Subsidiarity and Proportionality : Evidence for the Balance of Competences Review

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Introduction:

The interrelated matters of legal competence, subsidiarity and proportionality ask in turn first, whether the EU has the legal authority to act in that policy field (competence – could the EU act?); second, and assuming competence is in place, whether it is the European Union or the State level which is the most appropriate legislator on the matter at hand (subsidiarity – should the EU act?); and finally, what sort of action, in terms of its scope and nature should be undertaken (proportionality – how should the EU act?).

This evidence reflects on the operation of these principles, especially subsidiarity and proportionality, with a particular reference to the 'Early Warning System' of subsidiarity monitoring, operated by the national parliaments.

It makes the following observations and recommendations:

> There is some degree of confusion over the meaning of, and the relationship between the concepts of subsdiairity and proportionality. Clarification of the meaning of subsidiarity and proportionality would be welcome, and the European Commission's Guidelines for Impact Assessments could be used as a useful starting point.
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> Any clarification of the scope of subsidiarity and proportionality should not bring about a restriction on the scope of enquiry conducted by national parliaments under the 'Early Warning System'. Subsidiarity should be interpreted broadly to include relevant proportionality matters, or the procedure should explicitly be redefined as a subsidiarity and proportionality review.
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> The consultation period under the Early Warning System could be extended from 8 to 12 weeks. This would assist *inter alia* in the incorporation of regional parliament/assemblies' views.
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> There are complicating factors relating to subsidiarity review in respect to measures adopted under enhanced cooperation which need acknowledgement.

Scope: Are the principles of Subsidiarity and Proportionality effective ways to decide when the EU acts, and how it acts?

The principles of subsidiarity and proportionality are systemic principles, embedded in the EU order. Multiple opportunities are provided for their assessment and review in respect to legislative action, both ex ante and ex post, by a wide range of actors, both political and judicial. Even before bringing forward any legislative proposal, the European Commission will have had opportunity, through stakeholder

consultations and drafting 'roadmaps', for a basic preliminary engagement with subsidiarity and proportionality concerns in respect to the proposed area of activity. Subsequently, an Impact Assessment (IA) will have been conducted, which should contain a full assessment of the subsidiarity and proportionality of proposed action, in line with its Guidelines.[1] The Impact Assessment Board in its review of the Commission's IA may make invite the Commission to revisit its treatment of these aspects.[2] The next layer of possible interventions and checks on subsidiarity comes from the national parliaments under the Early Warning System, provided for under the Lisbon Treaty's Protocol Number 2, as well as more broadly through the route of the political dialogue. National parliamentary interventions may trigger a reconsideration of the proposal by the Commission.[3] During the legislative phase, other actors, including the Committee of the Regions may feed in their opinions on subsidiarity and proportionality, this Committee of course having a particular sensitivity to the subsidiarity issue, especially as it may play out at a regional, sub-state level. Once the Member State governments, usually alongside the European Parliament, have adopted the legislative measure, it remains open to a possible ex post judicial review before the EU courts. In addition to the usual catalogue of actors who may bring judicial review actions under Article 263 TFEU, the Subsidiarity and Proportionality Protocol (Article 8) provides for annulment actions in respect to the review of subsidiarity by the Committee of Regions, and from also national parliaments, through the route of their Member State government.[4]

As this review demonstrates, on paper there would appear ample structures to ensure that subsidiarity and proportionality and fully and effectively respected. Of course, how well these work will depend on how effectively actors are engaging with these structures, and their capacity and willingness to learn from the exchanges that take place within them. On the whole, in recent years subsidiarity and proportionality have become rooted in the legal and political culture of the EU and its governance structures. This has been reinforced through the EU's engagement with an agenda for 'Smart Regulation'.[5] Whilst acknowledged formally as justiciable before the Courts, the tendency has been to regard subsidiarity as having a more political nature, whilst competence and proportionality are more legal principles. The assessment of 'how well' the principles are working may depend somewhat on one's perspective on European integration, and political position on the appropriate scope of EU interventions. As the Commission itself has observed, the assessment of whether particular actions respect the principle of subsidiarity may evolve over time,[6] with the decision that previously established actions should be scaled back or discontinued, or new actions introduced. Subsidiarity assessment is

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1 SEC(2009) 92, see further below.

2 Examples are reported in European Commission Annual Report 2012 on Subsidiarity and Proportionality (COM)2013 566 final, p 2.

