Balance of Competences Consultation Response

Subsidiarity and Proportionality

June 2014

This is a joint response from the Law Society of England and Wales and the Law Society of Scotland (the Law Societies).

The Law Society of England and Wales is the independent professional body, established for solicitors in 1825, that works globally to support and represent its 160,000 members, promoting the highest professional standards and the rule of law.

The Law Society of Scotland is the professional body for Scottish solicitors, established in 1949. It is not only the representative and regulatory body for all practising Scottish solicitors but also has an important duty to work towards the public interest.

Introduction

I. UK membership of the EU has brought significant benefits to solicitors, law firms and their clients, most particularly through the ability to trade, provide services and establish across the EU and to seek effective redress to cross-border legal issues.

II. The legal services sector plays a key role in the UK economy, the UK's competitive advantage and in improving the efficiency of doing business. Legal services directly contributed £27.2bn[1] in turnover to the UK economy in 2011. This included almost £4bn of exports – a substantial volume of which was generated through trade with EU Member States.

III. The UK legal services sector is globally focussed with offices and lawyers based throughout Europe and the world. Law firms exist in order to service the needs of their clients; these are commonly British businesses trading throughout the Internal Market and increasingly non-British clients doing business in the Internal Market.

IV. The legal profession works day-to-day with clients throughout the EU dealing with a broad range of legal issues across a diverse range of fields, from commercial transactions, intellectual property and competition law to employment law, civil and criminal justice and dispute resolution.

V. It is for these reasons that the Law Societies and the UK legal profession have an interest in the stability of the UK's position within the EU and the future role of the UK at the heart of EU rule-making.

VI. The Law Societies nevertheless accept that there is a debate as to the appropriate level of EU competence in various policy areas and have accordingly input into the other reviews of the balance of competences of most relevance to the legal profession.

[1] http://www.ons.gov.uk/ons/rel/abs/annual-business-survey/2011-revised-results/index.html

Scope

Question 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.

1. The Law Societies strongly support the principles of Subsidiarity and Proportionality as essential facets of EU lawmaking.

2. Both principles are enshrined in Article 5 of the Treaty on European Union (TEU) to be read in conjunction with Protocol 2.

3. The principles are therefore to be regarded as an integral part of the Treaties, from which all other EU legislation derives its power and legitimacy. As such they are the corollary of the principle of conferral - the principle that the Union only has power to act if such power has been conferred upon it by the various EU treaties.[2]

4. Accordingly it is important to ensure that all EU legislation complies with Proportionality and with Subsidiarity where appropriate. This goes hand in hand with the idea of legislation and regulation that is fit for purpose. The Law Societies have already raised this point in a number of previous responses to the Balance of Competences Review.

5. The Law Societies understand that the principle of Subsidiarity first appeared in EU law in the context of environmental legislation - an area where there are very obvious advantages from international collaboration as environmental problems occur irrespective of Member State borders. Subsidiarity is intrinsically linked with the idea that decisions should be taken as closely as possible to the citizen.

6. This consultation response focuses on Subsidiarity along the nation state/EU divide but these are not the only levels at which measures are decided. Action can be taken at regional level, be this across a geographical area combining whole Member States or parts thereof, or the narrower concept of localism centring on towns or counties. In the UK-specific context, devolution dictates the level at which certain decisions are made. All of these should be borne in mind when considering the concept of Subsidiarity and its practical effects.

7. The principle of Subsidiarity also means that in a number of areas a broad framework may be put in place but the Member States will retain a reasonable amount of discretion as to the specifics of implementation. In these situations the EU merely plays a coordinating role, allowing different national systems to retain much of their autonomy. This is specifically provided for in a number of directives and can work well in satisfying the requirements of Subsidiarity.

8. The Societies emphasise that it is important to remember that regulation and enforcement need not be carried out at the same level, and indeed the appropriate enforcement agency need not even be a state body. A good example of national enforcement of pan-EU rules is competition law[3] where the rules are set out at EU level and successfully policed by competition authorities at national level working in cooperation with one another to ensure effective enforcement. This is a good example of Proportionality and of ensuring that decisions are taken as close to the citizen as possible.

[2] http://europa.eu/legislation_summaries/institutional_affairs/treaties/lisbon_treaty/ai0017_en.htm
[3] Noted in previous Balance of Competences responses as an area of particular EU success

9. It is also worth noting that Proportionality is widely recognised as a basic principle of good lawmaking, applicable under national laws as well as within the EU legal system. Proportionality is a directly usable tool for striking down legislation: a number of successful cases have been brought before the Court of Justice of the European Union (CJEU)[4] challenging legislation on the grounds that it failed the Proportionality test.

