Brussels & Europe Liberal Democrats
ldbxl@yahoo.co.uk
www.uklibdems.eu

BRUSSELS AND EUROPE LIBERAL DEMOCRATS SUBMISSION
Balance of Competences Review

Subsidiarity and Proportionality

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/300217/Call_for_Evidence_Subsidiarity_and_Proportionality_FINAL.pdf

for submission to: BalanceofCompetencesSubsidiarity@fco.gov.uk

Call for Evidence

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.

With the UK's membership of the European Union, and successive treaties signed by sovereign governments allowing for varying degrees of intergovernmental and supranational cooperation, many acts carried out at different levels of governance (local, regional, national and European) must be seen increasingly in terms of their proximity to citizens in their specific context and in terms of their stated policy objectives.

As set out in the call for evidence document, competence to act in certain areas is divided between EU institutions and agencies, as well as national governments and their regional and local structures and agencies.

The crossover between acts carried out by agencies at each level is often unclear, and the concept of "EU competence" and "national competence" is difficult to define. For example, a Local Enterprise Partnership established under a national government policy choice, but being involved in the dissemination of funds which come partly from the EU regional development funds can be seen as local, national or European in nature.

Bearing this in mind, the principles of subsidiarity and proportionality give a useful touch stone in assessing at which level a policy choice should be taken and implemented - the core premise being that it should always be at the closest level to the citizen at which the policy can be implemented effectively and have the most added value.

This general principle enshrines the concept of putting citizens and accountability at the heart of decision making. The European Commission as the defender of the European treaties is entrusted with making such a judgement as to when EU action is both necessary and appropriate, and should only act when both of these criteria are met. Equally national governments and local and regional authorities should make similar assessments when taking action.

The obvious example of where actions proposed by the European Commission have been legitimately challenged by national governments was in connection with the Posting of Workers Directive, with the so-called Monti II proposal[1] which would have attempted to legislate around recent ECJ judgements on posting of workers and right to strike legislation versus the freedom to provide services. Such an approach attempting to create legal certainty in these matters also ventured into core issues of national employment and labour relations legislation. Such a step contravened the principle of subsidiarity by attempting to delve into national competence even though the issues raised clearly had a significant cross border European element.

The inclusion in the Lisbon Treaty of specific mechanisms allowing National Parliaments to object to proposals on such grounds, and to ultimately block, or cause the Commission to reconsider proposals at an early stage: "Yellow card procedure", are a positive development and an important tool, which bring enhanced responsibility for national parliamentary scrutiny of the European Commission's work programme.

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?

With reference to the Monti II yellow card procedure, it is clear that the Commission took an interpretation focussing on the added value of developing coherent legislation in the wake of ECJ rulings which had left some issues surrounding a potential hierarchy of rights (freedom to provide services and right to strike) ambiguous and potentially harmful to the exercise of fundamental rights and freedoms throughout the EU. The reasoning that such issues could only be addressed by EU level action was compelling, but the implications for domestic legislation meant that the compatibility of such proposals with the subsidiarity principle was questionable.

Equally the submissions made by Member States on this issue, in many cases focussed (erroneously) on the political desirability, proportionality and legal base questions rather than with the subsidiarity point (due perhaps to the fact that a case for EU level action was clear), it is therefore worth remembering that both national parliament and EU institutions must carefully reflect on the definitions of subsidiarity and the stated objectives of action, as well as potential side effects when taking decisions of the compatibility of a proposal with the principle of subsidiary.

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?

[1] The text of the initial proposal is available here: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0130:FIN:EN:HTML

As outlined in the call for evidence document (Paragraph 4.9), subsidiarity is about local and regional action as well as National and European action. The default assumption that "more action should be taken at national level" regardless of content or objective misses the key element in subsidiarity, that the considerations must focus on where and how action is most effective and closest to citizens.

As outlined in the recent Heseltine report, the UK is in great need of reform of its domestic national, regional and local governance structures in order to deliver better outcomes for regions outside Metropolitan London. Any review of decision making in this respect should also take into account the European dimension, addressing in particular the Union's Regional Development policies in order to ensure the best use of European policy to deliver for British citizens at home.

Both houses of the UK national parliament have a key role to play in scrutiny of the European Policy process and must be better involved in that scrutiny by following more closely the work programme set out by the European Commission - scheduling debates on sensitive issues before the deadline for a yellow card procedure, and before the co-decision procedure begins.

