EVIDENCE FROM PROFESSOR DERRICK WYATT QC[1]

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

Preface and Summary

My evidence has been written with the aims of the Balance of Competences Review in mind - identifying elements of EU competences and their exercise which might figure in any future reform of the EU.

EU legislation provides an essential framework for the internal market and for important Union policies such as the environment and transport. But the EU intervenes excessively in the affairs of its Member States. In practice the EU legislator uses internal market competence not only to adopt measures to improve trade, competitiveness and cost effective regulation, but also to adopt measures which make little or no genuine contribution to the internal market, and which needlessly intrude upon the autonomy of the Member States. The EU legislator uses other lawmaking powers to adopt measures (such as environmental or social measures) which have no significant nor indeed any cross border implications and which do not in reality require EU action at all.

Neither subsidiarity nor proportionality has acted as an effective brake on the exercise by the EU institutions of their extensive lawmaking powers.

The principle of subsidiary is defined in a way which admits of more than one interpretation, and policy considerations and political judgment influence the way it is interpreted and applied in particular cases. These factors allow the EU institutions to present almost any proposal for EU wide action as having an objective which can be better achieved at EU level than at national level, and that is what they do. As regards internal market measures, it is argued that only EU harmonized rules can remove obstacles to cross border activities which result from differences between national laws. As regards other measures (such as environmental or social measures), it is argued that only EU action can guarantee higher standards in the Member States than currently prevail.

The current “yellow card” and “orange card” powers of the national Parliaments in

[1] Emeritus Professor of Law, University of Oxford; Barrister, Brick Court Chambers. I provided written and oral evidence to the House of Lords EU Committee in 2004 on the proposed mechanism for national parliamentary scrutiny of subsidiarity, which was contained in Protocol 2 annexed to the Treaty Establishing a Constitution for Europe, see generally House of Lords EU Committee, 14th Report of Session 2004-05, “Strengthening National Parliamentary Scrutiny of the EU - the Constitution’s Subsidiarity Early Warning Mechanism,” Report with Evidence, published 14 April 2005.

respect of draft EU acts have had little effect in practice and are unlikely to do so. Neither the national Parliaments nor the EU institutions apply the principle of subsidiarity without making assessments of policy and exercising political judgment. In both the “yellow card” and “orange card” procedures the policy assessments and political judgments of national Parliaments are subordinated to those of the EU institutions. In these circumstances, the national Parliaments cannot act as a credible check on the exercise of EU competence.

Nevertheless subsidiarity, in conjunction with proportionality, have considerable potential for inhibiting unjustified and unnecessary EU legislative initiatives, if further guidelines on subsidiarity and proportionality are formulated, and if national Parliaments are allowed to apply these principles to draft EU acts on an independent basis. Monitoring the compliance of draft EU acts with the principles of subsidiarity and proportionality involves a policy and political assessment which national Parliaments are uniquely qualified to undertake - their democratic legitimacy is unquestioned, as is their independence of the EU institutions.

Reform should include a clarification of the principles of subsidiarity and proportionality which expressly recognizes:

- That respecting and maximizing decision making at national or sub national level is a more important objective than making new EU rules which claim gains for the internal market which are notional or speculative and unlikely to yield significant improvements in trade, competitiveness or other economic or cost effective regulatory benefits.

- That measures other than internal market measures (for example environmental or social measures) should only be adopted if they regulate activities with appreciable cross border implications and those implications can only be addressed at EU level.

The Protocol on Subsidiarity and Proportionality should be amended:

- To include proportionality review of draft EU acts by national Parliaments, which have the democratic legitimacy to address the policy and political aspects of proportionality which are not subject to judicial control. The time allowed for subsidiarity and proportionality review should be extended from the present 8 weeks to 16 weeks.

- To require that a draft EU act go forward as a proposal for an optional regime, rather than as a measure of binding harmonization, if opinions equal to 33% or more of the votes allocated to national Parliaments find the proposal incompatible with the principle of subsidiarity and/or that of proportionality.

- To enable national Parliaments to reject a draft EU act (the “red card” procedure) if opinions equal to 40% or more of the votes allocated to national Parliaments find the proposal incompatible with the principle of subsidiarity and/or that of proportionality (the threshold should be 33% for proposals relating to cooperation on criminal matters).

- To enable national Parliaments to reject a draft EU act (the "red card" procedure) if opinions equal to 25% or more of the votes allocated to national Parliaments find the proposal incompatible with the principle of subsidiarity and/or that of proportionality, provided that the votes are cast by national Parliaments of Member States comprising at least 33% of the population of the European Union.

- In the case of draft EU acts which require unanimity in Council, to enable national Parliaments to reject a proposal (the "red card" procedure) if opinions equal to at least eight of the votes allocated to national Parliaments (equivalent to the votes of four national Parliaments) find the proposal incompatible with the principle of subsidiarity and/or that of proportionality.

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.

First, a word about proportionality. This principle applies to define and limit the competence of the EU authorities in the exercise of their powers, and to limit the discretion of national authorities when they act within the scope of EU law. The content of the principle in general and as it applies case to case is in the hands of the European Court of Justice and of national courts. It falls to national courts to apply the principle consistently with EU law in those cases which fall within the scope of EU law. Whatever the merits or demerits of judicial application of the principle of proportionality in EU law, it is not feasible to attempt to "reform" current judicial practice by soft or hard law devices. I shall not address the principle of proportionality in this evidence, except as regards its current and potential application by national Parliaments under the Protocol on Subsidiarity and Proportionality.

The various competences of the EU lawmaking institutions are drafted in wide terms in the TFEU, and interpreted widely by the European Court of Justice. Subsidiarity aims to limit the *exercise* of European lawmaking powers to subject matter which clearly requires pan European action, and it does so in the name of democracy. Its aim is to ensure that decisions are taken as *closely* as possible to the citizens of the Union.[2] *Any* proposal for a decision at EU level suffers from the intrinsic handicap that the decision will be made as *distantly* from the citizen as possible, and in principle should only be adopted if that handicap can be overcome. Yet in practice subsidiarity has not worked effectively. The principle of subsidiarity (as applied to date) is not an effective way to place limits upon the exercise of EU competence, though with appropriate amendments to relevant criteria, and to the procedure for national parliamentary monitoring of subsidiarity, its effectiveness could be increased.