10. While the principles are set out in Article 5, their existence in EU law predates both the Protocol and the TEU itself. Subsidiarity has received relatively little judicial attention although the potential for challenges under the yellow card system is explored further below. However, a significant quantity of jurisprudence has emerged, framing Proportionality and the test by which measures are assessed as compliant or non-compliant with this principle. For the principles to be effective they must be applied properly. It is therefore important that the tests surrounding those principles are clear and that they are interpreted consistently. A consolidated text, bringing together these various rules and tests might therefore prove beneficial in increasing transparency in relation to Proportionality. It could help to further understanding of its practical application and effect within the EU legal system.

Objective Assessment

11. A truly objective assessment of Proportionality, and to some extent of Subsidiarity, may, in certain circumstances, be difficult to achieve as decision-makers may be legitimately influenced by political views. National social and cultural difficulties may also complicate matters.

12. This can be seen, for example, in rules on advertising or labelling for a particular product or service. On the one hand it may be desirable to standardise those rules across the EU to further the free movement of goods and services and in the interests of completing the single market. Yet it may be difficult to achieve this single set of rules while at the same time catering for particular priorities, problems and sensitivities in specific Member States. The burden placed on sellers in a particular set of rules may be considered proportionate by some Member States when compared to their existing national criteria, whereas others may think the burden imposed is disproportionately demanding.

Interpretation

Question 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?

13. As a general rule the EU lawmaking system functions well and for the most part the laws laid down at EU level do comply with Proportionality and Subsidiarity. When the principles are properly applied and the legislation fits within the existing systems, the principles attract little notice but where legislation proves problematic, considerations of non-compliance with Proportionality and Subsidiarity may arise.

14. National parliaments play a key role in scrutinising proposals to ensure compliance with the principle of Subsidiarity. However, the way in which such scrutiny is carried out is left to the discretion of the Member States themselves and as such varies from

[4] Formerly the European Court of Justice

country to country. As noted in the consultation paper, in the UK parliamentary scrutiny is the responsibility of two specially designated committees, one in the House of Commons and the other in the House of Lords. These committees play an important role in assessing proposed EU legislation and other EU issues. The sub-national parliament/assemblies within the UK, to which a number of powers have been devolved, also have a key role to play in ensuring thorough scrutiny of those proposals which relate to devolved issues. Following adoption of measures at an EU level they are also responsible for implementing the legislation. It is important that all the UK entities communicate throughout the process to ensure they have a shared understanding of the EU legislation in order to avoid unnecessary fragmentation within the UK.

Proportionality and case law development[5]

15. Although it is now enshrined in the Treaties, the concept of Proportionality has been developed through case law and is a long-standing principle of the EU (/EC) legal system. The tests applied by the CJEU when assessing proportionality are set out below but further clarification or codification might be beneficial to help ensure its proper application in all circumstances.

16. Broadly speaking proportionality means that a measure must be both suitable and necessary to achieve its aim. If it is unsuitable or unnecessary it will not be proportionate. It should also not be unnecessarily burdensome or restrictive. Assessing Proportionality therefore involves a balancing act between different sets of interests and of the measure in question and importance of the aim as against the effect on a particular individual or group.

17. Proportionality was recognised as early as 1956 as a "generally-accepted rule of law"[6] under the European Coal and Steel Community (ECSC) Treaty. In 1971 it was relied upon in the *Internationale Handelsgesellschaft* case[7], confirming its position as a ground of review. More recent successful challenges can be seen in cases such as *Commission* v *France*[8].

18. Proportionality applies to both the actions taken at EU level and the actions of Member States as these relate to EU law. In the former context it is used as a means of reviewing EU measures and their impact upon individuals or legal persons and as thus safeguards the freedom of action of EU citizens and entities. Following the introduction of Article 5(3) it can be seen as a means of preserving the autonomy of the Member States in addition to its original purpose. It is also used to as a ground for assessing national measures by the Member States which affect one (or more) of the fundamental freedoms.

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[5] The development of case law is set out in numerous EU law textbooks and the subsequent case law evidences well established tests which shape the principle of Proportionality. This response includes references to some more modern cases which have looked at Proportionality with a view to providing practical examples of how the CJEU has interpreted these in recent years and the sorts of situations in which Proportionality may be used as the basis for a challenge to EU or Member State legislation.

[6] Case C-8/55 *Fédération Charbonnière de Belgique* v *High Authority of the European Coal and Steel Community*

[7] Case C-11/70 *Internationale Handeslgesellschaft mbH* v *Einfuhr- und Vorratsstelle für Getreide und Futtermittel*

[8] Case C-212/03 *Commission v France*

Reviewing EU measures

19. One of the earliest cases to examine Proportionality was the 1976 case of *Bela-Mühle*[9] concerning Council Regulation 563/76 of 15 March 1976 on the compulsory purchase of skimmed-milk powder held by intervention agencies for use in feeding stuffs. The case was referred for a preliminary ruling by Landgericht Oldenburg[10] and the principle of Proportionality was considered in conjunction with the prohibition of discrimination. The CJEU found that the obligation set out in the regulation was discriminatory "nor...was such an obligation necessary in order to obtain the objective in view". It therefore failed the Proportionality test and the CJEU declared that the regulation was null and void.

