

British Telecommunications plc
Response to the Call for Evidence
On the Government's Review of the Balance of Competences
Subsidiarity and Proportionality

12. 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.

Subsidiarity: Subsidiarity does not appear to be an effective way to decide when the EU acts after the Commission has forwarded draft legislative acts to national Parliaments for review. It is certainly not an effective substantive legal ground for challenging a final legislative measure before the European Court of Justice. On the other hand, it might be an effective means of deciding when the EU acts if there were more effective consultation of interested stakeholders and more transparency of the Commission's preparatory work before draft legislative proposals are adopted.

The subsidiarity principle says that action by Member States individually should be preferred unless the need for acting at the level of the Community can be clearly demonstrated. According to the Commission's Impact Assessment Guidelines, the Commission should always consider in its preparatory work whether its proposal is 'necessary' (i.e. is Member State action insufficient?) and whether there is an EU value add (can the EU do better than Member States?)

However, once the preparatory work is over and the European Commission has adopted a draft legislative measure, it is in practice impossible to use the subsidiarity principle to have the proposal amended or withdrawn. Given the general tendency for Member State views on the question of subsidiarity to diverge (as demonstrated by the various COSAC¹ subsidiarity checks on a number of legislative proposals over the years), it is very rare for the 'yellow card' procedure to be invoked. Even when the yellow card is used, the Commission is under no obligation to change its proposal. It simply has to review the proposal and give reasons for its decision to maintain it. This is what has happened on the two occasions when the yellow card has been used so far. The 'orange card' procedure has never come into play because the trigger for that procedure, reasoned opinions representing a simple majority of the votes allocated to national Parliaments, has never been reached.

¹ COSAC – "Conférence des Organes Spécialisés dans les Affaires communautaires" – The Conference of European Affairs Committees of National Parliaments.

Neither the European Parliament nor the Council provide an effective route to challenge a draft legislative measure on subsidiarity grounds.

The subsidiarity principle has never yet been used successfully to challenge a legislative measure before the EU Courts.

By contrast, subsidiarity arguments on procedure and substance should be examined in depth and raised before any legislative proposal is adopted by the Commission, for example at the green paper or white paper stage. This may contribute to avoiding the adoption of legislative proposals which are neither 'necessary' nor 'effective' in light of the Commission's own Impact Assessment Guidelines. This has particular resonance given the need for the Commission to focus forensically on what is needed for jobs, growth and competitiveness. Coupling strategic forethought by the Commission with a clustering of groups of Commissioners around core themes such as digital/innovation, financial & economic affairs, single market and trade could contribute to making this focus more effective in future, alongside some form of preliminary impact assessment against a competitiveness test.

A prime example of early legislative thinking on the part of the Commission which raised major concerns under a number of heads, including subsidiarity, was the possibility, ahead of the Commission's review of Directive 2003/41/EC on the activities and supervision of the institutions for occupational retirement provision (IORPs), of introducing Solvency II style quantitative measures for such institutions. Businesses, trade unions and pension providers at EU level were united against this proposal as were the governments of the five countries most affected by the proposal. The area of pensions is best dealt with as a national competence under principles of subsidiarity. Member States have developed materially different systems of pension provision and any attempt to harmonise them would cause significant and unjustified disruption. Member States are best placed to manage pension provision themselves. Moreover, it is essential that EU Commission consultation with stakeholders should take place on proposals, such as Long Term Financing & Investing and as Solvency II for pensions, at a very early stage in the legislative process so that economic operators as well as national governments are able to react as soon as possible under both subsidiarity and other grounds.

Proportionality: proportionality, and indeed legislative competence, is easier to apply in practice than subsidiarity and on a number of occasions the EU Courts have struck down EU legislative measures on proportionality and competence grounds. However, this has not happened often. As with any litigation, the outcome is difficult to predict. Moreover, it takes time for a legal challenge to come before the Courts and to be decided and throughout the period from the making of the challenge to the delivery of the Courts' decision uncertainty reigns. Uncertainty prevents businesses from making key decisions. When you add to the mix the fact that going to court is expensive, it all means that proportionality is not an effective means of controlling

inappropriate legislation ex post. There should instead be some means for examining proportionality early in the legislative process.

Unfortunately, although Article 5 of Protocol 2 of the Treaty on the Functioning of the European Union (TFEU) provides that a draft legislative measure must be proportionate², there is no specific mechanism equivalent to that for subsidiarity which allows national Parliaments to issue reasoned opinions stating why the proportionality principle has not been respected.

There is scope for COSAC to make representations on proportionality and other matters to the Commission, the European Parliament and the Council under Article 10 of Protocol 1 of the TFEU. Nevertheless, as with subsidiarity, the most effective means of using proportionality to question draft legislation is to do so before such drafts are adopted by the Commission.

² “Draft legislative acts shall take account of the need for any burden, whether financial or administrative, falling upon the Union, national governments, regional or local authorities, economic operators and citizens, to be minimized and commensurate with the objective to be achieved”.

13. 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?

See the answer to question 1 above.

14. 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?

It is vital that the principles of subsidiarity and proportionality should be considered and consulted on from the earliest stage in the Commission's work on legislative proposals. No legislative change is necessary for this to happen, only modifications to administrative practice.

For instance, economic operators likely to be affected and Member States must retain the ability to comment on green and white papers on subsidiarity, proportionality and competence grounds as well as on matters such as the financial implications of proposals.

Legislative roadmaps should contain preliminary subsidiarity and proportionality analyses which should be publicly available.

Stakeholders, in particular economic operators likely to be affected by a measure, must be consulted during the preparatory stage and asked for their views on subsidiarity and proportionality. The responses to consultations, and any studies from external experts consulted by the Commission, on the questions of subsidiarity, proportionality and legislative competence should be made publicly available.

Similarly, as required by the Commission's own guidelines, the Commission's Impact Assessment must demonstrate that a proposed measure is 'necessary' and 'effective'. That Impact Assessment should be published before the Commission adopts its legislative proposal.

The implementation of the above mechanisms would mean that proper regard is had to subsidiarity and proportionality in the legislative process.

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?

It does not. See the answer to question 1 above.

15. 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?

See the answer to question 3 above.

16. 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?

17. 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?