3 Formally, if the requisite threshold for a yellow or orange card is reached, then the Commission must reconsider its proposal. The Commission may chose, as an outcome of that reconsideration, to withdraw, amend, or maintain the proposal in its original form, which was the outcome of the European Public Prosecutor Office proposal. The first yellow card, Right to Strike 'Monti II' saw the measure withdrawn, but not on subsidiarity grounds.

4 See for a review of different state practice here K. Granat 'Institutional design of the Member States for the ex post subsidiarity scrutiny' Luiss Guido Carli, Rome SOG-WP5/2013 http://eprints.luiss.it/1205/1/SOG-WP5-2013_Granat.pdf

5 http://ec.europa.eu/smart-regulation/index_en.htm

6 SEC(2009) 92, p23.

thus quite dynamic and not a mechanical process whereby one 'right' answer is necessarily able to be read off. Whilst some national parliaments have been critical of the Early Warning System and a lack of responsiveness by the Commission to subsidiarity concerns raised through reasoned opinions,[7] there is certainly evidence of sustained attempts by the Commission to engage with subsidiarity concerns in legislative design, though individual outcomes may not always be convincing to all.

Interpretation: How have the principles been interpreted in practice?

The starting point for the interpretation of the subsidiarity principle is Article 5 TEU, which presents subsidiarity as a two-stage test : first is the test of necessity (why the objectives cannot be sufficiently achieved by Member States) and second, value added (why EU level action would better achieve objectives). Despite its formally acknowledged justiciability, the Court of Justice has seldom explicitly engaged with the principle, and has never formally annulled a measure for breach of the subsidiarity principle. The Court may be seen, as Horsley argues, as showing 'considerable deference to the subsidiarity assessments of the Union legislature'.[8] Members of the Court have themselves publicly acknowledged this- speaking in a personal capacity Judge Bay Larsen said:

> It is clear that the assessment of whether an EU objective cannot be sufficiently achieved at Member State level and better achieved at Union level at least to some extent builds on political considerations. When facing complex practical and political circumstances, a certain leeway must be left to the EU institutions in the decision-making process. In such cases, the Union Courts cannot simply replace the assessment of the EU Legislator with their own, if they want to remain within the limits of the competences assigned to the judiciary. Hence, the very nature of the subsidiarity test imposes certain limitations as to the level of scrutiny to be undertaken by the Court.[9]

Bay Larsen instead suggests that the principle may have a stronger role to play as a procedural ground for review. However, as Horsely convincingly demonstrates, the Court has in fact necessarily engaged with substantive subsidiarity review, in determining the appropriate limits of the internal market legal bases. Thus behind the decision to annul the Tobacco Advertising Directive[10] for example, on the grounds of incorrect legal base is the fact that the first limb of subsidiarity test - the necessity for EU action – was not passed. Rules on advertising on static media, with no cross border impacts, are a matter for Member State action. This seems to go to the heart of a subsidiarity assessment, but was not described as such by the Court.

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7 On the UK House of Commons position see Paul Hardy, Counsel for European Legislation, House of Commons contribution to the Round Table: 'Experiences of subsidiarity monitoring from national parliaments' Committee of the Regions 6th Subsidiarity Conference, Bundesrat, Berlin,December 2013.

8 T Horsley, 'Subsidiairity and the European Court of Justice: Missing Pieces in the Subsidiarity Jigsaw? (2012) 50 *Journal of Common Market Studies* 267-282, p 269.

9 Judge Bay Larsen, 'The judicial review of the principle of subsidiarity at the Court of Justice of the European Union' Committee of the Regions 6th Subsidiarity Conference, Bundesrat, Berlin, December 2013.

10 Case C-376/98, *Germany* v *European Parliament and Council (Tobacco Advertising)* [2000] ECR I-8419.

As far as interpretation by legislative actors, the 2009 Protocol on Subsidiarity and Proportionality gives no further definitional assistance in respect to these concepts to the Commission, or indeed to the national parliaments in relation to their conduct of subsidiarity review. There are however the Commission's own Guidelines on Impact Assessment,[11] which provide it with a set of questions to ask to ensure that legislative proposals are in line with subsidiarity and proportionality requirements. These incorporate elements of the former 1997 Protocol on Subsidiarity and Proportionality, as well as being influenced by work by the Committee of Regions,[12] which has developed through its Subsidiarity Monitoring Network its own set of guidelines in a 'Subsidiarity Tool Kit' , which incorporates both subsidiarity, proportionality, and 'better lawmaking' issues, from a regional perspective.[13] On subsidiarity, the Commission's Guidelines propose that the Commission consider such issues as whether the issue has transnational aspects which cannot be dealt with satisfactorily by action by Member States; whether actions by Member States alone, or the lack of EU action, would conflict with the requirements of the Treaty or significantly damage the interests of Member States, and whether action at EU level would produce clear benefits compared with action at the level of Member States by reason of its scale and effectiveness. On proportionality, the first question is the familiar one of whether the action goes beyond what is needed to achieve the objective satisfactorily. This is then supplemented by further questions, some of which connect very much to the issue of scope of action left to the Member States, and their regional components, and the balance of responsibilities in terms of level of action. These are 'will the Community action leave as much scope for national decision as possible while achieving satisfactorily the objectives set?' and 'while respecting Community law, are well-established national arrangements and special circumstances applying in individual Member States respected?'