20. The idea of doing only what is necessary is now established as a key aspect of proportionality. A more recent example of successful challenge to EU legislation can be seen in the joined cases C-453/03, C-11/04, C-12/04 and C-194/04. Preliminary reference cases were put to the CJEU looking at, among other things, Article 1(1)(b) of Directive 2002/2[11] which imposed an obligation on manufacturers to disclose formulas for the composition of their products. In its judgment the CJEU ruled that "an obligation of this kind cannot be justified by the objective of protecting public health which is being pursued and manifestly beyond what is necessary to obtain that objective" and ruled that it was "invalid in the light of the principle of proportionality".

21. Proportionality also dictates that if there a number of options available, then the legislator should adopt the least onerous.[12] This has been confirmed in subsequent case law.[13] It is also important to note that a measure is not justified merely because a more restrictive one could have been chosen instead.[14] This is logical and manifestly sensible.

The "manifestly inappropriate test"

22. As stated above, the general test of Proportionality is a two-part test looking at (1) suitability and (2) necessity, in pursuing a legitimate aim.

23. In the case of policy measures, the CJEU has traditionally seemed unwilling to set stringent limitations on the actions of the EU institutions. In such cases the CJEU exercises a low level of review and will only strike down a measure where it considers that it is "manifestly inappropriate" to achieve its stated aim.[15] The "manifestly inappropriate" test relates to both the suitability and necessity aspects of the proportionality test. It is applied to both economic and social policy measures. The

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[9] Case C-114/76 *Bela-Mühle Josef Bergmann KG* v *Grows-Farm GmbH & Co. KG*

[10] One of the German regional courts

[11] Directive 2002/2/EC of the European Parliament and of the Council of 28 January 2002 amending Council Directive 79/373/EEC on the circulation of compound feedingstuffs and repealing Commission Directive 91/357/EEC

[12] See Case T-162/94 *NMB France SARL, NMB-Minebea-GmbH, NMB UK Ltd and NMB Italia Srl* v *Commission*

[13] See for example, the CJEU's analysis in Case T-170/06 *Alrosa v Commission* where the court reiterates "when there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued*".*

[14] As Jacobs AG commented in Case C-24/90 *Hauptzollamt Hamburg-Jonas* v *Werner Faust Offene Handelsgesellschaft KG:* "The use of a canon ball to kill a fly cannot be defended on the ground that a nuclear missile might have been used instead."

[15] See for example C-331/88 *Fedesa and Others* at para 14 and T-*162/94 NMB France and Others v Commission*

judgments do not, however, give the institutions carte blanche to ignore Proportionality merely because there is an element of policy judgement as can be seen successful challenges to legislation referred to above.

24. It should also be noted that the actual effect of a measure and whether or not it has achieved its stated aim are not deciding factors in determining whether or not a measure is manifestly inappropriate.[16] While this is understandable, the success (or otherwise) of a measure should still be regarded as a relevant factor in assessing all the circumstances.

25. The interplay between the basic proportionality test and the "manifestly inappropriate" test is well summarised in the case T-340/99 *Arne Mathisen AS v Council of the European Union* where the applicant argued that the contested regulation was "manifestly inappropriate and in breach of the principle of proportionality". The CJEU in its findings acknowledged Proportionality as set out in Article 5(3) and that "the legality of Community rules is subject to the condition that the means employed must be appropriate to attainment of the legitimate objective pursued and must not go further than is necessary to attain it, and where there is a choice of appropriate measures it is necessary, in principle, to choose the least onerous." However, it also noted the "broad discretion which accords with the political responsibilities" granted by the treaties and applied the manifestly inappropriate test", dismissing the challenge on the facts of the case.

26. A further example an unsuccessful challenge can be seen in case C-84/94 *United Kingdom v Council* where the CJEU rejected the UK's challenge to the Working Time Directive (WTD)[17]. The UK argued that the measure was disproportionate to the aims it was seeking to achieve but the CJEU deemed the WTD to be the result of a complex social policy choice and applied a low level of review, concluding that there had been no "manifest error". There are a number of legitimate derogations to the rules in the WTD meaning that solicitors can opt out of the Directive, but there may be complaints from other sectors which are not similarly exempt.

27. It seems, therefore, that although there are a number of well-established tests, there is no easily identifiable set of criteria by which to measure the Proportionality of EU actions. The number of successful appeal cases may also suggest that the application of Proportionality at inception is not as rigorous as it could be, although it is difficult to draw any firm conclusions without comprehensive statistical data and analysis. It should also be noted that the additional direction accorded to Article 5(3) with the coming into force of the Protocol is a relatively new development, the full effects of which it is difficult to assess at this stage.

