

CBI Response to the Balance of Competences Review on Subsidiarity and Proportionality

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Introduction

For British business, large and small, the response to questions about the UK's future in the EU has been unequivocal: we should remain *in* a reformed European Union. Membership of the EU's Single Market remains fundamental to our global economic future. The CBI has comprehensively and objectively analysed the advantages and disadvantages of EU membership and concluded that the benefits vastly outweigh the costs.

However, the EU is far from perfect and with wider changes in the global economy, the EU must seize the opportunity to reform in order to keep pace in an increasingly globalised world. Business wants an EU that is fully focused on jobs and growth. This means being more open and outward looking to facilitate new trade opportunities, updating the Single Market for the 21st century; and changing the EU's regulatory approach to drive European competitiveness. It also means ensuring the EU works for all Member States – whether they are in the Eurozone or not – and striking the right balance between what is done at EU-level and by individual Member States.

The CBI therefore welcomes the opportunity to provide evidence to the Government's review of the Balance of Competences between the United Kingdom and the European Union. Our response focuses on the call for evidence questions in the review of Subsidiarity and Proportionality.

Executive Summary

British business sees the principles of subsidiarity and proportionality as the correct vehicles to manage the balance of competences between the EU and its Member States. However, the principles of subsidiarity and proportionality have been insufficiently applied in practice resulting in a feeling of 'mission creep' by Europe into areas of 'lifestyle regulation.' This has contributed to the EU's legitimacy being undermined in a number of Member States.

The CBI is calling for the principles to be re-asserted and a much less prescriptive approach to EU legislation to be taken. This requires a change of culture so that the default position is 'Europe where necessary, national where possible' backed-up by action from national parliaments using the Yellow Card procedure more effectively to ensure the principle of subsidiarity is respected.

Practically speaking, business wants a moratorium on any new regulation where adequate national legislation already exists until the principle of subsidiarity is fully restored. The Commission's Impact Assessment process could be a vehicle for determining whether a proposal from Europe is likely to genuinely add value.

The UK government has an important role to play to ensure the principles of subsidiarity and proportionality are reasserted. It can do this by building alliances in Europe, improving scrutiny of proposals by Parliament, and by resisting the temptation towards 'gold-plating' of EU regulation when transposing them into national law.



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The principles of Subsidiarity and Proportionality have not been sufficiently applied in practice

The CBI believes that the principles of subsidiarity and proportionality are the correct vehicles for managing the balance of competences between the European Union and its Member States. The Treaties clearly set out the limits of the EU's remit in terms of the breadth and depth of its activities.

However, in practice the European Commission has not sufficiently adhered to these principles, contributing to the sense of 'mission creep' by Europe with unnecessary regulation in areas like employment law and other aspects of 'lifestyle regulation'. Different Member States have also had varied interpretation of the principles resulting in complexity around their implementation.

Under subsidiarity, the EU is only meant to act if it is better placed than at national level because of the scale or effects of the proposed action. However, in a large number of areas, under 'shared competence', the EU is able to legislate while in theory respecting the principle of subsidiarity. In these circumstances, the EU is only meant to intervene in a particular policy area if it is able to act more effectively than Member States. In practice the Commission has – backed up by judicial reviews – taken a very narrow interpretation of what it must do in order to show that it has respected the principle.

The outcome has been that the EU has moved too far from 'adding value' to 'adding functions.' The sheer volume of EU legislation and lack of respect for subsidiarity has undermined its legitimacy in many Member States.

Meanwhile, Member States are also bound to the principle of proportionality when applying EU legislation due to the fact that the Treaty refers to 'action by the Community'. Under the principle of proportionality, the content and form of EU action must not exceed what is necessary to achieve the objectives of the EU treaties. There have been varying levels of interpretation regarding this principle and on a number of occasions, and it could be said that EU legislation has exceeded what was necessary to achieve the objectives laid out.

The principles need reasserting and a much less prescriptive approach to EU legislation is required

As the balance of competence between the EU and its Member States is broadly correct, it is the principles of subsidiarity and proportionality which need reasserting rather than the balance of competences which need unpicking.

It is worth emphasising here that the UK is not the only country considering the EU's remit. The CBI agreed with conclusions from the recent Dutch initiative which saw a subsidiarity and proportionality review carried out across government departments. The review concluded that the EU should take a backseat approach and allow Member States to take action in areas such as social security systems, working conditions, welfare and health and safety legislation.