One reason for the lack of effectiveness of subsidiarity to date is that the EU

[2] See the preamble to the Protocol on Subsidiarity and Proportionality, "wishing to ensure that decisions are taken as closely as possible to the citizens of the Union."

institutions treat proposals for measures which claim to remove obstacles to cross border economic activity as per se having an objective which can be better achieved at EU level than at national level. Another reason is that the institutions treat proposals for EU wide standards (e.g. environmental standards or equal opportunities rules) as having an objective which can be better achieved at EU level than at national level because EU rules are likely to achieve the standards in question more quickly than would the Member States if left to their own devices. From these perspectives, virtually any proposal which is within the competence of the EU can be presented as having objectives which can be better achieved at EU level than at national level.

It is, for example, possible to justify the adoption (as a matter of competence) of any number of consumer protection measures on the ground that differences between national laws deter cross border purchases and thus comprise obstacles to trade, and EU harmonization is necessary to remove these obstacles and improve the operation of the internal market. EU proposals which have the aim of improving the internal market are in principle and as a matter of law subject to subsidiarity, but may readily be defended as consistent with that principle because they have an aim which can always be better achieved at EU level than at national level - removing obstacles to cross border trade resulting from differences between national laws.

There is a certain logic in this, but it ignores the reality that an internal market measure might make no measurable or appreciable contribution to the internal market, with any contribution to cross border commercial activity being speculative at best. The EU institutions ignore the possibility that a contribution to the internal market which is notional or at best slight might be outweighed by the fact that adopting the measure in question at EU level has the effect of over-riding or constraining decision making at national or sub-national level, which is much closer to the citizen than EU decision-making, and is for that reason presumptively more desirable than EU action.

The Unfair Contract Terms Directive (93/13/EEC) is an internal market measure justified as such in its preamble as follows:[3]

“Whereas, generally speaking, consumers do not know the rules of law which, in Member States other than their own, govern contracts for the sale of goods or services; whereas this lack of awareness may deter them from direct transactions for the purchase of goods or services in another Member State;…”

In other words, the mischief which the Directive seeks to put right is that a consumer in one Member State may be deterred from a cross border transaction because s/he will not know whether s/he will be entitled to a lower standard of protection in the second Member State unless s/he checks the content of the second State’s law on contract terms. The “remedy” provided by the Directive to this state of affairs is to harmonize national rules on unfair contract terms. Yet the Directive leaves the

[3] The preamble also refers to the possibility that distortions of competition might arise from disparities between national rules on contract terms, but the *Tobacco Advertising Case* (C-376/98) made it clear that such distortions could only justify an internal market measure if the distortions were likely to be *appreciable.*

"mischief" at which the Directive is allegedly aimed (consumers deterred from cross border transactions because unaware of laws other than their own) *wholly unremedied*, since Member States are free to adopt *stricter measures* of protection than are prescribed by the Directive. The consumer will still be unaware whether s/he will receive a lower standard of protection if s/he shops abroad than if s/he shops at home! Where a Member State adopts stricter measures of protection, it must inform the Commission, which makes the information available to consumers on a dedicated website.[4] The Directive thus recognizes that any supposed deterrence to consumers to engage in cross border shopping can still only be countered by checking and comparing the provisions of their home law, and those of the country in which they intend to shop. This Directive has made no *actual* contribution to the internal market at all, and has needlessly encroached upon the competence of the lawmaking authorities of the Member States as regards the rules on unfair contract terms. Furthermore, while the mischief at which the Directive is aimed is deterrence to cross border transactions, the Directive harmonizes national rules with respect to *all* transactions, whether involving cross border transactions, or transactions wholly internal to a Member State. This feature in itself calls in question the compatibility of the measure with the principles of subsidiarity and proportionality, even if it were accepted, which I do not, that the application of the measure to cross border transactions facilitates cross border commercial activity. The Unfair Contract Terms Directive was adopted before the principle of subsidiarity became a binding principle of the European legal order. But such a directive, if adopted today, *should* be regarded as incompatible with the principle of subsidiarity, since, even if it fell within the formal competence of the EU under Article 114 TFEU, it would make no actual contribution to the internal market, and the encroachment upon national lawmaking competence which it entailed could accordingly not be justified.

Internal market measures on alternative dispute resolution (ADR) in consumer disputes, applying both to internal situations and to cross border transactions, have recently been adopted.[5] It is to be doubted whether these rules remove any appreciable obstacles to cross border activity,[6] though the measures fall within the

[4] See Article 8, and 8a.

[5] Directive 2013/11/EU; Regulation (EU) No 524/2013.

[6] I take this to be obvious from the nature of the measures, but I also note the comment of the Department of Business Investment and Skills (BSI, Government Response to Call for Evidence - EU Proposals on Alternative Dispute Resolution, page 10):

"In view of stakeholder comments it seems unlikely that these proposals will deliver the benefits suggested by the European Commission. Firstly, although they may establish more ADR capability, there is no guarantee that this would lead to more use of ADR. Secondly, the Commission seem to have significantly over-estimated the potential benefits of greater use of ADR within the EU.