Assessment of national measures affecting fundamental freedoms

28. Proportionality acts as a yardstick for all EU actors, including the Member States themselves, in line with the obligations set out in Article 28 TEU. One example is where a Member State wishes to set down requirements or conditions, for example on the basis of consumer protection or public health, the incidental effect of which is to limit one of the single market freedoms. Such action is not automatically forbidden or invalid but there is a balancing act to be carried out. Legislation may be challenged if the measures are considered to be disproportionate to the problem they are trying to solve.

[16] See for example C-40/72 *Schroeder KG v Germany* (preliminary ruling)
[17] Directive 93/104 concerning certain aspects of the organization of working time

29. National measures are judged by a stricter standard of Proportionality with a more thorough assessment of necessity together with consideration of less restrictive alternatives. As set down in *Van Duyn*[18] national measures which impinge upon exercise of the fundamental freedoms are allowed only where "strictly necessary".[19]

30. In practice much of the litigation against national measures relates to exception clauses such as the derogations set out in Article 30[20]. Again proportionality turns on the facts of the case. On the one hand this flexibility can be helpful in allowing Member States greater leeway to take action as long as it can be objective justified, but it can also lead to uncertainty.

31. The "less restrictive alternative" test[21] is complementary to the idea of necessity. Member States are not allowed to restrict trade more than necessary to obtain the objective of the measure.[22] A national measure which impinges upon the exercise of a fundamental freedom by an actor from another Member State will only be considered proportionate where the same result could not be achieved by less restrictive means.[23] This test may be regarded as a useful tool in facilitating the effective functioning of the internal market.

32. The CJEU has also ruled that just because another Member State applies a less restrictive regime, this does not necessarily mean that a national measure will be regarded as disproportionate.[24] This is sensible for two reasons. Firstly, and most importantly, it allows Member States to retain autonomy and to pursue the course of action best suited to the circumstances prevailing in their own jurisdiction. Secondly, it avoids the potential for a race to the bottom.

The role of national courts

33. The role of national courts is also particularly important in relation to review of national measures. The CJEU decides on the validity of EU acts and it makes rulings on EU law. In cases where a preliminary reference relates to the proportionality of a Member State measure, the final decision may be made by the CJEU but it can also be left to

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[18] Case C-41/74 *Yvonne van Duyn* v *Home Office* (preliminary reference)

[19] See also Case C-120/78 "*Cassis de Dijon", Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein;* and Case C-415/93 *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman*

[20] of the Treaty on the Functioning of the European Union (TFEU)

[21] See for example case C124/81 *Commission v UK* (the "*UHT"* case)

[22] Case C-42/82 *Commission v France* For a more recent example of application see Case C-212/03 *Commission v France* showing application of Proportionality in the context of pharmaceuticals

[23] See Case C-178/84 *Commission v Germany* (the "*German Beer"* case) A challenge was brought to the German *Biersteuergesetz* (law on beer duty) prohibiting the marketing of beers which were lawfully manufactured and marketed in other Member States if they did not comply with the *Biersteuergesetz*. It included manufacturing rules which applied only to German breweries and rules on the designation "*Bier*" (bier) which applied to both domestically produced and imported beer. The rules included rules on additives which amounted to a general ban on additives. The CJEU ruled that "since the prohibition [was] contrary to the principle of proportionality", it was not covered by the Article 36 EEC (now TFEU) exception allowing derogation from Article 30 EEC (now TFEU) on the grounds of protection of public health. The Court refers to the "less restrictive alternative" test at para 28.
For more recent example, see Case C-192/01 *Commission v Denmark*

[24] See Case C-384/93 *Alpine Investments v Minister van Financiën* (preliminary ruling)

the national court's discretion. While the judgement must answer the question posed, and although there may be a danger of fragmentation if too much discretion rests with national courts, broadly speaking the potential for national courts to play such an active role is positive. For practical reasons a national court may be better placed to carry out the balancing act central to the principle of proportionality.[25] Furthermore, this respects Member State autonomy in areas where there is no harmonisation and may even be seen to touch upon the idea of Subsidiarity and the idea of decisions being taken as close to the citizen as possible.

Subsidiarity

34. There is very little case law on Subsidiarity. This is unsurprising as Subsidiarity relates to allocation of power and may therefore be viewed as more overtly political. It does not lend itself to judicial review as readily as Proportionality and it is therefore more likely to appear as a procedural ground.[26] It does sometimes appear as a supporting principle or where the measure being challenged makes specific reference to it.[27] The CJEU has seemed reluctant to consider it even when brought a specific ground. In the *Tobacco Advertising* case[28] Germany put forward infringement of Subsidiarity as one of the grounds of its claim that the Tobacco Advertising Directive was invalid. However, the CJEU decided that the Directive failed on the basis that the EU did not have competence so Subsidiarity was not considered.