These guidelines could prove useful for national parliaments in their task of subsidiarity review. Review of practice to date demonstrates that there is a range of interpretations held by national parliaments of what falls within the proper scope of subsidiarity review under Protocol 2, and the possibility that some national parliaments are working with a different definition of these core principles than that held by the Commission. Reviews of the reasoned opinions submitted so far demonstrate the national parliaments regularly include considerations of legal competence and proportionality alongside strict subsidiarity concerns.[14] Some do this explicitly aware that they are going beyond the limits of subsidiarity review, whilst for others it appears part of a broad definition of what subsidiarity includes. On occasion the UK House of Commons for example has included qua subsidiairity factors that seem to be rather more concerned with proportionality as understood by the Commission under its Impact Assessment Guidelines, rather than of subsidiarity. This can be seen in respect to the devolution

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11 SEC(2009) 92.

12 J.Nymend-Christensen, Keynote speech 'The principle of subsidiarity as a joint challenge and opportunity for European institutions', Committee of the Regions 6th Subsidiarity Conference, supra n.5.

13 https://portal.cor.europa.eu/subsidiarity/Pages/Subsidiarityandproportionalityanalysiskit.aspx

14 Useful overviews are contained *inter alia* in Commission Annual Reports on Subsidiarity and Proportionality (COM)2013 566 final and COSAC (Conference of Parliamentary Committees for Union Affairs of Parliaments of the European Union) Eighteenth Biannual Report: Developments in European Union Procedures and Practices relevant to Parliamentary Scrutiny, 2012

arguments raised against the single national oversight body in the European Directives on Public Procurement.[15]
The Commission has now said[16] that 'it is well aware of that the limits of the principle of subsidiarity are not easy to trace, and has therefore adopted an open attitude towards reasoned opinions, interpreting their arguments, in so far as possible, in the light of the principle of subsidiarity'. That said, in the interests of transparency and clarity, a set of (non-binding) guidelines offering a clearer definition of the appropriate scope of subsidiarity would serve a useful purpose here, and avoid differences in the way the concepts are understood and operationalised during the impact assessment phase and during the later legislative phase.

Application : Subsidiarity and Proportionality under the Early Warning System:

As demonstrated in the previous section, despite formally being separated out in Protocol No. 2, subsidiarity and proportionality are regularly treated together by national parliaments under the Early Warning System, whether explicitly, as separate aspects, or through a broad reading of subsidiarity to include proportionality. As the 2012 COSAC report demonstrates, almost half of the parliaments and chambers eligible to participate directly in the Early Warning System see 'proportionality as an inextricable component of subsidiarity', and a large majority of them 'do not believe that subsidiarity checks are effective without the inclusion of a proportionality check'.[17] An explicit acknowledgement that proportionality checks are also to be included in national parliamentary review would thus capture what in fact is happening on the ground. It would be appropriate to include the division of powers proportionality issues referred to in the Commission's Impact Assessment Guidelines. The case may be made that the Early Warning System should go further to include questions of competence alongside subsidiarity and proportionality.[18] However, amongst the arguments which could be marshalled against that view include the fact that competence is primarily a legal rather than a political consideration, and it is political assessments that national parliaments are best suited to engage with. Also, a key rationale for bringing the national parliaments in through the Early Warning System can be that they bring a particular perspective and an important source of insight into what is able to be effectively achieved at national level (or below). These insights position them well to answer the questions posed by subsdiairity as well as the proportionality issues dealing with national arrangements as highlighted by the Commission in its Impact Assessment Guidelines. The nature of the legal assessment of competence meanwhile may not be assisted in the same way by such national and regional political insights.

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15 On the European Directives on Public Procurement, COM(2011) 895 and COM(2011) 896, in respect to the proposed single national oversight body.
http://www.ipex.eu/IPEXL-WEB/ scrutiny/ COD20110438/ukcom.do

16 In the context of its response to the reasoned opinions delivered on the proposal for a European Public Prosecutors Office, COM(2013) 851 final, p. 4.