In addition to comments made by stakeholders, UK Government economists and statisticians believe that the European Commission distorted the real picture when determining the typical loss per consumer complaint. The Commission used the figure of £250 which was determined by using the mean loss per complaint from survey data. In fact the data is skewed by a small number of high value claims. The median loss per complaint is nearer £15 and our economists take the view that it is this figure that should have been used when estimating total benefits."

scope of Article 114 TFEU as interpreted by the Court of Justice. Application of the rules to disputes internal to a single Member State as well as to cross border disputes raises both subsidiarity and proportionality issues.[7] But the rules on ADR have features which might argue in favour of their compliance with the principles of subsidiarity and proportionality. These features are (a) the ADR facilities provided under the EU rules only apply to consumers and traders who opt to use them, and (b) although the EU rules will impose quality requirements on ADR providers which apply for listing, this is not obligatory for ADR providers. The regime for ADR is thus in large part what I would describe as an "optional regime", which provides options for consumers and businesses without imposing further obligations upon them.[8] I shall return to "optional regimes," and to the advantages which they have over mandatory regimes in terms of subsidiarity and proportionality compliance, later in this evidence.

Leaving the context of the internal market, proposed measures which are not designed to improve the functioning of that market but rather (for example) aim to protect the environment, or ensure health and safety in the workplace, or equality in one context or another, may in theory be more amenable to subsidiarity constraints, to the extent that they may lack an obvious cross border element. If there is no cross border element, why should EU wide action be necessary, and why should national or regional/local action be regarded as insufficient to achieve the aims identified by the EU proposal?

Prior to the present Protocol on subsidiarity and proportionality (the Lisbon Protocol), its predecessor referred to several criteria for measuring compliance with subsidiarity. One was whether the issue under consideration had "transnational aspects which cannot be satisfactorily regulated by action by Member States". All but one of the criteria included in the Amsterdam Protocol were omitted in the Lisbon Protocol, which did however retain the reference to substantiating the need for EU wide action by reference to "qualitative and wherever possible quantitative criteria". It is generally held that the Lisbon text was intended to be a simplification of the previous text rather than a rejection of the previous criteria, and the cross border effects or not of a proposed measure are still relevant to a subsidiarity assessment. This approach is indeed adopted in reasoned opinions of the House of Commons and House of Lords in subsidiarity assessments of EU proposals.

In practice environmental measures are adopted at EU level even if they lack any obvious cross border element, and even though no real effort has been made to identify such an element, nor otherwise to demonstrate the need for EU wide action. An example is that of the Commission's proposal for revision of the Directive on drinking water quality (which became Directive 98/83/EC). The explanatory memorandum to the proposal addresses subsidiarity. It concludes that the subject

[7] The application of the Directive to disputes internal to a Member State as well as to cross border disputes was criticised by the Bundesrat Chamber of Economic Affairs in Decision 772/11 of 24 January 2012, and the Chamber concluded that in this respect there was a breach of the principle of subidiarity.

[8] The UK is obliged under the Directive to ensure that ADR complying with the Directive is actually available and this may lead to the Government having to establish additional ADR capacity.

matter has a Community dimension because

"All Member States are concerned by this action." In addressing the question "Which solution is most efficient comparing the means of the Community and of the Member States" the Commission states
"- the existing directive has been effective in improving the quality of drinking water throughout the Community
- it has provided Member States and the water supply industry with a stable basis for their planning and investment
- consumers have become familiar with the directive and expect to receive water which they know will be safe to drink……."

The Commission's essential justification for EU wide action was that a proposal for a revised directive on drinking water quality was likely to improve the quality of drinking water. On this basis any proposal at all for EU wide action which is likely to have any measure of success will pass the subsidiarity test. If pressed the Commission would no doubt have said that if the EU did not set drinking water quality standards, some Member States at least might set lower standards, and that the objectives of the proposed measure could thus be better achieved at EU level than at national or sub national level.[9] It is possible to justify almost any proposal for EU wide action in subsidiarity terms on the basis that EU wide action will lead to higher overall standards than would result from different approaches being adopted by different Member States, and in practice that is the approach taken time after time by the EU institutions. It is an approach which deprives the principle of subsidiarity of most if not all of its useful effect.

This approach was reflected in the proposals for Directives prohibiting discrimination on racial and ethnic origin, disability, religion, sexual orientation, etc., in various contexts (which became Directives 2000/43 and 2000/78). A Commission Communication explained the subsidiarity justification as follows:

"Most Member States have included in their constitutional and/or legal order provisions which assert the right not to be discriminated against. *However, the scope and the enforceability of such provisions - and the ease of access to redress - vary greatly from one Member State to another.* The draft directives would lay down a set of principles on equal treatment covering key issues, including protection against harassment, the possibility for positive action, appropriate remedies and enforcement measures. *These principles would be applied in all Member States, thus providing certainty for individuals about the common level of protection from*

[9] There is academic support for this approach, see e.g., de Sadeleer, "Principle of Subsidiarity and the EU Environmental Policy", Journal for European Environmental and Planning Law (2012) at page 68:

"…subsidiarity does not preclude the EU lawmaker to regulate issues that don't have cross-frontier elements, such as urban noise, household waste or contaminated land remediation. Given the significant discrepancies among the Member States regarding the stringency of their environmental policies, EU harmonisation ensures that a common approach will apply in all Member States in a way ensuring a high level of environmental protection. In the absence of such a common approach, the efforts made by the most zealous Member States would easily be frustrated by the passivity of the others."

discrimination they can expect. Common standards at Community level can only be achieved through co-ordinated action." (emphasis added)

In other words, only common standards can guarantee a minimum guarantee for individuals in all Member States, and common standards at EU level can only be achieved by EU wide measures. Subsidiarity thus requires proposals for EU wide measures to pass a test which they can almost invariably and perhaps always be said to pass.

The Commission's proposal for gender balance in the non-executive directors on the boards of quoted companies "passes" the subsidiarity "test" on this basis. The Commission identifies first and foremost the consideration that the proposed EU action will bring about more balanced gender representation on boards more rapidly than would be the case if Member States were left to their own devices.

The foregoing indicates a systemic defect in the principle of subsidiarity as a potential brake on the exercise of EU competence. Subsidiarity is defined in a way which admits of more than one interpretation, and policy considerations and political judgment are likely to influence the way it is applied in particular cases. These factors allow the EU institutions to present almost any proposal for EU wide action as having an objective which can be better achieved at EU level than at national or sub national level, and that is precisely what they do.

