BALANCE OF COMPETENCES REVIEW: CALL FOR EVIDENCE ON SUBSIDIARITY, PROPORTIONALITY, AND ARTICLE 352 TFEU: 7 MAY WORKSHOP

Introduction

1. The FCO hosted a workshop on 7 May 2014 for the purposes of gathering evidence for the Balance of Competences Review on Subsidiarity, Proportionality and the Flexibility Clause (Article 352). It was attended by leading academics, practitioners and judiciary from the UK and abroad, specialising in the field of EU law, and particularly subsidiarity and proportionality, as well as lawyers from across Government. This record, in agreement with participants, is under the Chatham House Rule, i.e. remarks are not attributed by name to those present. It is not an exhaustive record but draws out the key points made. The points below all reflect comments from the floor but do not necessarily appear in the order in which they were made. Rather they have been grouped under a number of sub-headings.

2. After a brief introduction the programme and aims of the workshop were presented. The workshop was organised into three sessions (Subsidiarity; Proportionality and Article 352). A discussion paper was produced by leading academics and practitioners in order to stimulate debate and provide a rough structure for the discussion. It was explained that there was no need to discuss basic principles as all participants were very knowledgeable in the area.

SUBSIDIARITY

The Definition, Nature and Effects of the Principle of Subsidiarity

3. One participant noted that it was important to recognise the origins and intended nature of the three concepts of conferral, subsidiarity and proportionality: conferral being about whether the EU has the power to act, subsidiarity being about whether in particular circumstances, that power should be used, and proportionality being about whether it is appropriate for the EU to act, and for it to do so in the least intrusive manner.

4. Some participants mentioned that subsidiarity, is defined as a limit or control on the exercise of EU competence; requiring the Commission to stop and think about whether or not the EU should exercise its competence, in areas where it has competence, and how to justify that exercise of competence. Even so, many participants said that there was considerable confusion about the nature and effects of the principle of subsidiarity. One participant questioned how far subsidiarity should be considered to have a defined substantive meaning or how far it was primarily a procedural/political concept.

Subsidiarity as a defined substantive principle

5. Participants queried how far subsidiarity has, or should have, a substantive and legally identifiable meaning. If subsidiarity did have a substantive and legally identifiable meaning, then who determines the substantive content of subsidiarity? One participant thought that, even if EU institutions or national parliaments express their subjective understanding, ultimately, the objective meaning of subsidiarity must be decided by the Court of Justice of the European Union. The participant stated that the Court had consistently treated subsidiarity as a justiciable legal principle and it was therefore possible to seek judicial review of Union acts which were alleged to infringe the principle of subsidiarity.

6. One participant argued that if subsidiarity is considered to have a defined substantive meaning, then that specific meaning needs to be articulated and enforced. That participant asked whether subsidiarity was to be understood essentially as an economic test, driven primarily by the search for regulatory efficiency, by asking for the "added value" of EU level action in dealing with regulatory problems; or whether subsidiarity was instead to be treated as an essentially political test, informed by concerns about democratic legitimacy, which seeks to promote localised decision-making in recognition of the essentially national basis for political authority (even if those purely national solutions may not be so "efficient")? It was noted that those two conceptions may pull in very different directions: there will be issues where it makes economic sense for the EU to act, but there is little political desire or basis for overreaching local or national action.

7. This participant added that the available caselaw was not especially illuminating on competing conceptions. Most rulings – from the Biotechnology Directive dispute,[1] through to the more recent Vodofone litigation[2] – have concerned internal market legislation, where a cross-border element is essential to the very existence of EU competence, such that the subsidiarity principle is often treated as being fulfilled per se. Even here, however, the participant argued that there was a strong case for the Court being more critical of whether the sort of cross-border dimension which was sufficient to establish the potential exercise of EU competence was really sufficient to also justify the actual exercise of EU competence. For example, the Court could enquire more critically about whether an EU measure relating to the single market was really justified at all, even if there was some sort of cross-border element to the problem; or at least whether the detailed content of that EU act met the requirements of subsidiarity, e.g. by asking whether a given measure should really apply beyond cross-border situations so as also to regulate wholly internal cases.

8. This participant said that cases which concern non-internal market legislation were less frequent; where EU competence did not depend on the existence of a cross-border element, e.g. as in the case of much environmental or social legislation. It was not possible to treat the principle of conferral as equivalent to the principle of subsidiarity: the justification for the existence of competence was in no way the same as the justification for the exercise of competence; the EU needed to show real added value, and genuine democratic questions could arise, with no easy "cross-

[1] Case C-377/98 *Netherlands v European Parliament and Council (Biotechnology Directive)* [2001] ECR I-7079.
[2] Case C-58/08 *The Queen, on the application of Vodafone Ltd and Others v Secretary of State for Business, Enterprise and Regulatory Reform* [2010] ECR I-4999.

border" answers. It was further argued that it remains to be seen how far the Court would move beyond the minimalist approach set out in early cases like Working Time Directive,[3] and demand evidence to show the "added value" of EU action even in situations where there was no obvious cross-border problem to be tackled.

9. The participant said what did emerge clearly from the available caselaw was that subsidiarity had not so far provided any explicit grounds for the annulment of Union legislation. Many commentators thus felt that the Court did not enforce the principle of subsidiarity with any great rigour. One participant queried whether CJEU judges had the competence to decide whether proposed EU action was better achieved at the EU level, stating that this issue had often been sidestepped by the Court because of the lack of the ability of judges to evaluate this question.