17 COSAC Eighteenth Biannual Report, 2012, p. 5.

18 Academic endorsement of the inclusion of competence issues is provided inter alia by P. Kiiver, *The Early Warning System for the Principle of Subsidiairity: Constitutional Theory and Empirical Reality* (Routledge, Abingdon, 2012).

Future Options and Challenges:

1.Subsidiarity and the involvement of regional parliaments/assemblies: Post Lisbon, Article 5(3) TEU acknowledges for the first time, the place of regional and local level in EU governance. Whilst textually, the Treaty may be seen to formally integrate them into the subsidiarity assessment, EU law itself creates no self-standing rights for regional bodies to be involved in the assessment process. They may however participate indirectly, through the route of their national parliaments under the Early Warning System, if provided for internally[19] or through the Committee of the Regions, which also has a role in subsidiarity monitoring. As has been seen, the UK Parliament has incorporated regional concerns into certain of its reasoned opinions. In response, the Commission engages with (though does not accept) the concerns raised by the devolution aspects of the single oversight body for public procurement.[20] It is less taken with the House of Common's arguments based on the existence of regional, devolved criminal justice systems in relation to the European Public Prosecutor proposal. Regional concerns in this regard were not relevant, 'the division of powers between a Member State, its regions and its municipalities is a purely internal matter'.[21] It may well prove that the involvement of regional assemblies through the Early Warning System, and their concerns about the division of responsibilities will have more of a resonance for a domestic audience, than for a European one. That said, no *a priori* view should be taken that the concerns they raise will necessarily fall within the category of 'wholly internal', and they should be given the appropriate opportunities to engage with the review process. With that in mind, many practitioners and academics have suggested that the current 8 week window is too brief, and could usefully be extended to facilitate *inter alia* the full involvement of regional assemblies. A period of 12 weeks may be deemed more suitable.

2.Subsidiarity and delegated legislation: Under the terms of the Early Warning Mechanism, the national parliament subsidiarity check only applies to 'legislative acts'. This excludes the large body of rules adopted under the 'comitology' system, encompassing post Lisbon both delegated acts and implementing acts. Such 'non-legislative acts of general application'[22] may be thought not to create significant subsidiarity concerns, as they will be adopted under piece of parent legislation which, assuming it was adopted in the last two decades, will have gone through some form of subsidiarity assessment. Subsidiarity and proportionality will apply when these measures are being created, though the reasoned opinion route will not be available for their review. This exclusion is appropriate given the potential overload that it would create for national parliaments in respect to what are likely to be low risk measures from a subsidiarity perspective. That said, it should be noted that the Committee of the Regions announced in its 2014 Work Programme that its Subsidiarity Team 'will explore the relevance

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19 Protocol No 2, Article 6.

20 Commission Letter C(2012) 8150 final.

21 COM(2013) 851 final, Commission Communication on the review of the proposal for a Council Regulation on the establishment of the EPPO with regard to the principle of subsidiarity in accordance with Protocol No 2 .

22 Article 290 TFEU.

and feasibility of subsidiarity/proportionality monitoring in this context, on the basis of concrete and selected cases'.[23] Monitoring of the Committee's work in this regard may be appropriate.

3.Subsidiarity and enhanced cooperation/differentiated integration:

With the increase in the incidence of differentiated integration, through Treaty opt-outs, applying to the UK in respect to aspects of EMU as well as Justice and Home Affairs, along with the opportunities for smaller groups of states to go ahead with legislative initiatives through the route of enhanced cooperation there has been a considerable increase in the opportunities for legislation to be adopted which has no direct application to one or more Member States. The assessment of subsidiarity compliance of such measures may be particularly problematic, with particular difficulties in determining the necessity and value added of measures when only a section of the Member States are going to be covered by the resultant legislation. The matter has arisen in a number of reasoned opinions, such as that of the House of Lords on the European Public Prosecutor, in which it argued that 'the Commission's rationale for the proposal does not take sufficiently into account the fact that at least two Member States will not be participating in the EPPO...It is clear, therefore, the creation of the EPPO as proposed could not fully address the problem, acknowledged by the Commission, of the fragmentation of national law enforcement efforts'.[24] There may be a case to treat conceptually the group of states who will participate in enhanced cooperation as 'the EU' (rather than a mid-way group between no EU intervention and a whole-EU approach).

[23] Committee of the Regions, Subsidiarity Work Programme 2014, p. 5. http://extranet.cor.europa.eu/subsidiarity/activities/Pages/default.aspx

[24] http://www.ipex.eu/IPEXL-WEB/scrutiny/APP20130255/uklor.do