Call for Evidence questions on Subsidiarity, Proportionality, and Article 352 TFEU

Response to call for evidence, open session, Dublin, Ireland, Thursday, 22nd May 2014. Attended by several Irish academic and former EU officials.

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 participants noted that the question ought to be 'why are we doing this at all', rather than 'are we doing this at the appropriate level'. Moreover, subsidiarity was seen a fundamentally *political* question of how society and government interact – within a Member State (based on German Catholic social doctrine), whereas proportionality is a more legal concept (essentially a form of good governance). The underlying issue is of competence drift (or creep) rather than level of EU action. Subsidiarity, therefore, is an ineffective means of limiting EU action, given its political nature.

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?**

   Participants also noted that the CJEU currently looks at both subsidiarity and proportionality in a pro forma way, and is not capable of being a true guardian of either.

   Additionally, Member State governments all view proportionality and subsidiarity differently. In Germany, for example, it is practically part of the political DNA, whereas in a country like Ireland, which is centralised and lacks strong forms of local government, they are much more alien concepts.

   Concerns were expressed about the addition of national parliaments as a fourth decision-maker in EU policies (which could complicate matters); rather they should be exercising their influence on EU decision-making through their national executives.

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?**

   The participants argued that the Commission's own tests of proportionality and subsidiarity are hardly effective – it is impossible to imagine the Commission annulling its own proposal on the grounds of subsidiarity or proportionality. On the other hand, however, if a legislative proposal is proportional, it should be completed as quickly as possible – there is therefore a risk of undermining the effectiveness of the EU through burdensome subsidiarity and proportionality checks.

   Moreover, where once the Commission – and Commission officials – would have been live to the sentiments in different Member States, enlargement has made this 'soft' application of subsidiarity and proportionality impossible.

National parliaments – and parliamentarians – are not equal. Many suffer from a deficit of EU expertise and interest, but in larger Parliaments this can be overcome through numbers and resourcing. Oftentimes, national parliaments are at a disadvantage when it comes to access to documents and access to EU officials, which can be infuriating. Parliamentary offices in Brussels could co-ordinate more effectively with European Parliament officials/representatives to get advance notice of problematic proposals.

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?**

   As in answer to Question 1, participants noted that subsidiarity is a political concept, whereas proportionality is a legal one. The two principles are therefore distinct, and should not be conflated.

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

   The participants noted that greater cooperation between the various actors – e.g. the Commission, the European Parliament, and national legislatures – at an earlier stage would be an improvement. Whilst innovations such as the 'yellow card' (and possible future iterations) are useful, by the time that stage has been reached, it is usually very difficult to halt a proposal.

   The discussion also turned to the United States, where an active and alert states' rights movement polices the issues of subsidiarity and proportionality. Such a mechanism does not (yet) exist in the EU.

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?**

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

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?**

   As a more general means of improving the application of subsidiarity and proporotionality, the participants noted that the current institutional structures of the EU – the size of the College of Commissioners, the lack of accountability among MEPs, the European Council's ability to direct the Commission – inhibit effective application.

A smaller College of Commissioners, with greater political responsibility (removed from the European Council) with a co-legislature of MEPs responsive to the demands of citizens would be a more effective producer of legislation that respected both principles. Numerous extraneous Commissioners create an incentive to produce legislative proposals that can often contravene the principles. A lack of responsibility among MEPs directly to the population makes the European Parliament an ineffective enforcer.

One participant sent in the following comments after the meeting:

'I believe that the treaty provisions for subsidiarity are largely sufficient at present, but that the capacity of the national parliaments to police it is lacking.

This may be due to the low salience, the burdensome nature and the political unsexiness of the work of scrutiny; and possibly also to the unwillingness of Governments and executives to give national parliaments and/or their committees full and instant access to the complete dossier.

The work of national parliamentary clerks embedded in the EP is a help in providing early warning; so is the COSAC network, and the occasional joint meetings of functional committees with the EP. But overall, most parliamentary committees are less than excellent at the job: hence the absence of a drive to lean, not only on the Commission, but also on the national governments and Council.

The excellent work of the House of Lords Committee and sub-committees proves the rule: it's not a democratic chamber, but a largely expert one.

I believe that it is only when national parliaments can be said to be really exercising the existing provisions adequately, and are bringing firm and speedy pressure on the Commission, the national Government and national executive, that a judgement can be made as to whether the provisions themselves are inadequate.'