10. One commentator said that the argument that subsidiarity had a particular substantive meaning (carries with it various broader implications: "For example, it suggests that national parliaments are indeed capable of "abusing" their yellow card powers if they raise objections which do not conform to the objective substantive meaning of the subsidiarity principle; and in such situations, their views can legitimately be rejected by the EU institutions and ultimately by the Court."

11. This had been a common reaction among academic lawyers to many of the reasoned opinions issued against the Commission's Monti II proposals, i.e. that since those opinions generally did not relate to subsidiarity concerns, but rather the proportionality or simple desirability of the relevant legislation, they were not to be considered a "valid" exercise of the national parliament's scrutiny powers. But conversely, it was argued that this viewpoint also suggested that subsidiarity, in its true substantive sense, should be capable of much stronger judicial enforcement by the Court, particularly at the suit of national parliaments bringing subsidiarity-focused actions in the post-Lisbon era.

Subsidiarity as an essentially procedural/procedural principle

12. One participant argued that an alternative viewpoint was that subsidiarity only had the meaning which is attributed to it by political action expressed in accordance with the channels provided for under the Treaties. In other words: subsidiarity was no more or less than an expression of constitutional dialogue between legislative stakeholders within the EU's complex institutional framework. Subsidiarity, pre-Lisbon, meant what the EU legislature determined it should mean and that the Court was thus correct (in cases like Working Time Directive or Deposit Guarantee Scheme Directive) to limit the scope for judicial review over the essentially political determinations of the legislature.[4] Such a situation led to the criticism that the EU was policing the limits of its own powers, and the Court was unable or unwilling to enforce the principle more seriously. The participant did not deny that subsidiarity could be an influential brake on Union competence – particularly in the hands of the Council: consider, e.g. the Commission's proposed directive on legal aid, which was

[3] Case C-84/94 *United Kingdom v Council (Working Time Directive)* [1996] ECR I-5755.
[4] Case C-84/94 *United Kingdom v Council (Working Time Directive)* [1996] ECR I-5755 and Case C-233/94 *Germany v Parliament and Council (Deposit Guarantee Schemes Directive)* [1997] ECR I-2405.

amended by the Council so as not to apply to wholly internal (only cross-border) situations. But the participant noted that in the build-up to the Convention on the Future of Europe, there was a common feeling that subsidiarity was not as effective in practice as Member States wanted it to be.

13. One commentator noted that the main purpose of the Convention on the Future of Europe reforms – which provided the basis for the Lisbon Treaty provisions – was in fact threefold: 1) to shift the focus from ex post judicial enforcement of subsidiarity, more towards ex ante political enforcement of subsidiarity; 2) for those purposes, to introduce an external scrutiny of EU competence by engaging the institutions which had the greatest interest in the enforcement or abuse of subsidiarity, i.e. the national parliaments; and 3) more indirectly, to borrow some of the democratic legitimacy of the national parliaments so as to bolster the EU's own political mandate. Post-Lisbon the essential meaning of subsidiarity now lies in the voice offered by the yellow card system to the national parliaments, that is, in the procedural mechanisms by which the Member States express their views and preferences about the value of EU legislation. It was argued by several commentators that subsidiarity therefore meant whatever the national parliaments wanted it to mean and whatever political power their voice exerted upon the EU institutions. As such, the national parliaments were incapable of "abusing" their yellow card powers: for example, the reasoned opinions concerning issues of proportionality or political desirability which were expressed in relation to the "Monti II" proposals were very much an expression of subsidiarity, but precisely because of the procedural channels through which they had emerged.

14. Several commentators spoke out in agreement that subsidiarity was a political control and was much more useful as a political rather than a legal principle, in that it's whole political thrust was to limit the EU and protect the role of Member States. To that extent, it was therefore legitimate and acceptable for national parliaments to declare that they simply did not like a piece of proposed legislation. One participant argued that it was never expected that subsidiarity would be a powerful weapon for the Court, but rather part of the political morality of the EU.

15. One commentator concluded that, in reality, subsidiarity was a combination of many dimensions – economic, political and procedural – though which emerges as paramount would be conditioned by the context in which the issue arose. For example, even if we accept that subsidiarity was essentially a procedural concept when it comes to the political use of and responses to the national parliament's yellow card powers, it seemed more likely that subsidiarity would be conceived in substantive terms, for instance, were a national parliament to bring a subsidiarity challenge before the Court against subsequent EU legislation.

Broader context of the debate around the principle of subsidiarity

16. One commentator stated that the multifaceted character of subsidiarity was especially true given that subsidiarity had an existence beyond the strict confines of Article 5(3) TEU and / or the yellow card system. , It was argued that subsidiarity could be raised as a ground of judicial review other than by the EU or national legislative institutions and other than in respect of EU legislative acts: it might be

raised, e.g. by private parties; and / or to challenge non-legislative measures adopted by various EU institutions and bodies – in which situations, the procedural dimension to subsidiarity created by the yellow card system was much less relevant than the substantive meaning of subsidiarity that must be articulated and enforced by the courts.

