective, factual information about the impact or effect of these principles of Subsidiarity and Proportionality and/or Article 352 TFEU in your area of expertise. Questions on which we would value input are set out in section 9 below. Where your evidence is relevant to other balance of competences reviews, we will pass your evidence over to the relevant review teams.
- 7.3 We will expect to publish your response and the name of your organisation unless you ask us not to (but please note that, even if you ask us to keep your contribution confidential, we might have to release it in response to a request under the Freedom of Information Act). We will not publish your own name unless you wish it included. Please base your response on answers to the questions set out below.
- 7.4 We will be hosting a series of events to proactively seek evidence and to give further information on the Review. To register your interest in these events or if you have any other questions relating to the issues in this Review, please contact: BalanceofCompetencesSubsidiarity@fco.gov.uk
- 7.5 Please send your evidence by midday on 30 June 2014 to:

By Email: BalanceofCompetencesSubsidiarity@fco.gov.uk
By Post: BoC Team, PTF, Foreign and Commonwealth Office, King Charles Street, London SW1A 2AH

8. Call for Evidence questions on Subsidiarity, Proportionality, and Article 352 TFEU

Scope

1. Are the principles of Subsidiarity and Proportionality effective ways to decide when the EU acts, and how it acts? You may wish to refer to particular examples in your evidence.

Interpretation

2. What are your views on how the principles have been interpreted in practice by EU and Member State actors including: the EU courts, the other EU institutions, Member State governments, Member State parliaments, sub-national or regional bodies and civil society?

Application

3. Do you have any observations on how the different actors play their roles? Could they do anything differently to ensure that action takes place at the right level?
4. The EU Treaties treat Subsidiarity differently from Proportionality. National parliaments have a role in reviewing whether EU action is appropriate (Subsidiarity). The EU is not legally permitted to act where it is not proportionate (Proportionality). Does it make sense to separate out the two principles like this, and use different means to protect them?

Future options and challenges

5. Where might alternative approaches or actions as regards the scope, interpretation and application of the principles of Subsidiarity and Proportionality be beneficial?

Article 352 TFEU ('flexibility clause')

6. In your opinion, based on particular examples, is it useful to have a catch-all treaty base for EU action? How appropriately has Article 352 been used?
7. Which alternative approaches to the scope, interpretation and application of Article 352 might be beneficial?

Other

8. Are there any general points you wish to make on how well the current procedures and actors work to ensure that the EU only acts where it is appropriate to do so, and in a way which is limited to the EU's objectives, which are not captured above?

Annex A: Links with other Balance of Competences reports

The review of Subsidiarity and Proportionality overlaps with a number of other Balance of Competences reviews. These are all available at: <http://www.gov.uk/review-of-the-balance-of-competences>.

Semester One (final reports published in July 2013)

- **Single Market:** Raised issue of Treaty principles being applied in areas where there is limited or no formal EU competence.
- **Taxation:** The report stressed the general view of UK respondents was EU-level action on taxation was appropriate only where there was a clear internal market justification. Many said they would like less EU-level involvement in taxation.
- **Health:** References to the UK Government has asserted the principle of Subsidiarity in ongoing negotiations on EU capabilities in the area of cross-border health threats like pandemic flu.
- **Development:** The report noted this is an area of shared competence and the Treaty requires EU's and Member States' policy in these areas to complement and reinforce each other. Although the EU has legal personality, and its competence in these areas extends to concluding international agreements with third states and international organisations, it does not affect Member States' ability to do so.

Semester Two (final reports published 13 February 2014)

- **Trade and Investment:** Suggestion of looking for more Subsidiarity in response to pressures between those within and outside the Eurozone.
- **Environment and Climate Change:** Some references to areas where action more appropriate at national rather than EU-Level e.g. planning, noise, protection of soil, flooding and environmental justice.
- **Transport:** Contributors supported EU action where transport crosses EU member States but there is a feeling that EU action fails to take account of distinct circumstances of Member States with peripheral geographical locations. The EU can impose some cross border rules on local and domestic transport that operate solely within UK and do not affect Single Market.

Semesters Three and Four (forthcoming)