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Review of UK and EU balance of competences: response to the call for evidence on *Subsidiarity and Proportionality*

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This evidence was first presented at a roundtable seminar held at the Foreign and Commonwealth Office in May 2014. We focus our comments on the principle of subsidiarity (rather than the other questions raised in the Call for Evidence, e.g. concerning proportionality or the flexibility clause).

Some Basic Questions about Article 5(3) TEU

Article 5(3) TEU contains the principle of subsidiarity as understood in the narrow sense of an express limit or control on the exercise of EU competence. Even so, there is considerable confusion about the nature and effects of the principle of subsidiarity; in particular, how far subsidiarity should be considered to have a defined substantive meaning or how far it is primarily a procedural concept.

Subsidiarity as a defined substantive principle

If we consider that subsidiarity has a defined substantive meaning, then of course that specific meaning needs to be articulated and enforced. The first question is: who determines that substantive content? Even if the other EU institutions or the national parliaments might express their subjective understanding, ultimately, the objective meaning of subsidiarity must be decided by the Court of Justice of the European Union. In that regard, the Court has consistently treated subsidiarity as a justiciable legal principle. It is therefore possible to seek judicial review of Union acts which are alleged to infringe the principle of subsidiarity.

The next question is: what sort of substantive content for the principle of subsidiarity emerges from the Court's caselaw? In particular: is subsidiarity to be understood essentially as an economic test, driven primarily by the search for regulatory efficiency, by asking for the "added value" of EU level action in dealing with regulatory problems; or is subsidiarity instead to be treated as an essentially political test, informed by concerns about democratic legitimacy, which seeks to promote localised decision-making in recognition of the essentially national basis for political authority (even if those purely national solutions may not be so "efficient")? After all, those two conceptions may well pull in very different directions: there will be issues where it makes economic sense for the EU to act, but there is little political desire or basis for overreaching local or national action.

The available caselaw is not especially illuminating about this choice between competing conceptions of the subsidiarity principle. Most rulings – from the *Biotechnology Directive* dispute,[1] through to the more recent *Vodofone* litigation[2] – have concerned internal market legislation, where a cross-border element is essential to the very existence of EU competence, such that the subsidiarity principle is often treated as being fulfilled per se. Even here, however, there is a strong case for the Court being more critical of

[1] Case C-377/98 *Netherlands v European Parliament and Council (Biotechnology Directive)* [2001] ECR I-7079.

[2] Case C-58/08 *The Queen, on the application of Vodafone Ltd and Others v Secretary of State for Business, Enterprise and Regulatory Reform* [2010] ECR I-4999.

whether the sort of cross-border dimension which is sufficient to establish the *potential* exercise of EU competence is really sufficient also to justify the *actual* exercise of EU competence at issue. Indeed, the Court could enquire more critically about whether an EU measure relating to the single market is really justified at all, even if there is some sort of cross-border element to the problem; or at least whether the detailed content of that EU act meets the requirements of subsidiarity, e.g. by asking whether a given measure should really apply beyond cross-border situations so as also to regulate wholly internal cases.

Less frequent are cases which concern non-internal market legislation, where EU competence does not depend on the existence of a cross-border element, e.g. as in the case of much environmental or social legislation. Here, it is not possible to treat the principle of conferral as equivalent to the principle of subsidiarity: the justification for the *existence* of competence is in no way the same as the justification for the *exercise* of competence; the EU needs to show real added value, and genuine democratic questions can arise, with no easy "cross-border" answers. It remains to be seen how far the Court will move beyond the minimalist approach set out in early cases like *Working Time Directive*,[3] and demand evidence to show the "added value" of EU action even in situations where there is no obvious cross-border problem to be tackled.

What does emerge clearly from the available caselaw is that subsidiarity has not so far provided an explicit grounds for the annulment of Union legislation. Many commentators thus feel that the Court does not enforce the principle of subsidiarity with any great rigour.

In any event, the argument that subsidiarity has a particular substantive meaning (even if we do not yet know precisely what that consists of) carries with it various broader implications. For example, it suggests that the national parliaments are indeed capable of "abusing" their yellow card powers, if they raise objections which do not conform to the objective substantive meaning of the subsidiarity principle; and in such situations, their views can legitimately be rejected by the EU institutions and ultimately by the Court. This indeed has been a common reaction among academic lawyers to many of the reasoned opinions issued against the Commission's "Monti II" proposals, i.e. that since those opinions generally did not relate to subsidiarity concerns, but rather the proportionality or simple desirability of the relevant legislation, they were not to be considered a "valid" exercise of the national parliament's scrutiny powers. But conversely, this viewpoint also suggests that subsidiarity, in its true substantive sense, should indeed be capable of much stronger judicial enforcement by the Court, particularly at the suit of national parliaments bringing subsidiarity-focused actions in the post-Lisbon era.

Subsidiarity as an essentially procedural principle

[3] Case C-84/94 *United Kingdom v Council (Working Time Directive)* [1996] ECR I-5755.

The alternative viewpoint argues that subsidiarity only has the meaning which is attributed to it by political action expressed in accordance with the channels provided for under the Treaties. In other words: subsidiarity is no more or less than an expression of constitutional dialogue between legislative stakeholders within the EU's complex institutional framework.