17. Another commentator agreed with these views and set out the following three points:

- First, as well as being a written principle of EU constitutional law, subsidiarity was also treated as an unwritten principle of EU constitutional law which was binding on all EU institutions and bodies whenever exercising their powers and functions under the Treaties. As such, subsidiarity applied not only to the exercise of EU legislative competence but also, for example. to the interpretation and application of EU law: the Court has on several occasions invoked the principle of subsidiarity to help inform its choice between rival interpretations of EU legislation.[5] Similarly, Member States have raised the general principle of subsidiarity (largely without success,) in order to resist enforcement proceedings brought by the Commission.[6]

- Secondly there was growing interest in the way that subsidiarity can and should apply to all of the EU institutions, not just the law-making bodies, including the Court of Justice itself as it engages in the interpretation and enforcement of EU law.[7]

- Thirdly, it was worth recalling that subsidiarity also finds expression in a series of cognate Treaty provisions which are capable of influencing the interpretation and application of EU law: consider the "national constitutional identity clause" contained in Article 4(2) TEU, which can be seen as a concrete manifestation of subsidiarity in its more "political" guise, and which has sometimes provided Member States with a legitimate defence when national rules are found to infringe the Treaty provisions on free movement.[8]

18. One participant mentioned that one of the purposes of reflecting on subsidiarity was because decades of Treaty reform had not addressed widespread popular disengagement with the EU, which threatened membership and even the existence of the EU. The participant argued that this was a very difficult environment in which to be thinking about the EU and that, whilst subsidiarity was not a solution to all of the problems of the EU, it did have an important role.

Handling of Subsidiarity by National Parliaments

19. Some participants noted that serious questions must be raised about the quality, capacity and experience of national parliaments to deal adequately with the principle

[5] E.g. C-114/01 AvestaPolarit Chrome [2003] ECR I-8725.
[6] E.g. Case C-518/07 *Commission v Germany* (Judgment of 9 March 2010).
[7] On which, see further T Horsley, "Reflections on the Role of the Court of Justice as the Motor of European Integration: Legal Limits to Judicial Lawmaking" (2013) *Common Market Law Review* 931.
[8] E.g. Case C-208/09 *Sayn-Wittgenstein* [2010] ECR I-13693.

of subsidiarity. One participant said that national parliaments did not understand basic points of EU law. It was argued that national parliaments did not fully understand the Monti II proposal, namely that it was seeking to address the CJEU decision and its interpretation of the Treaties in respect of the predecessor measure. This participant argued that the only way to address the Court's decision in this case was by EU action and that the Commission was legitimately given a mandate to draft a proposal to deal with the CJEU decision.

20. It was stated that where there was no coherence of how national parliaments work across the EU, the entire system was weak. One commentator said that the real weakness of Protocol 2 was that whilst it harmonised the task (national parliaments reviewing EU proposals on grounds of subsidiarity), it did not harmonise the procedure, and that all national parliaments processed the issue in different ways and came to different analyses. This weakness meant that it was therefore difficult to reach the relevant threshold consistently. One participant stated that parliaments should focus on scrutiny of national governments and not the Commission and queried whether the two were mutually exclusive.

Handling of Subsidiarity by EU Institutions

21. It was argued that the EU institutions did not and have not respected the principle of subsidiarity in practice. One participant argued that subsidiary had failed as a concept because it was too vague a principle to actually deter the EU institutions from acting.

22. One commentator said that the real problem was the way EU institutions use internal market measures to justify EU action, because as soon as Member States have different rules and therefore "obstacles" to free trade, all legislation can be justified on an internal market basis. This commentator argued that this was a sloppy notion of subsidiarity, as all consumer protection could be justified on this basis. Other examples were given, such as, psychological obstacles where people may be deterred from doing business simply because different rules applied across the EU and therefore an EU Company Statute could be justified, or the fact that achieving gender balance on corporate boards would always be easier/quicker to be done at the EU level than at a national level, even though an optional or model laws system would be better.

23. Some commentators disagreed with this, arguing that there were many areas in which there were no EU measures, such as social security or health, because these were sensitive issues dealt with at the national level. This was recognised in the case law and legislative process where there had been no attempt at harmonisation. It was argued that subsidiarity was also recognised by the EU institutions in the form of carve-outs and derogation in legislation. Pornography was mentioned as an example, in that it has been carved out of the Internet Directive, and it was argued that all carve outs such as this are reflective of the principle of subsidiarity.

Handling of Subsidiarity by the CJEU

24. Many participants argued that it was difficult to know how the issue of subsidiarity would play out because nothing had been annulled by the CJEU on subsidiarity grounds and it was not realistic to expect the CJEU to rule on subsidiarity.

25. Some commentators said, however, that the Court was rightly taking a light touch on subsidiarity because there were justiciability issues in this area. It was argued that in controversial areas of public morality – such as abortion, lap dancing, pornography, gambling – where different societies may make different choices, the Court had granted a wide margin of appreciation, which in effect recognised the role of subsidiarity – in contrast to its unwillingness to do so in economic cases. These commentators said that this was an example of subsidiarity in action.

26. One participant argued that on one level, the key legal questions surrounding subsidiarity concerned the future evolution of the Court's caselaw: for example, would subsidiarity eventually acquire a more settled and more decisive definition as an economic, political or procedural principle; and how far would certain national supreme courts be prepared to go in exerting pressure upon the Court to police the principle of subsidiarity more aggressively?

27. Another participant stated that there were some indications that the Court was now trying to make greater use of evidence and the requirement to provide reasons in order to facilitate a more substantive review. For example, in the *Vodafone* case,[9] one commentator noted that the Court made better use of reasons, explanations and evidence to come to the conclusion that it did on subsidiarity, and that the Court was more self-consciously looking at Impact Assessments. Ultimately, the participant argued, the Court was right in rejecting the subsidiarity argument in this case, based on the evidence in the Impact Assessment.