35. Protocol 2 reinforces the procedural duties in relation to Subsidiarity but does not offer any assistance on interpretation itself and the lack of case law on Subsidiarity contrasts starkly with the plethora of cases which give shape to Proportionality.

36. The CJEU 's reluctance to carry out detailed review in relation to Subsidiarity is a result of the political nature of the principle. Although, in some areas it is possible to carry out an objective assessment, this will not always be possible, even if the decision-makers are acting in good faith.

37. In practical terms all legislation must be approved by Member States. Although the position of Member State governments may not always accord with the view of their parliaments or parliamentary chambers as a whole, they are accountable to them[29], including in relation to actions in Council. If a proposal receives Council approval then this may imply that Member States do not feel their discretion or competence is being impinged upon.

38. However, this does not mean that the definition of Subsidiarity is sufficiently clear if it is to operate as a ground of review. Some practitioners have expressed the view that expanding upon the principle, the tests by which it is to be assessed and detailing relevant factors to be taken into consideration, might be of assistance to all actors, from the Commission and the CJEU to the Member State Governments and parliaments/parliamentary chambers.

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[25] and it is possible to assess on an objective basis whether this is indeed the case.
[26] See Takis Tridimas, *The General Principles of EU law* (Oxford University Press: 2nd Edition, 2006) at page 185
[27] See for example the "*German firemen"* case , Case C-103/01 *Commission v Germany*
[28] Case C-376/98 *Germany v European Parliament and Council*
[29] The level of, and mechanisms for, accountability, are a matter for Member States to determine at national level.

Practical Examples

39. A positive example of an EU instrument which the Societies consider to strike the right balance can be seen in the current Insolvency Regulation which has brought benefits to business and creditors by providing a choice of law instrument and reducing legal uncertainty and cost around insolvencies with cross-border implications.[30] However, the Societies would not favour harmonisation of insolvency law which would go beyond what is necessary and could potentially bring about significant disadvantages.

40. The Law Society of England and Wales of has identified a number of concerns in this respect regarding the current Commission proposal for a Common European Sales Law (CESL), which it believes to be a disproportionate policy response to an unclear problem and to infringe the Subsidiarity principle. The Society did not agree that it had been shown that lack of a common law of contract poses a significant barrier to cross border trade. The Society also considers that the introduction of the instrument, rather than save costs,[31] may create additional costs, ultimately to be borne by businesses and consumers.[32]The Society is of the view that the Commission should have, but did not, consider alternative solutions which could be effected horizontally at the Member State level. The Society supports efforts to improve the functioning of the Internal Market but does not agree that a need for the CESL has been shown. It believes that there are more important factors in determining whether individuals and businesses enter into cross-border trade, such as access to effective redress, differing advertising rules, tax, etc. Further, the Society is concerned that this initiative would cause uncertainty, not only in the interpretation of the new instrument but also in its scope of application, in its relationship to existing law and whether there is a legal basis under the treaties to create it. The Law Society of England and Wales also considers that the introduction of the instrument is likely to create additional costs ultimately to be borne by businesses and consumers.[33]

41. The Law Society of Scotland has consistently supported CESL. It considers that a uniform text would enable both consumers and SMEs to refer to an official translation without the need for SMEs to seek foreign legal advice on translation services. The CESL is intended to cover simple transactions and as such an in-depth legal understanding on the part of consumers or SMEs themselves is not required. A single system is preferable to a proliferation of national laws to cover the transactions envisaged.

42. The differing positions in the two Law Society opinions demonstrate the point referred to above that assessment of compliance with the principles of Subsidiarity and Proportionality is inextricably linked to policy positions and individual views of those who are analysing a particular proposal or piece of legislation.

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[30] The Regulation is a good example of the correct application of Subsidiarity but further clarity could be provided and accordingly the Societies welcome the current Commission review of the legislation.
[31] As the Commission's impact assessment indicated
[32] See further latest joint comments by the Law Society and Bar Council on the Common European Sales Law (April 2013): http://international.lawsociety.org.uk/files/Law%20Society%20and%20Bar%20Council_CESL%20briefing%20for%20MEPs%20April%202013.pdf.
[33] See further latest joint comments by the Law Society and Bar Council on the Common European Sales Law (April 2013): http://international.lawsociety.org.uk/files/Law%20Society%20and%20Bar%20Council_CESL%20briefing%20for%20MEPs%20April%202013.pdf.

Identifying problems: ensuring thorough research and impact assessments

43. One issue very closely related to Subsidiarity, and perhaps in particular to Proportionality, is the importance of accurate, independent and objective research into the law reform or legislation that is needed before any proposal is put forward. Only when a problem has been correctly identified can one hope to achieve accurate and useful impact assessments in the early stages.

44. The Law Societies support solid and comprehensive cost-benefit analysis of legislative proposals. It would be particularly helpful if there were a greater consultation on Commission proposals to facilitate this analysis. The current consultations are often general and high-level without any follow-up consultation on the legislative proposal itself.