Interpretation

2. What are your views on how the principles have been interpreted in practice by EU and Member State actors including: the EU courts, the other EU institutions, Member State governments, Member State parliaments, sub-national or regional bodies and civil society?

Historically speaking, and at the risk of somewhat personifying EU institutions, the Commission and the Parliament have never really "believed" in subsidiarity. It has always been established that subsidiarity has no application to areas which fall within the exclusive competence of the Community. From the outset the Commission argued for an interpretation of exclusive competence which included measures designed to remove obstacles to the free movement of goods persons and services in the internal market. Since some of the most important and controversial of Community measures fall within this category, it is difficult to read this standpoint of the Commission as anything but a desire to minimise the practical effects of subsidiarity. The Commission maintained its position in this regard until the Court of Justice indicated that the principle of subsidiarity did indeed apply to such measures, though the Court also indicated that internal market measures would generally pass the subsidiarity test. The European Parliament adopted the same approach as the European Commission, and indeed clung to its narrow view of the scope of subsidiarity even after its implicit rejection by the European Court, precipitating an

explicit rejection of this argument by the Court of Justice in a later case.[10]

The passages dealing with subsidiarity which appear in explanatory memoranda of the Commission are often perfunctory, in many cases simply stating that the requirements of subsidiarity are complied with. The qualitative and quantitative assessments referred to in the Lisbon Protocol on Subsidiarity and Proportionality (and before that in the 1997 Amsterdam Protocol and initially adopted as guidelines at the Edinburgh summit in 1992) have not been undertaken in any systematic or adequate way, and this is particularly true of quantitative assessments. Compliance with subsidiarity is commonly demonstrated simply by a claim along the lines that the legislation will lay down common standards, and that individuals expect to find common standards in the various Member States, and examples of this are given above.

That said, in some contexts, the Commission has adopted a more practical and result orientated approach to new proposals for legislation, and that might at least in part be attributed to subsidiarity (and proportionality) considerations, which were highlighted in the Commission's White Paper on European Governance in 2001. That White Paper states (at page 22):

"The European Union will rightly continue to be judged by the impact of its regulation on the ground. It must pay constant attention to improving the quality, effectiveness and simplicity of regulatory acts …

— First, proposals must be prepared on the basis of an effective analysis of whether it is appropriate to intervene at EU level and whether regulatory intervention is needed. If so, the analysis must also assess the potential economic, social and environmental impact, as well as the costs and benefits of that particular approach. A key element in such an assessment is ensuring that the objectives of any proposal are clearly identified….

……

— Sixth, a stronger culture of evaluation and feedback is needed in order to learn from the successes and mistakes of the past. This will help to ensure that proposals do not over-regulate and that decisions are taken and implemented at the appropriate level."

I have just suggested that the above considerations may have led to a more practical and result orientated approach on the part of the Commission to new proposals for legislation. It is, for example, my impression that post 2000 Commission proposals in the field of company law have on the whole represented genuine attempts to facilitate cross border activity and improve the global competitiveness of the EU. The Commission appointed the High Level Group on Company Law which in 2002 published a Report on the proposed Takeover Bids Directive, and a Report on a Modern Regulatory Framework for Company Law in Europe. These reports argue that EU legislation in the field of company law should facilitate the running of efficient

[10] Case C-377/98, Judgment of 9th October 2001, paragraphs 30-34, in which the Court applies the subsidiarity test and thus implicitly acknowledges it application to internal market measures, and Case C-491/01, Judgment of 10 December 2002, paragraphs 177-180, where the Court states unequivocally that "the principle of subsidiarity applies where the Community legislature makes use of Article 95 EC [the then legal base for internal market measures see now Article 114 TFEU]…".

and competitive businesses. The 2005 Directive on Cross Border Mergers is an example of a measure which makes a genuine positive contribution to the internal market and has been welcomed and much used by businesses across the EU (for example British Airways and Iberia merged under the rules implementing the Directive in 2011).

In any discussion of subsidiarity, and more broadly, of the EU's propensity to over-legislate/regulate, it is important to acknowledge and bear in mind that there can be real advantages to commercial operators in being able to adapt their goods and services to a single regulatory regime for the whole of the EU, rather than having to adapt to a range of product requirements and regulatory regimes. Many EU internal market measures provide cost effective EU wide regulation which facilitates cross border commercial activities and is welcomed on all sides. Equally, other EU measures, which do not aim to improve the functioning of the internal market, but harmonize, for example, environmental rules with major cross border implications, achieve aims which simply could not have been achieved by Member State action alone. The fact is, however, that not all EU measures either make a genuine and significant contribution to the internal market, nor address problems with significant cross border implications which could not have been achieved by Member State action alone.

Perhaps the staunchest opponent (in practice, and rhetoric apart) of subsidiarity is the European Parliament. For MEPs participation in a legislative process which is seen to produce European wide rules is the yardstick by which their political and constitutional legitimacy is to be measured. Relatively few MEPs have believed that political advantage was to be derived from preventing or curbing, rather than promoting, the adoption of European wide legislation. In recent elections, euro-sceptic parties have significantly increased their representation in the European Parliament. It remains to be seen whether or not these new MEPs engage constructively with the EU legislative process, and if so, whether their presence directly or indirectly affects the Parliament's sensitivity to the demands of subsidiarity. But in the main, to date, the European Parliament has seen subsidiarity as requiring an explanation for a measure that the majority is minded to adopt, rather than raising a serious question as to whether that measure should be adopted.