The Role of Subsidiarity in how EU Legislation is Implemented

28. Several participants noted that the role of subsidiarity was not just in the exercise of competence, but once competence has been identified, in how EU action was implemented. It was argued that the principle of subsidiarity should reflect the choice of a Regulation or Directive, as it was important to recognise that subsidiarity had a role in the implementation and application of EU law, separate from legislation itself.

29. One commentator argued that subsidiarity was in action where the EU regulated an area with a light touch, as it enabled Member States to exercise discretion in implementing measures. For example, by using a Directive rather than a Regulation, or setting minimum standards only, or leaving entire parts of the scheme (e.g. enforcement) to Member States.

Impact Assessments

[9] Case C-58/08: Reference for a preliminary ruling from High Court of Justice (England & Wales), Queen's Bench Division (Administrative Court) (United Kingdom) made on 13 February 2008 — Vodafone Ltd, Telefónica O2 Europe plc, T-Mobile International AG, Orange Personal Communications Services Ltd v Secretary of State for Business, Enterprise and Regulatory Reform.

30. Several participants argued that poor impact assessments made it difficult for national parliaments to rebut the position taken by the Commission. One commentator stated that often national parliaments are not in a position to say that a measure breaches the principle of subsidiarity because they did not have the relevant information. It was stated that the Commission had become lazy in its use of the internal market justification for measures, for example, the Commission simply insisted that there was an internal market justification for the Common European Sales Law, despite there being no evidence. One participant argued that the subsidiarity protocol assisted because it provided the basis for demanding more information and proper Impact Assessments, (what is enough information though depended on the meaning of subsidiarity).

31. Most participants agreed that more could be done on the quality and quantity of data and information provided by the Commission. It was noted that it would be easier for national governments to defend EU legislation if the need for it were better evidenced. One commentator noted that the Commission had limited resources and a lot of work to do, so did not have the time or money to do more on Impact Assessments. Some participants argued that the Court could check claims on grounds of subsidiarity and justifications by the Commission with more rigour.

Subsidiarity not necessarily a good thing

32. It was noted that there was often an assumption that subsidiarity was an unalloyed good, for the UK and the national interest, and that the more subsidiarity, the better. Several commentators, however, argued that subsidiarity was not necessarily a good thing in all circumstances. One participant argued that the UK sometimes wants subsidiarity when it benefited the UK but not where it benefited others. This participant went on to argue that the standards in the UK are higher than in most other places in the EU, and that if one pushed the subsidiarity argument too far, decisions may be taken elsewhere in the EU that the UK would not be happy with.

33. One participant argued that the reality was that there was a down-side to subsidiarity – a cost – and it was important to be mindful of this .

> First of all, the business community does not like subsidiarity. They prefer a clear single regulatory scheme and do not want increased transaction costs by having different regulatory regimes across Member States. The internal market Balance of Competences review attested to this. The business community wants to know what regulations must be complied with and to do so with minimum costs. The participant added that it was incontrovertible that virtually every instance of regulatory failure in the EU was down to discretion being left to Member States. This could be a price to pay for subsidiarity, but was a definite downside. This was the case with agriculture, structural funds, banking, utilities, and more. All the failure in these areas were down to schemes which, when initially enacted, left significant discretion and choice to Member States, which subsequently causes serious problems. For example, in the EMU, the asymmetry between monetary and economic policy was due to subsidiarity. The reason why the EU did not have more control over national budgets in the Lisbon Treaty was due to

subsidiarity, and it was this that caused significant problems in the economic crisis. Similarly, in the Lamfalussy regime, this was found explicitly to be the case. The De Larosiere report found that the failures were caused, in large part, by Member States having too much uncontrolled discretion (e.g. capital ratios set by MS). The ratcheting up of EU controls following the crisis was all about trying to limit subsidiarity.

Future Options and Challenges

Improving the operation of the current system

34. Several participants argued that there was scope to improve existing processes without Treaty amendment. One participant mentioned that before considering the extension of scope, it was important to better manage the existing system, and stated that the Commission and Member States could invest more effort here. One participant noted that there was greater scope to use the "Barroso dialogue" (between Commission and national parliaments), which worked better than the principle of subsidiarity. It was also argued that improving the operation of the yellow card system could be done by extending the time available for national parliaments to respond to EU proposals, i.e. beyond the current 8 week period, which was widely considered to be insufficient time for national parliaments to formulate their responses.

35. Several commentators stated that there was a strong case for increasing the amount and quality of data supplied to national parliaments in order to explain and justify EU proposals from a subsidiarity perspective. It was argued that the Commission was effectively reversing the burden of proof when it came to enforcing the principle of subsidiarity, by relying too readily upon general assertions about the "added value" of cross-border action, then expecting the national parliaments to adduce evidence which positively contradicted those assertions in order to rebut a de facto presumption of compliance with the subsidiarity principle.

Extending the scope of the yellow card system

36. It was argued that extending the scope of the yellow card could cover a range of issues over and above subsidiarity in the strict sense: for example, the existence of EU competence; the proportionality of EU action; the national constitutional identity clause and even the political desirability of EU action. Several participants argued that there was some merit in amending the scope of review for national parliaments to include proportionality.

