

NATS Response to the Call for Evidence on the Government's Review of the Balance of Competences between the United Kingdom and the European Union
Semester 4 - Subsidiarity and Proportionality

Scope

1. Are the principles of Subsidiarity and Proportionality effective ways to decide when the EU acts, and how it acts? You may wish to refer to particular examples in your evidence.

The principles themselves seem appropriate. If they are not fully effective it is because of the way in which they are applied, or in some cases seemingly not applied (see question 2).

A mechanism which is able to evaluate the merits of EU or National action on a case by case basis is clearly necessary given the differing natures of various regulated activities. For example, an inter-continental airliner will typically spend an hour or less in each State's airspace when flying across Europe. In this context common rules can be extremely useful. However, hang gliders will typically only fly within a few miles of their starting point and may thus best be regulated locally.

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?

Discussions about subsidiarity and proportionality can often focus on the high level 'political' regulations and directives adopted by the Ordinary Legislative Procedure ("Co-Decision").

However, proportionality should also be considered at the level of Commission Implementing Regulations ("Comitology"), and in some cases at national level as well.

Implementing Regulations can result in national costs running to tens of millions of pounds (hundreds of millions of euros across the EU). A recent aviation example of this is the Data Link Services rule (DLS – [29/2009](#)) which has proved difficult to implement in most States and, even where implemented, is currently giving little real benefit to the end users (airlines) due to unresolved issues with the underlying technology.

These potential costs, which must be weighed up against the anticipated benefits, cannot be captured if a proper Impact Assessment is not performed. EASA Opinion [05/2011](#) for Part B of the Standardised European Rules of the Air (SERA) included a proposal for automatic weather reporting which would have cost tens of millions of

pounds to implement in the UK for no operational benefit (the Met Office have no use for the proposed quantity of data). However, because no quantitative impact assessment was undertaken this disparity was not identified during drafting. NATS provided DfT with the relevant cost information to support negotiations in Comitology and the relevant provision was consequently amended in the adopted rule - [923/2012](#).)

Such potential costs cannot be claimed to be necessarily factored into the Impact Assessment for the higher level regulation since in some cases the scope and nature of the Implementing Regulations is unknown when the higher level regulation is developed.

It is often not clear whether a non-proportionate regulatory solution is proposed because of an individual official's personal views or a formal institutional position. The Commission may need to increase their oversight of their Agencies/subcontractors to ensure that the principles are being followed.

In some cases, even when the proposed rule as a whole respects the principles, one or more individual provisions may not. The EU-wide single Aeronautical Information Publication envisaged in Regulation [551/2004](#) would in practice have constituted an additional layer of overhead over and above the national equivalents. The concept has not been implemented and is dropped in the draft new version of the Regulation.

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?

As noted in the examples above, the Commission may need to have an explicit role to ensure that draft laws developed by Agencies/subcontractors are proportionate before circulating them to States and industry stakeholders for review.

A case in point is the Data Link Services (DLS) rule ([29/2009](#)) which is currently the subject of considerable debate following a number of implementation issues. A [report](#) by the Commission's European Aviation Safety Agency suggests that it may be impossible to deliver the anticipated operational benefits by complying with the rule as adopted. Work is thus ongoing to identify a way forward, 14 months after the initial implementation date and after industry has already spent tens of millions of pounds to implement a possibly flawed technical solution.

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?

NATS has no particular response to make on this specific point. However, when

considering proportionality it may be useful to be clear about how “not proportionate” is defined/measured. Is it simply if the Cost Benefit Analysis is negative?

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?

There is a need to ensure that proper Impact Assessments are both carried out and taken into account. As noted above, EASA Opinion [05/2011](#) (SERA Part B) presents no numerical analysis of the likely implementation costs, despite these running to hundreds of millions of euros on the text as initially proposed. It is quite possible that neither the EASA nor Commission staff involved had any appreciation of the cost of their proposals.

There is therefore a need to ensure there are appropriate checks and balances. Any institution left unchecked risks acting inappropriately.

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?

No comment.

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

No comment.

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?

On occasion, the Commission may make a proposal which can be challenged as not falling within the competence of the EU at all. A current aviation example is the [Commission’s suggestion](#) that the airspace over the High Seas in the North Atlantic should be subject to the Single European Sky. NATS presumes that legal competence is a separate test from subsidiarity and proportionality.

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