Is the Council a counterweight to the centralising tendencies of the Commission and Parliament? The Council is made up of ministerial representatives of Member States, and may in particular cases act as a counterweight to the centralising tendencies of the Commission and Parliament. In terms of ensuring that decisions are taken as closely as possible to the citizen, it can with some justification claim to be championing democracy in so doing. But it is only up to a point that the Council is effective in this respect. Governments of Member States have political agendas. When the representatives of Member States vote on proposals for legislation their first priority (generally) is whether they agree with the proposal in policy terms or not. If they do agree with a proposal, there may be major advantages in supporting the proposal, and in effect seeing government policy being pursued by the EU institutions. One advantage can be that a particular government policy may be unpopular, but if it is incorporated into the requirements of an EC Directive, then the national authorities can "blame Brussels." Another advantage is that implementation of EU Directives may expose governments to less parliamentary accountability than

the implementation of purely national legislative measures (UK implementation of EU obligations via secondary legislation under section 2 of the European Communities Act 1972 is less costly in terms of Parliamentary time and accountability than primary legislation). In many cases, Member States will be happy to support a proposal if they agree with its content, even if its compliance with subsidiarity is questionable. Even if a Member State does not think that a proposal will do much good, and that it is really rather unnecessary, it might be unwilling to oppose the measure if it will be regarded by other Member States as taking a "dog in the manger" attitude. The line of least resistance may simply be to seek to minimise the objectionable features of a proposal, rather than opposing the proposal on the ground that the measure simply need not be taken at EU level, or at all. The result of these various factors is that the actual effectiveness of the Council as a guardian of "states' rights", and as a counterweight to the Commission and Parliament, whose tendency is ever to increase their ability to take action at the European level, is questionable, and my own general impression is that the Council is not at all effective in this regard. The centralising tendencies of the Commission and Parliament exceed the ability and inclination of the Council to police the constitutional boundaries of EU action.

How effective are the relatively new powers of national Parliaments to monitor subsidiarity under the Lisbon Treaty through the issue of reasoned opinions, with the possibility of a "yellow card" or an "orange card" if there are sufficient objections to a draft EU act? Generally speaking, national Parliaments do not always confine their objections to subsidiarity issues, and tend to object to proposals which they find objectionable, In my written evidence to the EU Committee of the House of Lords on the arrangements for national parliamentary monitoring of draft EU acts which was contained in Protocol No 2 to the EU Constitution Treaty, I said (August 2004):

"Scrutiny by national Parliaments will only be effective if they develop systematic objective criteria for the application of subsidiarity. If they fail to do this, and simply object to measures they disagree with, their objections will be easily dismissed by the Commission. This will particularly be the case if different national Parliaments adopt different approaches to subsidiarity, and then adopt inconsistent approaches to proposals which come before them."

The element of doubt in this observation has only partly been borne out by events. The Commission's last report on Better Lawmaking (for 2012, published 30 July 2013) confirms that the various national Parliaments apply different criteria or versions of subsidiarity. The Report states (pages 3 and 4):

"Reasoned opinions continue to vary greatly in terms of their form and the type of arguments put forward by national Parliaments underpinning their conclusion that the principle of subsidiarity was breached. Similarly to the previous year, the focus of reasoned opinions issued by national Parliaments varied greatly. The 70 reasoned opinions covered no fewer than 23 Commission proposals….This trend seems to confirm the varying political interests of national Parliaments, which follow different priorities when choosing Commission proposals to be scrutinised in the context of the subsidiarity control mechanism and apply different criteria when assessing compliance with the principle of subsidiarity. This means that coordination among them remains a challenge."

Yet to put the differing approaches of national Parliaments in context, there is a consensus at national and EU level that there is inevitably and properly a large *political* element involved in the application of the principle of subsidiarity. The Commission makes this point in its 2012 Report on Better Lawmaking, referring to COSAC's[11] 18th Report (at page 4 of the Commission's Report):

"…a large majority of national Parliaments report that their reasoned opinions are often based on a broader interpretation of the principle of subsidiarity than the wording in Protocol No 2. For example, the Dutch *Eerste Kamer* believes that 'it is not possible to exclude the principles of legality and proportionality when applying the subsidiarity check …'. The Czech *Senát* is of the opinion that subsidiarity has a 'general and abstract nature … is not a strict and clear legal concept' and therefore a broad interpretation should be used. The UK House of Lords gave a similar view, arguing in favour of a wider interpretation of this principle because 'although the principle is a legal concept, in practice its application depends on political judgement".

National Parliaments cannot really be criticized for taking the principle of subsidiarity as they find it. Applying the principle in practice involves a large element of policy assessment and political judgment rather than the application of a precise legal formula. Nor is it surprising if opinions of national Parliaments on the compatibility of draft EU acts with the principle of subsidiarity comment on the compliance of those drafts with the principle of proportionality. The current Protocol is after all entitled a Protocol "on the application of the principles of subsidiarity *and proportionality*" (emphasis added). The preamble refers to establishing "a system for monitoring the application of those principles" (viz., subsidiarity and proportionality). It is anomalous that the opinions of national Parliaments on draft EU acts are confined to assessment of compliance with the principle of subsidiarity, and that proportionality is excluded. I return to this point later in this evidence (see section 4 below).

There have been only two "yellow cards" to date, and no "orange cards" in respect of national Parliamentary scrutiny of proposals for EU legislation.

Before looking at this practice in detail it is appropriate to recap on the "yellow card" and "orange card" procedure in the Protocol, and note how the arithmetic of national Parliamentary votes dovetails with that of the votes which must be cast in Council to adopt legislation. The Protocol does not use the language of yellow or orange cards, which as the reader may be aware, is based on football terminology. A yellow card is a caution to a player, and a red card signifies sending off. The orange card (which has been proposed but not adopted in football) signifies an intermediate category.