37. One participant noted that making the national parliaments (in effect) another chamber of the EU legislature had important implications for the inter-institutional balance within the EU itself. It was argued that on the one hand, it could (in theory) significantly increase the level of democratic scrutiny over EU action, but on the other hand, it could raise difficult questions about the function and value of the EU institutions themselves, (especially of the European Parliament, whose very mandate and authority derived from its status as the EU's only directly elected institution).

38. It was also noted that extending the scope of the yellow card system begged the question of whether national parliaments had the time and resources to handle a potentially massive increase in workload, which would necessarily be required if they were to engage in proper scrutiny of the EU legislative process, as well as their own purely domestic functions.

Strengthening the potency of the national parliaments' voice

39. It was argued that a move from a yellow card to a red card system (i.e. whereby a sufficient number of reasoned opinions would have the effect of vetoing the draft EU legislation) would be one way to strengthen the potency of the national parliaments' voice.

40. Some participants noted that it is clear from the Monti II and European Prosecutor examples that the Commission would always stick to its guns and reject all objections from national parliaments. One commentator stated that the threshold required for the red card would require careful thought because If it was pitched too low, then the subsidiarity monitoring system risked offering a backdoor through which a minority of Member States (unable to muster a blocking vote in the Council itself) might nevertheless manage to veto EU legislation by steering the reasoned opinions of their parliamentary chambers at home. Yet if the threshold was pitched too high, the red card risked becoming a purely paper power which national parliaments were unlikely to be able to activate in practice – thus drawing attention to the strength of widespread opposition to certain EU proposals but without an effective outlet for or response to those national political feelings.

41. This commentator further argued that one possibility might be to combine a lower threshold with a less potent "red card", e.g. by convening a "conciliation committee" between the Union legislature and the national parliaments when a "red card" is shown, with a view to negotiating amendments to the relevant Commission proposals as to address the concerns raised at Member State level.

42. Some commentators thought that a "red card" was not a viable option as. it would be inappropriate for a State to exercise a veto power through a different route. It was termed "not pragmatic" and not "normatively desirable" for national parliaments to have that power. It was argued that existing Treaties reflected the debate and compromises, and had been ratified nationally. This participant further argued that it would make national parliaments part of the decision making mechanism, raising questions over whether this was their role and if so, why. It was stated that it was pragmatically problematic to add national parliaments to the legislative process and it was normatively difficult to justify as well.

43. Another commentator argued that democracy did not seem to be the solution but rather democracy – at least the shadow of it in the European Parliament – was itself the problem. It was argued that the real issue was the lack of European Parliament legitimacy and that it was necessary to give the European Parliament something to do, for example, by making model laws as guidance for Member States. This would

be a type of partnership which would give the European Parliament legitimacy without necessarily being legally binding.

Rethinking the articulation and enforcement of EU competences

44. It was mentioned that more far-reaching reforms had been discussed in the literature and political debates: for example, the creation of a "competence scrutiny panel" at EU level (to include representatives of the national parliaments) charged with independently reporting to the Council and the European Parliament on compliance of all Commission proposals with the general scheme of EU competence; or the creation of a "competence court" (drawing upon judges from the EU courts as well as the national supreme courts) to deal specifically with competence and subsidiarity disputes (though this already much-aired proposal would raise difficult questions about the division of jurisdiction between any new judicial body and the existing Court of Justice of the European Union).

PROPORTIONALITY

The Definition, Nature and Application of the Principle of Proportionality

45. Many participants agreed that the proportionality principle was a long established principle of EU law, but its application remained uncertain and ill-defined. It was noted that domestic courts frequently struggled to apply the proportionality principle in any consistent fashion, and judges may disagree not only on the results of the application of the test to a given set of circumstances, but on the principles to be applied in seeking to arrive at the correct result.

46. One commentator noted that Article 5(4) TEU and Protocol 2 did not provide much assistance when attempting to define the principle of proportionality. This commentator thought that the full content of the principle must be derived from the case law of the EU courts, as it has been applied over time. Another participant agreed by stating that it was difficult to talk about proportionality in the abstract as the way the CJEU had dealt with proportionality had been unpredictable and case specific. It was agreed that the relevant context is key to understanding this principle.

47. Whilst it was noted that proportionality is an intuitively comprehensive notion, it was again emphasised by a number of participants that there were different approaches that could be taken, and that are taken. This is reflected, for example, in the different approaches taken by the judges in *R (Sinclair Collis and Another) v Secretary of State for Health* [2011] EWCA Civ 437. One participant highlighted an extract from Lord Reed in the *Bank Mellat v HM Treasury* (No 2) [2013] 3 WLR 179 case, which contains a summary of the origins of the concept of proportionality and its place in EU law.[10] This participant noted that it was surprising that this needed to be done so long after the principle had been established, which, it was thought, gave rise to two questions – first, why had it taken so long to articulate and express this principle, and

[10] See paragraph 3 of written evidence provided by Robert Palmer on Proportionality.

second, why was it still so difficult to understand and predict the appropriate standard of reviews?

48. One participant set out their view on the classic test of the principle of proportionality as follows:

    - Does the measure pursue a legitimate objective? Where applicable, is it one which is capable of justifying a derogation from a fundamental freedom (i.e. the Treaty acknowledges the interest to be worthy of protection and sufficiently important to justify a derogation, or else the CJEU has recognised it to be so)?
    - Is the measure suitable to achieve the desired end?
    - Is the measure necessary to achieve the desired end (i.e. is it no more restrictive than is necessary to produce that result)?
    - Are the disadvantages caused disproportionate to the aims pursued? (Or sometimes, depending on context: does the measure impose an excessive burden on the individual in relation to the desired end?)