That means that, pre-Lisbon, subsidiarity meant what the EU legislature determined it should mean. The Court was thus correct (in cases like *Working Time Directive* or *Deposit Guarantee Scheme Directive*) to limit the scope for judicial review over the essentially political determinations of the legislature.[4] Such a situation of course led to the criticism that the EU was policing the limits of its own powers, and the Court was unable or unwilling to enforce the principle more seriously. That is not to deny that subsidiarity could be an influential brake on Union competence – particularly in the hands of the Council: consider, e.g. the Commission's proposed directive on legal aid, which was amended by the Council so as not to apply to wholly internal (only cross-border) situations. But generally, in the build-up to the Convention on the Future of Europe, there was a common feeling that subsidiarity was not as effective in practice as the Member States wanted it to be.

The main purpose of the Convention reforms – which provided the basis for the Lisbon Treaty provisions – was in fact threefold: 1) to shift the focus from ex post judicial enforcement of subsidiarity, more towards ex ante political enforcement of subsidiarity; 2) for those purposes, to introduce an external scrutiny of EU competence by engaging the institutions which had the greatest interest in the enforcement or abuse of subsidiarity, i.e. the national parliaments; and 3) more indirectly, to borrow some of the democratic legitimacy of the national parliaments so as to bolster the EU's own political mandate.

Post-Lisbon, according to this viewpoint, the essential meaning of subsidiarity now lies in the voice offered by the yellow card system to the national parliaments, that is, in the procedural mechanisms by which the Member States express their views and preferences about the value of EU legislation. Subsidiarity therefore means whatever the national parliaments want it to mean and whatever political power their voice exerts upon the EU institutions. As such, the national parliaments are incapable of "abusing" their yellow card powers: for example, the reasoned opinions concerning issues of proportionality or political desirability which were expressed in relation to the "Monti II" proposals, were very much an expression of subsidiarity, but precisely because of the procedural channels through which they had emerged.

In reality, of course, subsidiarity is a combination of all those dimensions – the economic, the political and the procedural – though which emerges as paramount will be conditioned by the context in which the issue arises. For example, even if we accept that subsidiarity is essentially a procedural concept when it comes to the political use of and

[4] Case C-84/94 *United Kingdom v Council (Working Time Directive)* [1996] ECR I-5755 and Case C-233/94 *Germany v Parliament and Council (Deposit Guarantee Schemes Directive)* [1997] ECR I-2405.

responses to the national parliament's yellow card powers, it seems more likely that subsidiarity would be conceived in substantive terms, say, were a national parliament to bring a subsidiarity challenge before the Court against subsequent EU legislation.

This multifaceted character of subsidiarity is especially true taking into account that subsidiarity has an existence beyond the strict confines of Article 5(3) TEU and / or the yellow card system itself. After all, subsidiarity can be raised as a ground of judicial review other than by the EU or national legislative institutions and other than in respect of EU legislative acts: it might be raised, e.g. by private parties; and / or to challenge non-legislative measures adopted by various EU institutions and bodies – in which situations, the procedural dimension to subsidiarity created by the yellow card system is much less relevant than the substantive meaning of subsidiarity that must be articulated and enforced by the courts.

Moreover, one should not forget that subsidiarity also exists in a much broader context than Article 5(3) TEU and / or the yellow card system alone.

First, well as being a written principle of EU constitutional law as set out in Article 5(3) TEU, subsidiarity is also treated as an unwritten principle of EU constitutional law which is binding on all EU institutions and bodies whenever exercising their powers and functions under the Treaties. As such, subsidiarity applies not only to the exercise of EU legislative competence but also, e.g. to the interpretation and application of EU law: the Court has on several occasions invoked the principle of subsidiarity to help inform its choice between rival interpretations of EU legislation;[5] similarly, Member States have raised the general principle of subsidiarity (largely without success, one might add) in order to resist enforcement proceedings brought by the Commission.[6] Secondly and in particular, there is growing interest in the way that subsidiarity can and should apply to all of the EU institutions, not just the law-making bodies, including the Court of Justice itself as it engages in the interpretation and enforcement of EU law.[7] Thirdly, it is worth recalling that subsidiarity also finds expression in a series of cognate Treaty provisions which are capable of influencing in a direct and tangible manner the interpretation and application of EU law: consider the "national constitutional identity clause" contained in Article 4(2) TEU, which can be seen as a concrete manifestation of subsidiarity in its more "political" guise, and which has sometimes provided the Member States with a legitimate defence when national rules are found to infringe the Treaty provisions on free movement.[8]

Looking to the Future of Subsidiarity

[5] E.g. C-114/01 AvestaPolarit Chrome [2003] ECR I-8725.
[6] E.g. Case C-518/07 *Commission v Germany* (Judgment of 9 March 2010).
[7] On which, see further T Horsley, "Reflections on the Role of the Court of Justice as the Motor of European Integration: Legal Limits to Judicial Lawmaking" (2013) *Common Market Law Review* 931.
[8] E.g. Case C-208/09 *Sayn-Wittgenstein* [2010] ECR I-13693.