To trigger a "yellow card" under the Protocol requires adverse votes representing at least 33% of all the votes allocated to the national Parliaments. This is broadly equivalent to the adverse votes of 10 national Parliaments and at least broadly though not invariably indicative of potentially adverse votes in the EU legislative

[11] COSAC is a Conference of the committees of the national Parliaments of the European Union Member States dealing with the European Union affairs as well as representatives of the European Parliament.

process from 10 Member States.[12] I appreciate that adverse votes from national Parliaments cannot be precisely equated to potentially adverse votes from national governments, because the votes of national governments in the EU lawmaking process do not always reflect the predominant view of their national Parliaments. Furthermore, each unicameral parliament may cast 2 votes under the Protocol (15 of the current parliaments are unicameral), whereas each house of a bicameral parliament may cast its own vote. In some cases one house of a bicameral legislature may vote against a measure, but not the other. But there is nevertheless likely to be a *broad* correlation between votes cast against a proposed measure by national Parliaments, and likely reactions to a proposal by national governments in Council, and this is relevant to any assessment of the impact which national Parliaments might be making, by exercising their powers under the Protocol, on the application of the normal voting rules in Council for the adoption of legislation.

The rules which define a qualified majority in Council (I refer to the rules applicable under the Treaties with effect from November 2014 and treat them as the current rules, and for simplicity's sake leave out of account the Protocol on Transitional Provisions which applies until 31 March 2017) require a minimum proportion of Member States to vote for a measure, and that the votes cast represent a minimum proportion of the population of the EU (Article 16(4) TEU). These minimum proportions are 55% of the members of the Council, "comprising at least fifteen of them and representing Member States comprising at least 65 % of the population of the Union". In fact, 55% of the Council currently comprises 16 Member States. It is further provided that: "A blocking minority must include at least four Council members, failing which the qualified majority shall be deemed attained." It will be noted that under these rules, and in an EU which currently has 28 Member States, the adverse votes of 13 Member States in the Council would be sufficient to reject a legislative under qualified majority voting, irrespective of the total populations of those Member States.

As noted above, the threshold for a "yellow card" (which requires the proposer of a measure to review the proposal) in the Protocol amounts to one third of the votes allocated to national Parliaments, which I have described as broadly indicative of potentially adverse votes from 10 Member States. This is below the threshold for a blocking minority of Member States (currently 13), so the yellow card option *appears* to provide some additional direct influence for national Parliaments over the EU lawmaking process over and above that which might be exercised indirectly over that process. Since populations are left out of the equation, the option might be said to strengthen the arm of the smaller Member States more than it does that of larger Member States. That said, all that happens if a yellow card is shown, is to require the Commission (or other proposer of the measure) to think again. On both occasions on

[12] In the current 28 Member State EU, one third of the votes allocated to national parliaments is equal to 18.48 votes, which could be said to amount to the votes of 9 and a half national parliaments. But 15 of the EU's national parliaments are unicameral, so in the event of an adverse opinion these parliaments will cast both their 2 votes against a measure. In a 29 Member State EU, one third of the votes would be equal to 19.14 votes, and in a 30 Member State EU, one third of the votes would be equal to 19.8 votes. In all these cases it is reasonable to say that one third of the votes allocated to national parliaments amounts to approximately the adverse votes of 10 national parliaments.

which the Commission has been asked to think again, it has confirmed its original view.

In reality the "yellow card" procedure does not enable national Parliaments to act as an effective brake on the exercise of EU competence. I pointed out above that the interpretation and application of the principle of subsidiarity includes a large element of policy assessment and political judgment. Unsurprisingly, the EU institutions interpret subsidiarity in a way which enables them to shepherd through the EU legislative process those measures they wish to see adopted as law. Equally unsurprisingly, national Parliaments sometimes see things differently, and consider some draft EU acts to be incompatible with the principle of subsidiarity. These differences represent to a considerable extent a clash of divergent policy assessments and political judgments. The "yellow card" procedure leaves the final policy assessment and political judgment in the hands of the European Commission (or other proposer of the draft EU legislative act in question, though it will almost invariably be the Commission, or if not, another EU institution). It is always going to be much more likely that the Commission will confirm its original position, rather than change it. The "yellow card" procedure gives little or nothing to national Parliaments. It provides no credible check on the exercise of EU competence.

The procedure for "showing an orange card" (leading to possible rejection of the proposal on subsidiarity grounds) may be invoked in the course of the ordinary legislative procedure. For the first stage, triggering review of the proposal by the Commission, there must be adverse votes representing at least a simple majority of the votes allocated to the national Parliaments (a simple majority of Member States is currently 15). If there is a second stage of the procedure, because the Commission maintains its position, and the subsidiarity issue is considered by the Council and the Parliament, the proposal can only be rejected on subsidiarity grounds if either 55% of the Council votes to that effect, or there is a majority of the votes cast in the European Parliament to that effect.

The "orange card" procedure provides little or nothing in the way of a safeguard for national Parliaments which is not provided in any event through the voting rules in the EU legislative process, and, like the "yellow card" procedure, subordinates the policy assessments and political judgments of the national Parliaments to those of the EU institutions.

It will be noted that in the ordinary legislative procedure the Council acts by qualified majority, which requires the votes of 55% of the Council to adopt a measure (currently 16 Member States[13]), and means that 13 Member States will always constitute a blocking minority, irrespective of populations. Requiring the votes of the equivalent of 15 national Parliaments to object to a proposal which can only be blocked on subsidiarity grounds if 16 Member States then vote against it in Council (or a majority of the votes are cast against it in the European Parliament), does not really do many favours for national Parliaments. Such a proposal would on the face of it have had little chance of negotiating the ordinary legislative procedure, since if

[13] I have already noted that reference is made to the rules on qualified majority voting which apply after 1 November 2014, but without regard to the Protocol on Transitional Provisions, which will remain in force until 31 March 2017.

the proposal had attracted sufficient opposition at the outset to muster negative votes from the equivalent of 15 national Parliaments, it would also have been likely to have been opposed by the representatives of sufficient Member States (13) to reject the proposal in any event. Nor does it make obvious sense that under the orange card procedure the adverse votes of 16 Member States in Council are required to reject a proposal, when 13 Member States could reject the proposal in the course of the legislative procedure in any event.