45. Similarly, where major amendments are put forward during the ensuing legislative process, it might be appropriate to carry out a specific assessment to examine the effect of the change. This would not relate to minor drafting changes but would apply where new entirely new policy measures are incorporated into draft legislation, for example in situations such as the curtailing of bankers' bonuses under CRD IV, a development which had not been considered in the original Commission proposal. This could help to ensure that the final legislation remains consistent with the principles of Proportionality.

46. The quality of the Commission impact assessments themselves could also be improved. One way of achieving this might be to conduct the impact assessment as a first step, based on which a legislative proposal is drafted instead of the current practice of drafting the impact assessment and the proposal simultaneously.

47. Closely related to this are situations where a question arises as to whether action is necessary at all. If Proportionality and Subsidiarity are to be applied properly, action must only be taken where there is a legitimate objective to be pursued or problem to be solved. If action is unnecessary then by definition it cannot properly satisfy either principle. An example of the difficulty faced in determining this can be seen in relation to the Commission's recent work on a potential European Insurance Contract Law. While the view of the Law Society of England and Wales and others in relation to the Commission's working group[34] on this matter was that legislative action in this area is not necessary nor capable of resolving the problem concerning cross-border insurance contracts, other stakeholders, such as the Law Society of Scotland and academics consider that legislative action such as the introduction of an Optional Instrument could contribute to improving the current situation. In order to determine whether action is necessary at all, a solid and comprehensive evaluation and analysis, both qualitatively and quantitatively, of the current situation will need to be undertaken.

48. In assessing the need for action, legislators at all levels should pay proper regard to both existing legislation, and legislation which has been agreed but is not yet in force. For example, the Consumer Rights Directive is only now reaching the implementation phase in Member States and recent legislation establishing a framework for alternative dispute resolution is also due to come into force in the coming years. It is important to ensure that such measures have time to establish themselves before a reliable assessment of their effectiveness can be made. This can help with deciding

[34] http://ec.europa.eu/justice/contract/insurance/expert-group/index_en.htm

whether further legislative action is required at all.[35] As set out in the previous response to the Competition and Consumer consultation, the rationale for future legislation needs to be clear and rigorous and should be targeted at resolving significant and persistent problems which genuinely inhibit the effective operation of the single market. Measures such as the Consumer Rights Directive and the new package on Alternative Dispute Resolution[36] must be allowed to deliver before it is possible to determine whether further action is required.

49. The Law Societies do not offer a detailed response on interpretation by other Member States, save to comment that the CJEU plays a crucial role in fostering continuity, coherence and consistency of judgment across the union.

50. The Commission, as the body which instigates most EU action, is a natural focal point for considerations of Subsidiarity but this does not mean that maintaining this principle is the sole responsibility of the Commission. This is commented upon in further detail below in relation to scrutiny on the part of the Member States and the system for review of legislation set out in Protocol 2 to the TEU.

Application

Question 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?

51. At a national level, the dedicated committees of both the House of Commons and the House of Lords perform a vital function in scrutinising EU legislation. As noted above, where legislation concerns devolved issues, it is imperative that the Scottish parliament, and national assemblies of Wales and Northern Ireland, are involved in this process of scrutinising proposed legislation. The sheer volume of EU legislation makes scrutiny, at whatever level, a challenging task. Providing education and training to national legislators to ensure that they have a thorough understanding of the EU Institutions and legislative processes could further enhance scrutiny at the national level.[37]

52. Ensuring thorough and objective research into perceived problems is necessary to evaluate: whether any action is necessary; the level at which measures should be introduced; and that the action itself will be workable and appropriate in achieving its stated objectives. Greater participation from national parliaments (or other legislative bodies at regional or local levels) could perhaps assist in raising the quality of such assessments. High quality impact assessments are essential in determining the proper application of Subsidiarity and Proportionality.

[35] The Law Society of England and Wales notes that the perceived problem which the CESL is aimed at solving may in fact be dealt with by such existing measures.
[36] In conjunction with the Online Dispute Resolution framework
[37] Different mechanisms whereby EU law is incorporated or imported into the domestic legal system may also play a role in parliamentary scrutiny. For example in the UK this occurs via the European Communities Act of 1972 whereas in France the constitution provides for automatic inclusion as international agreements are recognised within the legal hierarchy and as such apply automatically without need for further implementation. Different constitutional systems may be important in other ways too, for example Parliamentary Sovereignty is recognised as absolute in the UK whereas in France, laws are assessed against the constitution and will be invalid if they do not conform to constitutional norms.

Subsidiarity and the Yellow Card/Orange Card System

53. The Subsidiarity principle governs the level at which action is taken in areas where competence is shared between the EU and the Member States.

54. The role played by national parliaments in assessing compliance of Commission proposals with this principle and the procedures for raising objections are set out in Protocol 2 to TEU, which was inserted in 2007 with the signing of the Treaty of Lisbon. These mechanisms have been nicknamed the "yellow card" and "orange card".