49. This participant noted that there was no substantial difference between the classic test above and the formulation adopted by Lord Reed in *Bank Mellat* at paragraph 74, where he held that it was necessary to determine:

    - whether the objective of the measure was sufficiently important to justify the limitation of a protected right;
    - whether the measure was rationally connected to the objective;
    - whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective; and
    - whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter.

50. The participant stated that the difficulties lay in the third and fourth steps of the classic test, (set out in paragraph X above). The language of "desired" ends or objectives in the third step was inherently imprecise and unclear, masking an important question of effectiveness which a court was usually ill equipped to judge, and may in large part be a value judgement.At the fourth step, an assessment of proportionality inevitably also involved a value judgment concerning the balance to be struck between the importance of the objective pursued and the value of the right intruded upon.[11] Therefore these value judgments (though masked) inform where a balance should be struck, on questions of effectiveness and the debate on the appropriate intensity of review. This was what makes proportionality difficult to predict.

51. One participant stated that applying a test of rationality (rather than proportionality) might be different but the same complexity would apply. Another participant stated

[11] See *Bank Mellat* at paragraph 71, per Lord Reed.

that the complexity is found in the *application* of proportionality, but this complexity has nothing to do with proportionality itself. For example, it was noted that in "rights" cases, the complexity could come from the fact that where different rights were involved, not all rights had the same value, and even the same right may have different values.

Intensity of CJEU Review

52. One participant commented that the intensity with which the CJEU reviews action on the grounds of proportionality varied – sometimes a strict approach was taken, and at other times a wide discretion was afforded. It was argued that where the margin was at its widest, the CJEU would step away from the fourth stage of review (the balancing stage).

53. It was questioned how one might conceptualise the intensity of review – was it about the degree of weight or respect that was afforded to the primary decision maker? One commentator set out the key variables as follows:

    - whether the primary-decision makers were the EU institutions or a Member State;
    - whether the nature of the power was legislative in nature or affected an individual directly;
    - the nature of the objective pursued and/or interests affected;
    - the degree to which the subject-matter fell within the technical competence of the CJEU;
    - whether (and to what extent) the measure interfered with individuals' fundamental rights;
    - whether the focus of assessment was on the third stage of the assessment (no less restrictive means) or the fourth stage of the assessment (overall balance).

54. One commentator gave numerous examples of how these variables play out in CJEU case law.[12]

55. It was noted that the recent *Digital Rights Ireland* case[13] provided a model of a strict proportionality review, notably conducted on the basis of interference with Charter rights and by reference to ECtHR case law. The CJEU accepted that the directive genuinely satisfied an objective of general interest, namely the fight against terrorism and organised crime, and ultimately public security, which traditionally might have attracted a wide margin of discretion. However, the CJEU found that in view of the "particularly serious" interference with rights of privacy and data protection, a strict review had to be conducted, and accordingly, the CJEU declared the Data Retention Directive to be invalid. One participant thought that this was a surprising outcome, given the absence of any objective criteria governing the scope and application of the measure.

[12] See paragraph 12 of written evidence provided by Robert Palmer on Proportionality.
[13] Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland and Seitlinger and Others.*

56. It was mentioned that the CJEU has done a lot in laying down the factors which affect the intensity of review. But, it was also noted that there were limits to how far the CJEU could lay down a general checklist of factors. One participant said that the CJEU was between a rock and a hard place: either it was too general or, in setting out too much detail, it made issues too complicated.

57. This participant went on to say that there needed to be more realism and noted that there was no pristine clarity in domestic public law either. This participant gave examples of domestic rationality reviews under *Wednesbury* or *GCHQ*, and stated that if those formulations represented the reality, no case would ever be met. This participant thought that, in practice, cases had been successful because domestic courts had been manipulating these classical domestic tests.

58. One participant concluded from *Sinclair Collis* that, when dealing with national measures that impact on EU rights, there must be a stricter intensity of review, and that proportionality must subsume the *Wednesbury* test.

59. One commentator thought that proportionality in EU law applied to national law and national action in areas which would not otherwise be subject to EU law, and with a standard of review higher than that generally found in national (non human rights) cases.

Different Standards of Review for Member States and EU acts

60. There is a strong current in academic literature that there are different standards of review applied in relation to a) Member States and b) EU acts, and some participants argued that this was not right. One commentator stated that although it was difficult to produce any general rules on how proportionality should be applied, the distinction between national and EU measures could not be right. This commentator continued that there was no reason why national measures should not have the same defences as EU measures and argued that it was wrong that proportionality in the human rights and EU contexts would lead to the same level of review. It was argued that the EU treaties focus on economic rights (e.g. four freedoms), which were very different from that human rights, and noted how that in domestic law, the procedural aspect was particularly potent, whereas under the ECHR law, procedural cases were largely irrelevant. It was argued that any hard and fast rule was questionable.