There have been only two yellow cards to date - those in respect of the Monti II proposal, and the proposal for a European Public Prosecutor. Are there lessons to be learned from these examples, or at least points to be noted? Most of the objections to the former proposal (there were 12 in all) were objections as to competence under Article 352 TFEU as well as to compatibility with subsidiarity. The objections to the latter (11 in all) were objections as to compatibility with subsidiarity and proportionality.

One lesson NOT to be learned is that precedents have been set that the Commission will withdraw a proposal if there is a yellow card. In each of these cases the Commission insisted after review that the measures were consistent with the principle of subsidiarity, but then withdrew the proposals. But each of these proposals required unanimity, and opposition in each case from about a dozen national Parliaments clearly meant that the proposal would not be adopted. A more realistic assessment is that the Commission is unlikely to change its mind about the subsidiarity compliance of a measure once it has got to proposal stage, and that the Commission will have the good sense to withdraw a proposal which cannot possibly secure acceptance in the Council.

What of the attitude of the EU Courts to subsidiarity? In a paper I wrote in 2003 I offered the following assessment, and I consider that it is an assessment which holds good today:

“The Court of Justice could have breathed constitutional life into subsidiarity had it so chosen. It has certainly gone out of its way to enhance the legal significance of European citizenship, which amounts to something of a triumph of legal form over substance, given the essentially declaratory character of the Treaty provisions on citizenship. But the Court has set its face against doing the same for subsidiarity. It has minimised the duty of the institutions to incorporate subsidiarity reasoning into the preambles of Community acts. And in the case of internal market measures, while accepting that subsidiarity applies to the measures in question, the Court has in effect held that if there is competence to adopt the measure, then that in itself resolves the question of compliance with subsidiarity. This is rather like the Commission’s (circular) approach to subsidiarity and law-making generally – if there is competence to adopt common standards, the adoption of common standards justifies the exercise of the competence.”

The views currently expressed extra-judicially by judges and Advocates General are generally to the effect that subsidiarity is a principle which involves a political judgment and that its application falls for practical purposes outside judicial control. This indicates that Article 8 of the Protocol on Subsidiarity and Proportionality (actions before the ECJ to annul a legislative act on grounds of infringement of the

principle of subsidiarity) is very unlikely to loom large in ensuring compliance with the principle of subsidiarity. There is no realistic prospect of the Court of Justice adopting an approach to subsidiarity which would improve its application in practice.

Application

3. **Do you have any observations on how the different actors play their roles? Could they do anything differently to ensure that action takes place at the right level?**

I have included observations invited under this heading in the views I have expressed in response to the questions in Section 2.

Current interpretation and application of subsidiarity by the EU institutions condemn it as a failed experiment to date in terms of compensating for the extensive scope of EU competence, and for the enthusiasm or at least strong inclination of EU lawmakers to exercise that competence to the full. In theory the EU institutions could act with self-restraint and take subsidiarity seriously, and if they did, and thereby acted differently, this would ensure that action takes place at the right level, but unfortunately in practice they don't, and unfortunately they won't unless they are constrained to do so.

National Parliaments might make more than they do out of their role of assessing compliance of draft EU acts with the principle of subsidiarity, but they have a very short time in which to adopt their opinions, and the procedure provides few incentives to national Parliaments to engage in "subsidiarity activism", since any opinions they might express on non-compliance by the EU institutions with the principle of subsidiarity are subordinated to the judgment of the EU institutions themselves.

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?**

The current position is that the EU courts do not enforce the principle of subsidiarity, though they do enforce the principle of proportionality, within limits to which I shall shortly refer. National Parliaments review draft EU acts for compliance with subsidiarity, but not for compliance with proportionality. Application of the principles of both subsidiarity and proportionality involve policy choices and political judgment, and national Parliaments should review draft EU acts for compliance with both principles, rather than just for compliance with subsdiarity, which is the present position.

Proportionality as applied by the EU courts allows a large measure of discretion to the EU lawmaker when making policy choices and laying down general rules. Very

occasionally specific provisions of EU acts are held to be disproportionate, on the basis that the EU lawmaker has manifestly laid down more burdensome requirements than are necessary to achieve the end in view. But as applied by the EU Courts proportionality is a principle with neither the track record nor the potential to compensate for the wide scope of EU lawmaking competence and the inclination of EU lawmakers to exercise that discretion to the full.

The deference accorded by the EU courts to the EU lawmaking institutions as regards policy choices when adopting legislation is an acknowledgment that there is a policy and political dimension to proportionality which is not subject to judicial control. If the proportionality of draft EU acts is to be policed as regards these policy and political elements then this can only be achieved by the independent political assessment of a third party. National Parliaments would seem to be ideally suited to enforce compliance with proportionality in this context, since they have a democratic legitimacy which qualifies them to address the policy and political dimension to proportionality. I would argue that it does *not* make sense to exclude proportionality from the scope of national Parliamentary review of EU proposals under the Subsidiarity and Proportionality Protocol.

The aim of the principle of subsidiarity is that every decision of the EU lawmaker is taken as closely as possible to EU citizens. If a decision which could be taken at national or sub national level is taken at EU level then EU action is unnecessary and there would seem to be a breach of the principle of proportionality *as regards the need for EU action rather than action at national or sub national level*. While the principle of proportionality is to this extent an element in subsidiarity analysis, it does not add anything to subsidiarity analysis, and does not extend to review of the proportionality of a proposal beyond the question of the appropriate level at which action should be taken.

It cannot really be argued that general proportionality review is implicit in subsidiarity review since the texts of Article 5 TEU and of the Subsidiarity and Proportionality Protocol distinguish subsidiarity and proportionality in a way that rules out that conclusion as a matter of interpretation. In practice national Parliaments sometimes review EU proposals in terms of (general) proportionality as well as subsidiarity. It is understandable that national Parliaments stray from proportionality as an element of subsidiarity into proportionality simpliciter, and it does not in any event make sense to exclude proportionality review from subsidiarity review (for the reason indicated above), unless the reason be to exclude proposals within the exclusive competence of the EU from the yellow and orange card procedure.