The Yellow Card

55. Each Member State is allocated two votes under the yellow card system. In dualist systems such as the UK one vote is allocated to each house and a double vote in the case of Member States which do not operate a two-tier parliamentary system. If national parliaments or chambers believe that a proposal infringes the principle of Subsidiarity, they must send reasoned opinions to the Commission. According to the aggregate vote system, opinions representing a third of the votes must support the view the test of Subsidiarity is not met if a proposal is to be challenged successfully on this basis. Following the review, the Commission can choose to maintain, amend, or withdraw the legislation, giving reasons to accompany its decision.

56. Yet there is a logical inconsistency in this aggregate vote system: Subsidiarity is a fundamental principle of EU law, enshrined in the treaties and as such may[38] give rise to legal challenge resulting in judicial review. Therefore a mere proposal requires agreement on the part of a third of the national parliaments before it will even be reconsidered but a fully fledged law could be struck down if a coherent case were put forward by just one Member State.

57. The yellow card was first used in May 2012 in response to a Commission proposal for a regulation 'on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services',[39] also known as Monti II. The requisite proportion of national parliaments/chambers considered that this proposal failed to comply with the Subsidiarity principle. They issued a yellow card and the proposal was eventually withdrawn.

58. It does, of course, make sense that laws remain open to judicial review in this way but it might be more logical/consistent to give more weight, or at least pay more attention, to the objections of either a single Member State or a smaller grouping than is currently required at the earlier stage (see further below). If a proposal does not meet the Subsidiarity test, then it is much better if this can be established at the earlier stage.

The EPPO Example

59. The recent example of the proposed European Public Prosecutor's Office (EPPO) perfectly illustrates the problems with the existing yellow card system.

60. In the recent Commission legislative proposal on the establishment of a European Public Prosecutor's Office, the Law Societies welcomed the raising of the yellow card by fourteen chambers of national parliaments, in accordance with Article 6 and Article

[38] At least theoretically
[39] ec.europa.eu/social/BlobServlet?docId=7480&langId=en

7(2) of Protocol 2. They shared the House of Lords' view that the legislative proposal is at odds with the principle of Subsidiarity, as an unnecessary, excessive and insufficiently justified measure[40].

61. However, following the publication of a Commission Communication that reviewed the EPPO proposal with regard to the principle of Subsidiarity,[41] the Law Societies are deeply concerned about the lack of scrutiny faced by the Commission when reviewing the reasoned opinions of national parliaments. While the Commission's Communication referred to the concerns raised by national parliaments, no additional evidence was provided by the Commission to support its claim that the proposal was in line with the principle of Subsidiarity. For example, the Commission Communication acknowledged the House of Commons' reasoned opinion which outlined that the Commission did not sufficiently explain the reasons why its proposal was compatible with the principle of Subsidiarity. However, in response to this concern, the Commission simply disagreed with the House of Commons without providing any additional evidence to support their argument.

62. The Law Societies are of the position that the Commission's approach to the yellow card procedure with regard to the EPPO shows the need for additional scrutiny of the Commission's procedures and competence when reviewing a Subsidiarity concern. Additional evidence must always be provided by the Commission in undertaking a Subsidiarity review in order to ensure that the national parliaments' concerns are addressed sufficiently.

The Orange Card

63. Some commentators have argued that the yellow card procedure does not need to be reformed because of the possibility for recourse to use of the orange card. The "orange card", so called because it stops short of an outright veto, comes into play when the reasoned opinions on non-compliance sent by national parliaments represent (or exceed) a simple majority of the voted. If this occurs, the Commission is required to give a reasoned opinion setting out why it considers that the proposal does comply with Subsidiarity. This is then submitted to the European Parliament and the Council together with the reasoned opinions to allow the EU legislator to consider the merits of each side's arguments. A vote by 55% of the Members of the Council or majority of the European Parliament that the proposal is incompatible with Subsidiarity will mean that it "shall not be given further consideration"[42]. Only one of these two institutions need reject the proposal for it to be struck down.

64. There are a number of problems with the use of the orange card. The first stems from the fact that it may be regarded as a "nuclear" option; the political reality is that Member States will consider this a last resort which they will only countenance in extreme circumstances. There is also a problem is that responsibility for exercising the yellow card lies with the national parliaments, whereas the point at which the orange card "turns red" is decided by national governments. It may be that in some cases the political case for not exercising the orange card overrides the legitimate

[40] (House of Lords European Union Committee, 3rd Report of Session 2013-14, Subsidiarity Assessment: The European Public Prosecutor's Office, October 2013)
[41] COM(2013) 851 final Communication from the Commission to the European Parliament, the Council and the National Parliaments on the review of the proposal for a Council Regulation on the establishment of a European Public Prosecutor's Office with regard to the principle of Subsidiarity, in accordance with Protocol No 2
[42] Article 7(3) of Protocol 2

concerns expressed by parliament and a national government decides to follow its own agenda. Political realities may also affect the European Parliament's decision also as it may decide not to object to a proposal if it is an area where it is keen to legislate.