A change of culture is needed in the EU's institutions in order to honour the principles of subsidiarity and proportionality and better respect the boundaries set by Member States. In this regard, the Commission must refocus its activities based on a more limited interpretation of its remit to ensure that "Europe where necessary, national where possible" is the default position. The EU should step back from pushing further legislation in the areas of social and employment law and 'lifestyle' regulation such as rules on diets and gambling, leaving more to the discretion of Member States as to how they achieve the ends agreed at European level.

National Parliaments must increase their engagement and actively build coalitions to restore the principle of subsidiarity in EU policymaking. As part of the Lisbon Treaty, the European Parliament is meant to protect the right of national parliaments to object to EU legislation should they consider them to concern matters better dealt with at the national level. The Yellow Card procedure has therefore proved a welcome introduction in the EU legislative process. The CBI calls upon national parliaments to step up their level of engagement and make effective use of this tool in order to ensure that the principle of subsidiarity is respected. The CBI would be happy to consider other proposals to boost the role of national parliaments in EU decision making – such as red cards or green cards – but business wants to see decisions taken on the basis of alliance-building rather than national vetoes which could compromise progress on deepening the Single Market.

Until the principle of subsidiarity is fully restored, there should be a moratorium on any new regulation where adequate legislation already exists or there is a strong argument for national decision making, including in the area of social and employment law. Making the opt-out from provisions of the Working Time Directive permanent would be a positive step in the right direction.

The principle of subsidiarity could be built-in to the EU's policymaking process through the Impact Assessment system. In its *Our Global Future* report the CBI called for the Impact Assessment Board (IAB) to be strengthened by giving greater consideration to IAB opinion on Commission Impact Assessments before the Commission adopts a proposal, and by making regular use of independent expert knowledge. In addition to the Commission's own assessment of subsidiarity and proportionality as part of this process, input could be sought from both national parliaments and the European Council at this stage to ensure they are satisfied the proposed action complies with the principles and spirit of subsidiarity and proportionality. Should a proposal be considered to not comply, this would provide a mechanism for the Commission to revise it or drop it.

The UK Government should improve its engagement strategy in order to push the EU to reassert these principles

The UK should increase interaction with EU issues, policy and politics at home to allow for better engagement in Europe and a better relationship with the EU overall. The UK should look to learn best practices from national parliaments across Europe in order to raise the level of debate on matters related to the EU in the UK Parliament, either before Ministers attend Council meetings or on the specifics of EU legislation.

The government must use the flexibility given at EU level when transposing legislation and ensure that it does not put the British economy and businesses at a disadvantage. Nearly half of UK businesses perceive UK 'gold plating' to be the main challenge with EU regulation. It is easy to blame the EU for adding competences and setting prescriptive rules, but government must ensure that it is doing all it can to interpret them in a way which reduces the regulatory burden as far as possible within the rules.

The UK must vigorously resist expansive judgements by the European Court of Justice which do not adhere to principles of subsidiarity and proportionality. The CBI believes that the UK must defend against ECJ judgements which go beyond what could have been foreseen when EU rules were introduced. A recent example of this, which the UK must resist against, is the ECJ's ruling in the *Lock v British Gas Trading Limited* case in which employers may have to change the way they calculate holiday pay to take account of commission payments and could face retrospective claims relating to earlier periods of annual leave.

The UK must focus on its engagement strategy and contribution to the process in order to achieve the maximum benefits out of the EU. The UK should attempt to build links with other Member State governments and parliaments to improve co-operation and ensure that the procedures mentioned above are effective tools to uphold the principle of subsidiarity. The UK has best realised its interests when it has built strong coalitions in Council to robustly defend its interests during negotiations. For example, in response to suggested amendments to the 1992 Directive on pregnant workers, the UK was able to block damaging proposals during the negotiation phase by building an alliance with Germany and other Member States who also believed the proposals overstepped the boundaries of subsidiarity and would increase costs for both companies and governments without solid evidence.

About the CBI

The CBI is the UK's leading business organisation speaking on behalf of 190,000 businesses of all sizes and sectors which together employ nearly 7 million people, about one third of the private sector-employed workforce.

The CBI helps create and sustain the conditions in which businesses can compete and prosper for the benefit of all. We are the premier lobbying organisation for UK business on national and international issues. We work with the UK government, international legislators and policymakers to help businesses compete effectively.