On one level, the key legal questions surrounding subsidiarity concern the future evolution of the Court's caselaw: for example, will subsidiarity eventually acquire a more settled and more decisive definition as an economic, political or procedural principle; and how far will certain national supreme courts be prepared to go in exerting pressure upon the Court to police the principle of subsidiarity more aggressively?

Beyond that, debate will surely focus on the options for future Treaty reform and especially the prospects for revising the existing yellow card system. Several key issues emerge.

First, improving the operation of the yellow card system. This could be done by extending the time available for national parliaments to respond to EU proposals, i.e. beyond the current 8 week period, which is widely considered to be insufficient time for national parliaments to formulate their responses. There is also a strong case for increasing the amount and quality of data supplied to national parliaments in order to explain and justify EU proposals from a subsidiarity perspective. In particular, the criticism has been made that the Commission is effectively reversing the burden of proof when it comes to enforcing the principle of subsidiarity, by relying too readily upon general assertions about the "added value" of cross-border action, then expecting the national parliaments to adduce evidence which positively contradicts those assertions in order to rebut a de facto presumption of compliance with the subsidiarity principle.

Secondly, extending the scope of the yellow card system. Particularly if one subscribes to the view that subsidiarity is an essentially substantive principle with a defined meaning, an extended yellow card system could cover a range of issues over and above subsidiarity *stricto sensu*: for example, the existence of EU competence; the proportionality of EU action; the national constitutional identity clause; even the political desirability of EU action. Obviously, if one subscribes to the view that subsidiarity is an essentially procedural principle to be used for whatever purpose the national parliaments desire, such extensions would be more of a formality. However, it should be emphasised that making the national parliaments (in effect) another chamber of the EU legislature has important implications for the inter-institutional balance within the EU itself. On the one hand, it could (in theory) significantly increase the level of democratic scrutiny over EU action. On the other hand, it could raise difficult questions about the function and value of the EU institutions themselves – especially of the European Parliament, whose very mandate and authority derives from its status as the EU's only directly elected institution. Moreover, extending the scope of the yellow card system begs the question: do the national parliaments have the time and resources to handle a potentially massive increase in workload, which would necessarily be required if they were to engage in proper scrutiny of the EU legislative process, as well as their own purely domestic functions?

Thirdly, strengthening the potency of the national parliaments' voice. Here, the main proposal is usually to move from a yellow card to a red card system, i.e. whereby a sufficient number of reasoned opinions would have the effect of vetoing the draft EU legislation. That would require careful thought about the threshold required for the red

card to become effective. If the threshold is pitched too low, then the subsidiarity monitoring system risks offering a backdoor through which a minority of Member States – unable to muster a blocking vote in the Council itself – might nevertheless manage to veto EU legislation by steering the reasoned opinions of their parliamentary chambers at home. Yet if the threshold is pitched too high, the red card risks becoming a purely paper power which national parliaments are unlikely to be able to activate in practice – thus drawing attention to the strength of widespread opposition to certain EU proposals but without an effective outlet for or response to those national political feelings. One possibility might be to combine a lower threshold with a less potent "red card", e.g. by convening a "conciliation committee" between the Union legislature and the national parliaments when a "red card" is shown, with a view to negotiating amendments to the relevant Commission proposals as to address the concerns raised at Member State level.

Finally, rethinking the articulation and enforcement of EU competences. In this regard, more far-reaching reforms have been discussed in the literature and political debates: for example, the creation of a "competence scrutiny panel" at EU level (to include representatives of the national parliaments) charged with independently reporting to the Council and the European Parliament on compliance of all Commission proposals with the general scheme of EU competence; or the creation of a "competence court" (drawing upon judges from the EU courts as well as the national supreme courts) to deal specifically with competence and subsidiarity disputes (though this already much-aired proposal would raise difficult questions about the division of jurisdiction between any new judicial body and the existing Court of Justice of the European Union).

Conclusion

Much of the academic and political discussion about subsidiarity is framed in terms of the principle's *meaning* and its *enforcement*, as if the two are separate issues posing distinct problems. Our main point is that, when it comes to subsidiarity, questions of meaning and enforcement are in fact *inseparable*: the one decisively influences the other at almost every step.

In theory, subsidiarity is a principle capable of bearing very different understandings – including the economic, the political and the procedural. Those understandings acquire relative definition through the contributions of a wide range of institutions and bodies – including but not limited to the Court of Justice of the European Union and the national parliaments of each Member State. Where the emphasis falls among those different potential understandings, as they emerge from the complex institutional matrix which mixes together meaning with enforcement, will decisively affect subsidiarity's potential to act as an effective control on the exercise of Union competence – by influencing its character, its objectives, its effectiveness and its limits.

In practice, as they currently stand, the Treaties provide no clear steer towards any one conception of subsidiarity over any other. It may well be that future Treaty reform will recognise the existing tensions and lay down a clearer vision for the various legislative

and judicial actors to subscribe to and pursue. The key task will surely be to design a system that gives a more effective voice to the national parliaments without unduly distorting the Union's own institutional balance.