Question 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?

65. The principles of Subsidiarity and Proportionality are intended to serve the interests of better law-making. It is, however, important to remember that they are distinct concepts, representing different tests and performing very different functions within the lawmaking process. It would be possible for each to function and to maintain its place on a stand-alone basis but together they determine the fundamental rationale at the heart of EU lawmaking. When applied properly, they contribute to the creation of a more sensible and effective legal system within the EU.

66. Subsidiarity applies only to areas of shared competence. It relates to the level at which action is taken, based on the premise that action should only be taken at EU level "if and is so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level."[43]

67. It is therefore entirely appropriate that national parliaments should have a role in assessing Subsidiarity. It is logical that the need for any proposed legislation should be questioned at the outset and Member States given the opportunity to challenge an EU action if they think it fails to comply with Subsidiarity. Subsidiarity is intended to ensure that action is taken as close as possible to the citizen and therefore action should only be taken at EU level if necessary.

68. Proportionality is a separate consideration and essentially looks not at the "whether" but at the "how" of any given action. Proportionality is therefore not related to the level at which a decision is taken but rather the scope and detail of the legislation itself. This is a very different consideration. Once it has been established that the EU has competence, (either because it has exclusive competence or, in the case of shared competence, because Subsidiarity determines that EU action is appropriate,) a proposal can be put forward. It is essential that such action does not go beyond what is necessary to achieve the stated objectives, thus minimising the burden placed on parties affected by the measures.

69. Proportionality should be assessed as objectively as possible but it must also be recognised that consideration of what is proportionate may be inextricably linked with political beliefs and personal views. While it is important for the test to be a legal one which can be applied by the CJEU where appropriate, it is the final result in the proposal as a whole which must meet the Proportionality test. It therefore makes sense for the test to be borne in mind throughout the lawmaking process.

70. All the EU institutions have a responsibility to ensure that the principle of Proportionality is complied with. The European Parliament as a whole, and individual MEPs, should bear this in mind when assessing a Commission proposal and

[43] Article 5 TEU

suggesting modifications thereto. Similarly Member States have the opportunity to assess whether the detailed proposal is indeed proportionate during Council deliberations.

71. The detail available at this stage is crucial to the proper consideration of Proportionality. It is possible to have a broad idea for EU action which complies with the Subsidiarity principle but for the proposal itself to fail the Proportionality test. This is one of the most obvious reasons why Proportionality and Subsidiarity cannot be dealt with in the same way.

Future options and challenges

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

72. In relation to Subsidiarity, one possibility would be to strengthen the yellow card system. It might also be helpful to impose more stringent obligations on the Commission where a number of Member State parliaments/parliamentary chambers raise concerns that a Commission proposal fails to comply with the principle, or indeed in cases where they do not consider that sufficient evidence has been provided in the impact assessment. New rules could ensure that the Commission, when faced with a yellow card could not merely provide an explanation but submit the same proposal and then go ahead with it, regardless of the national parliaments' views. If, upon offering a thorough analysis, the parties felt that the case for Subsidiarity had been made, then of course the proposal should be allowed to proceed, but where this has not been achieved the Commission should be forced to address these concerns more fully. This would help to avoid situations such as the EPPO where a proposal is allowed to continue despite significant opposition.

73. The corollary of better adherence to Proportionality and Subsidiarity principles is more emphasis on properly measuring the effectiveness of existing policies and measures after they have been implemented. This should be complemented by a greater willingness to repeal poor legislation which is not achieving the ends it was supposed to achieve and reforming the existing body of rules where there is poor drafting or there are inconsistencies with other legislation.[44]

Article 352 TFEU ('flexibility clause')

Question 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?

74. The catch-all treaty basis under Article 352 is a logical step if all Member States agree that a certain action should be undertaken. The requirement for unanimity is key as this safeguards Member State powers, ensuring that the EU does not go beyond its anticipated remit against the wishes of a Member State. Where all Member States agree on the action in question, however, it makes sense that it should be possible to carry this out using EU structures already in place. This also means that it can be brought within the EU legal framework, facilitating coherence and consistency.

75. Nonetheless, the provision should be used sparingly, not least so that EU law develops in accordance with the expectations of its citizens. If it were used too

[44] For example multiple definitions of the same concept, such as "consumer" (See further explanation in the Joint Response of the Law Societies to the Balance of Competences review on Competition and Consumer Policy)

frequently, or to extend competence in a particular sphere, this might more appropriately be dealt with by treaty reform in order to provide the requisite legal basis on a more formal footing.

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

The Law Societies offer no comment on this question.

Other

Question 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?

The Law Societies offer no comment on this question.