The UK should recognise that both houses are entitled to submit a reasoned opinion on the subsidiarity principle to new policy proposals and therefore should coordinate their submissions. Failure of one house to submit an opinion while the other submits one would suggest a divided opinion within the UK and diminishes its argumentation.

The UK should seek to discuss potential subsidiarity issues with like-minded nations before the 8 week period elapses to ensure coordinated and coherent objections are put forward.

Reasoned opinions should follow closely the concept and principle of subsidiarity rather than focussing on the political desirability of the proposed content - content can be changed through co-decision but the question of subsidiarity and proportionality can only be addressed at this early stage - further political considerations will not be taken into consideration at this stage.

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?

Subsidiarity and proportionality are two fundamentally different concepts which - while crucial to answering the questions of where action should be taken - and whether the actions proposed are appropriate means for achieving the stated objectives of a policy choice, are manifestly different in nature.

It makes sense that both of these questions are asked at an early stage and answered in a satisfactory manner, with full input and scrutiny from democratically-elected representatives at the national and European level.

By dealing with these two questions separately, there is in effect a double lock of checks carried out which can prevent inappropriate legislative proposals on one or both of these grounds. From a perspective of defending the role of national sovereignty, it is both politically coherent and politically desirable to have a double lock process such as this, rather than a single check.

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

No comment is offered on this point.

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?

Paragraph 6.2 in the call to evidence explains the flexibility clause in art 352 of TFEU and suggests that this gives a "potentially wide and flexible legal basis that could extend to anything coming within EU competence"...

This wording suggests a perhaps alarming level of discretion while more or less ignoring the fact that the unanimity in Council required for such action gives the UK (or any other EU member states) the right of veto on any action for which the flexibility clause is invoked, therefore substantially limiting this action to issues only where there is absolute consensus amongst the Unions 28 national governments to carry out action. The consent requirement of the European Parliament further restricts these powers by giving the European Parliament the right to block such actions, but not amend or propose them.

There are conceivable scenarios in the future (further to those cited in the call to evidence document) where the UK and like-minded nations may wish to push for action or legislation in certain areas where the treaties have not specifically mandated this to happen. In the context of a possible reform agenda driven by the UK, and bearing in mind the challenges of a wholesale treaty change, such an option should be seen as a possible avenue for reform.

The Monti II regulation, referenced earlier in this submission, used the Art 352 legal base, precisely because there are in many areas insufficient legal bases set out in the treaty for reform or clarification of EU law where ECJ rulings have fundamentally altered the application of existing EU law. In some cases, EU law has developed beyond what was agreed by the legislators, going beyond what National parliaments may have envisaged when agreeing to such measures. In the process of reform which the UK has determined to undertake, it makes sense that treaty provisions exist to modify and clarify areas of EU law which have become unclear as a result of decisions by the ECJ which have fundamentally changed EU law (and by proxy UK law). This may indeed be crucial when addressing for example the application of the Working Time Directive.

7. Which alternative approaches to the scope, interpretation and application of Article 352 might be beneficial?

No comment is offered on this point.

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?

UK scrutiny and oversight of the European Policy process is currently ill equipped to effectively address all of the possible challenges arising from new legislative proposals from the European Commission.

The UK must adopt a more constructive approach with other national governments within the European Union in order to have greater influence within the European policy process to safeguard its national interest. Better engagement with British Parliamentarians in the European Parliament is crucial in this regard, particularly in view of the rise of euro sceptics in the European Parliament which will lead to less engagement by MEPs in the legislative process, rather than greater scrutiny.

The Commons and Lords European scrutiny committees should be equipped and resourced to follow the European Commission's work programmes, and liaise directly with the European Parliament and UK ministers attending European Council meetings.

Better engagement of national parliamentary committees with those of the European Parliament, and with the UK's Permanent Representation in Brussels, could also lead to better results for the UK in avoiding legislative proposals which could adversely affect the UK's national interest, and conversely ensuring it makes the most of legislation which benefits the UK. Crucially, better access to information through detailed policy advice and programmes to educate UK ministers and parliamentarians in the European legislative process could deliver better results for the UK in this regard.

Ideally the UK - as one of the largest member states and therefore a significant player in both Parliament and Council – should be in a position to ensure that even potentially harmful legislative proposals can become advantageous to the UK interest, bearing in mind the benefits to the UK economy ensuing from the single market.

END