61. One speaker stated that the CJEU showed a systemic tendency to treat with suspicion Member State action and a systemic tendency to look favourably on EU action in the context of proportionality review. It was argued that, in the past, even though the CJEU had the relevant information and arguments concerning proportionality when dealing with EU action, it had not even addressed the issue in its judgment. Another participant stated that, in some cases, the CJEU turned “full guns” on Member State and ignores Member State sensitivity, which was difficult in terms of legal coherence and certainty as it led to too much unpredictability. Another speaker stated that there was admittedly a double standard when it came to Member State and EU action but the real question was whether this was justifiable. The

answer to this question, it was argued, depends on whether you agreed that the four freedoms trumped all other public values.

62. However, it was argued, that there was a good reason for the difference in treatment between the paradigmatic EU acts and Member State acts. For example, one commentator noted that EU acts were challenges to discretionary exercises of powers or choices made under an EU policy, whereas challenges to Member State acts were typically four freedoms cases where there was a prima facie breach of a core EU right and the Member State was using proportionality as a potential defence. It was noted that if one was going to compare Member State action with EU action, then one must find analogous cases, for example, where there was a prima facie breach of a right under EU law and the EU was using proportionality as a defence. However, there were fewer of these cases because of the structure and nature of EU law. Another participant noted that it was only natural that Member States took into account their own interests, and the EU took into account the range of EU interests.

63. One commentator argued that the process by which a CJEU judgment was agreed was unsatisfactory because there would be a range of judges with differing views and differing language comprehension, all trying to agree one judgment. It was noted that it was easy to get a majority of judges against any proposition and difficult to get a majority in favour.

Proportionality and Subsidiarity

64. It was argued that proportionality was so different from subsidiarity that it was not sensible to have them both in Article 5 TEU. Another speaker pointed out that it was interesting though that so many reasoned opinions concern proportionality, rather than subsidiarity grounds.

65. When comparing the two concepts, one commentator stated that both subsidiarity and proportionality limited competence but that proportionality was broader. A number of speakers stated that determination of the scope of proportionality clearly lies with the ECJ, whereas the scope of subsidiarity was contested by national parliaments. However, it was noted that there was a proportionality element in subsidiarity, for example, questions such as is there added value to EU legislation, is a directive enough, do we need all the standards?

Conclusion

66. To conclude, it was noted that there remained considerable room for improvement in the clarity with which competing models of review of proportionality were applied. Less clear still, however, was the basis upon which any such clarity was likely to be, or could be, provided.

ARTICLE 352

The Definition and Nature of the Flexibility Clause

67. It was noted that the flexibility clause now in Article 352 TFEU (former Article 235 EEC and then 308 EC) approached its third decade of existence as an exceptional legislative tool in the event that the powers specifically allocated to the EU are not adequate for the purpose of attaining the objectives expressly set by the Treaties. The participants agreed that the flexibility clause represented the most general power in the EU system of legislative competences. It was stated that its purpose was to enable the EU to react in unforeseen circumstances via the establishment of common EU policies

68. Article 352 TFEU provides:

> 1. 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.
>
> 2. Using the procedure for monitoring the **subsidiarity** principle referred to in Article 5(3) of the Treaty on European Union, the Commission shall draw **national Parliaments**' attention to proposals based on this Article. Article 12 TEU and Protocol 2 of the ToL provide that a third of national chambers can raise an objection (‘yellow card’) on the basis of the violation of the principle of subsidiarity. Therefore, the rejected Proposal must be reviewed by the Commission.
>
> 3. Measures based on this Article shall not entail harmonisation of Member States' laws or regulations in cases where the Treaties exclude such **harmonisation**.
>
> 4. This Article cannot serve as a basis for attaining objectives pertaining to the **common foreign and security policy (CFSP)** and any acts adopted pursuant to this Article shall respect the limits set out in Article 40, second paragraph, of the Treaty on European Union.

69. One commentator noted that whenever Article 352 TFEU was cited as the legal basis for a proposal, it was common practice in the Member States to check that the proposal was necessary to attain one of the Treaty’s objectives and that the Treaty had not provided the necessary power elsewhere.

70. It was noted that the scope of Article 352 TFEU was wider post-Lisbon, as the pre-Lisbon version of this provision could only be used in the course of the operation of

the Common Market, which was not the case any longer. It was noted that the EU had added certain restrictions to the flexibility clause, most notably:

- Under Article 352(2) TFEU, a proposal shall be subsidiarity-proof according to national parliaments. In line with Article 5(3) TEU, national parliaments shall ensure compliance with the principle of subsidiarity in accordance with the procedure set out in Protocol 2 on the application of the principles of subsidiarity and proportionality.

- Under Article 352(4) TFEU, the flexibility clause is inapplicable in the CFSP domain and any proposal citing it shall respect the limits of the non-affectation clause of Article 40 TEU.

Member States Policing the Flexibility Clause through Domestic Legislation

71. It was noted that the UK, by virtue of the EU Act 2011, had enhanced parliamentary controls. In general, there was a requirement for parliamentary approval in order to agree to any Treaty change, or the use of any passerelle or, in certain circumstances, the use of Article 352 TFEU. One commentator noted that this was not a novelty. Germany and Czech Republic also operate similar parliamentary controls.

72. One participant stated that section 8 of EU Act 2011 was controversial in that it required parliamentary approval by Act of Parliament before the UK could agree to any future use of Article 352 TFEU whether it was used as part of the legal base or exclusively for a proposed EU measure, (subject to a number of exemptions).

