

# **Professor Robert Schütze – Durham University**

## **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.

The principle of subsidiarity still lacks clear judicial contours; and the only way that it seems to be enforceable at the moment is via the political safeguard of the yellow card mechanism. However, I would personally think that the introduction of a red card system is not advisable for the simple reason that the time limits are too tight, and the decision-making processes are already very complex, and moreover, a red card mechanism would not give the Westminster parliament a veto right.

The situation with regard to proportionality is slightly different: the principle has been given strong judicial teeth, and there is no political mechanism to enforce it. The problem here however is that it ultimately rests with the ECJ.

### **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?

Subsidiarity is under-interpreted; proportionality is over-interpreted by the European Courts. With regard to the national parliaments, they have rather been confused as to when which principle applies: so in some of the applications of Protocol 2 (eg. Monti II), they have confused proportionality with subsidiarity. In terms of democratic legitimacy, the question arises whether the Subsidiarity Protocol really adds much: after all, these decisions will typically be taken by a FA committee and very few might be discussed in the plenary of Parliament.

### **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?

No, the two should be combined. In fact, with regard to the intensity or degree of Union intervention, this is technically not a question of subsidiarity but of proportionality (cf. Schütze, 'Subsidiarity after Lisbon: Reinforcing the Safeguards of Federalism?'. Cambridge Law Journal 68(3): 525-536), and the way forward here is to either extend the Yellow card mechanism to the principle of proportionality; or to understand subsidiarity as including the question of the harmonisation method chosen by the Union.

### 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?

The best way, I think, to protect national spaces is via “complementary” or “supporting competences”; or by including provisions within a shared competence that allow the Union only to lay down minimum standards.

### 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?

I have published in the area (cf. Schütze, 'Organized Change towards an 'Ever Closer Union' Article 308 EC and the Limits To the Community's Legislative Competence', Yearbook of European Law 22: 79 -115), and this study was meant to show that Article 352 can be very useful for some things. After all, it allows every Member State to veto a Council decision. One way to strengthen the democratic safeguards at the national level is to follow the German example and have the minister get parliamentary authorization before a vote under 352 is taken.

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?

**Please send any responses or comments regarding one or all of these questions to:**

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