Utility of the Flexibility Clause

73. Some participants highlighted that recourse to Article 352 today was not as frequent as it used to be. One commentator provided numerous reasons for this change of circumstances,[14] for example, the former frequent use of the flexibility clause was owed to the limited range of competences available in the Treaty and the fact that the new flexibility clause required unanimity voting in the Council. This commentator said that since Article 352 TFEU was only cited as the legal base for a proposal when the Treaty had not provided the necessary power elsewhere, its role as a gap-filler (to supplement both the areas of authorised EU activity and the powers conferred by specific legal bases) became redundant when more specific legal bases were available to enable the EU's objectives to be given effect.

74. Many commentators agreed that Article 352 was only used now to fill gaps, (e.g. Article 308 in *Kadi*; sanctions against non-state actors). One commentator thought that Article 352 remained useful both for institutional gap filling and for really significant issues which had not been foreseen, (e.g. the financial crisis).

Usefulness of a catch-all Treaty Base for EU Action

[14] See page 3 of the report on Article 352 TFEU ('flexibility clause') by Dr Theodore Konstadinides.

75. Many participants thought that it had proved useful to maintain a flexibility clause in the Treaty. One participant said that the use of it to give electronic version of Official Journal authentic status showed the need for it. Another commentator said that although the flexibility clause was not the same generic catch-all as before, it was still useful if it was considered on a case by case basis and seen as a technical and specific provision. It was also noted that Article 352 should be kept to enable amendments to legislation previously adopted on this basis.

76. One commentator concluded that the use of Article 352 TFEU had been downgraded over time and was therefore currently used for rather trivial proposals. A look at the Commission's recent proposals, however, demonstrated that Article 352 TFEU can still be utilised to introduce far-reaching measures where there was the appropriate political will. One participant argued, for example, that the flexibility clause still allowed de facto – albeit incremental – Treaty amendment or change by the back door. However, given the limitations of the flexibility clause, such proposals can, at least in theory, be easily trumped by the UK.[15]

Appropriateness of Use of Article 352

77. It was argued that the flexibility clause had reached its heyday in the 1970s and the 1980s. Member States had witnessed great latitude in the interpretation of the then Article 235 EEC when certain fields were not yet codified in the Treaties.[16] It was noted that today, recourse to the flexibility clause by the Council was rather rare but could still be proved controversial when it was used as a legal basis.

78. One commentator relied on *European Parliament v. Council*[17] as an example of a controversial case that dealt with the appropriate role of Article 352 TFEU. This commentator said that the CJEU in this case, in line with Opinion 1/94[18], confirmed the role of Article 352 TFEU as a provision for the creation of new rights, superimposed on national rights, through the creation of new legal forms governed by EU law.[19]

Alternative Approaches to the Scope, Interpretation and Application of Article 352

79. One commentator stated that, given the safeguards written into Article 352 TFEU, most of the problems were internal / political. The following examples were provided:

[15] See page 5 of the report on Article 352 TFEU ('flexibility clause') by Dr Theodore Konstadinides for examples of such legislation.
[16] See page 6 of the report on Article 352 TFEU ('flexibility clause') by Dr Theodore Konstadinides for examples of such fields.
[17] Case C-436/03, *European Parliament v. Council* [2006] ECR I-3733. The case concerned the adoption of a Regulation aimed at the improvement of the scope for establishing small and medium size companies in the Community and their competitive position.
[18] Opinion 1/94 [1994] ECR I-5267. In this case the CJEU held that the Community had competence in the area of intellectual property under Articles 94 and 95 EC and that resort to Article 308 EC was justified in order to create new rights, such as the Community trademark.
[19] The CJEU pointed to the creation of new intellectual property rights in addition to national rights in Case C-377/98, *Netherlands v. Parliament and Council* [2001] ECR I-7079, para 24.

- It was important for the UK government to find ways to police Article 352 TFEU requirements proactively and at an early stage in the legislative process to avoid the risk of precedence setting and avoid any criticism about competence creep.[20]

- The law should not get mangled in either the putting or the answering of the questions of necessity / conferral and subsidiarity due to the desire of governments to be politically engaged in a dialogue with their counterparts.

- The existence of safeguards at a late stage in the legislative process (unanimity and approval by an Act of Parliament under EU Act 2011) did not necessarily remedy a 'competence creep' and did not, therefore, relieve the government of its responsibility to scrutinise proposals early in the legislative process.

- Lastly, there should be more guidance from the UK Government with reference to 'how it intends to comply with the requirement under section 8 of the EU Act . . . for an Act of Parliament to be passed before final agreement is given in the Council'.[21]

Other Miscellaneous Points

80. It was argued by one commentator that Article 352 should not be criticised too heavily as a culprit of "competence creep" because it had lost its might in modern times.[22] Its use is constrained by unanimity voting in the Council so any competence creep had occurred with the acceptance of national governments. One commentator thought that Article 114 TFEU and perhaps Article 216 (1) in the external realm were now the main culprits of competence creep and expressed surprise that there were no policing measures to monitor their use.

[20] Animal Cloning: the use of Article 352 TFEU Witnesses (introduction by William Cash) <http://www.parliamentlive.tv/Main/Player.aspx?meetingId=15300>
[21] See European Scrutiny Committee, 'European Private Company', Documents considered by the Committee on 19 July 2011. Available at: <http://www.publications.parliament.uk>.
[22] T. Konstadinides, 'Drawing the line between Circumvention and Gap-Filling: An Exploration of the Conceptual Limits of the Treaty's Flexibility Clause' (2012) 31 (1) *Yearbook of European Law* 227.