If the role of national Parliaments were extended to cover proportionality, one possible result would be to enable them to monitor for compatibility with this principle EU proposals which fall within the exclusive competence of the EU, since proportionality, unlike subsidiarity, applies to all EU measures. This would in my view be an advantage rather than a disadvantage. The fact that a proposal falls within the exclusive competence of the EU does not mean that national Parliaments have no legitimate interest in that proposal and its compliance with the principle of proportionality. I shall give two examples. One is that of conservation of marine biological resources under the common fisheries policy: the common fisheries policy (shared competence) and the conservation of marine biological resources under the

common fisheries policy (exclusive competence) are closely inter-related and for national Parliaments to be able to review proposals across the board in these fields on grounds of proportionality would make for valuable joined-up review. Another example is that of competition law: the competition rules necessary for the functioning of the internal market are within the exclusive competence of the EU, yet those rules concern and provide for implementation and application by national authorities and overview of amendments to these rules by national Parliaments as regards their proportionality would on the face of it seem to be beneficial.

Future options and challenges

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

Since the EU intervenes excessively in the affairs of its Member States, and since the principles of subsidiarity and proportionality have the potential to mitigate this propensity, I would identify the following alternative approaches or actions as beneficial if adopted.

In the first place, there should be a clarification of the principle of subsidiarity which recognizes that respecting and maximizing decision making at national or sub national level is a more important objective than (a) seeking gains for the internal market which are notional and speculative and unlikely to yield significant benefits, and (b) achieving EU wide standards which have no direct and significant cross border implications which necessitate action at EU level.

Some movement in this direction might be made by joint declarations of the EU institutions and the Member States. But the past practice of incorporating more extensive guidelines on subsidiarity into the Subsidiarity and Proportionality Protocol could and in my view should be revived, and guidelines along the lines indicated above included in the Protocol, as guidelines applicable to both subsidiarity and proportionality review.

The Protocol on Subsidiarity and Proportionality should be amended to include proportionality review, and to enhance the powers of national Parliaments to reject proposals, or require that a proposal go forward solely as a proposal for an optional regime. The period of 8 weeks for review by national Parliaments referred to in Article 6 of the Protocol should be extended to 16 weeks.

There might well be a consensus on the part of Member States to amend the Subsidiarity and Proportionality Protocol to include general proportionality review by national Parliaments, and if so, the opportunity might be taken to re-open the terms of the Protocol as it applies to subsidiarity. I have suggested above that the “yellow card” procedure appears to give to national Parliaments an influence which they would not otherwise have, but that it is an influence which can be readily countered by the Commission, or other proposer of the measure in question. I have also suggested that the “orange card” procedure provides little or nothing in the way of a safeguard for national Parliaments which is not provided in any event through the voting rules in the EU legislative process, and, like the “yellow card” procedure,

subordinates the policy assessments and political judgments of the national Parliaments to those of the EU institutions.

Since the respective positions of the EU institutions and the national Parliaments as regards compliance of a particular draft EU act with the principles of subsidiarity and proportionality are conditioned in large part by policy assessments and political judgment, it is pointless to make the assessment of national Parliaments subject to those of the EU institutions. The national Parliaments should be given an independent role in the scrutiny of draft EU acts which is beyond the control of the EU institutions. The question is how to strike the right balance between the role of the national Parliaments in subsidiarity and proportionality review, and the competence and responsibilities of the EU institutions.

The yellow card procedure should be replaced by a new procedure. Where the Council acts by a qualified majority in the lawmaking process, the new procedure would work as follows. Where opinions that a draft does not comply with the principles of subsidiarity and/or proportionality represent 33% of the votes allocated to national Parliaments the effect would be to require the proposal to proceed as if the proposal were for an optional regime, irrespective of whether or not the Treaty base for the proposal could otherwise have provided a valid legal basis for an optional regime.

Although the threshold for such national Parliamentary action would be relatively low (votes equivalent to those of 10 national Parliaments), in terms of a comparison with the number of adverse votes needed in Council for a blocking minority (13), this would in my view be justified because of the unique democratic legitimacy of national Parliaments and because the effect of such action would not be to exclude the adoption of an EU measure, but would rather substitute a relatively less intrusive EU measure for a relatively more intrusive EU measure.

I should say something more about optional regimes, since the expression is not a term of art. By optional regime I mean a regime which has one or both of the following features. The first is that the regime provides an option of which *individuals or firms or other legal bodies* might avail themselves, or not, but which does not apply to them on an obligatory basis, and does not foreclose existing national options. Examples of such regimes are given below in the context of comment on the use to which Article 352 TFEU has been put, and I would single out in particular as examples the Community Trade Mark regime, the Statute for a European Company, and the Statute for a European Cooperative Society. On occasions harmonized rules provide for regimes which are *in part* optional for private parties, for example, the Takeover Bids Directive, which allows a company to opt for application of the rules on board neutrality/non-frustration and breakthrough, which would otherwise not apply to it because the Member State in which it is registered has opted out of those rules. It should be noted that even in the case of a regime which is in its entirety optional for individuals, firms and other legal bodies, there will be an obligation on Member States to adopt any necessary legislation at national level to implement that regime.[14]

[14] See, by way of example, SI 2004 No 2326, The European Public Limited-Liability Company Regulations, implementing the EU rules on the European Company.

The second feature which qualifies a regime as an optional regime is that the regime gives *Member States* the option whether or not to impose obligations on individuals or firms or other legal bodies. On occasions harmonized rules allow Member States to opt out of certain provisions and relieve commercial operators from the obligation to comply with rules which would otherwise apply to them. An example is the Takeover Bids Directive, which allows Member States to opt out of the rules on board neutrality/non-frustration and breakthrough, which means that those rules are not binding on companies registered in those Member States.

I would like to make clear that I am not arguing that all proposals for optional regimes are bound to be a good thing. What I am arguing is that in particular cases an optional regime is a preferable alternative to "one size fits all" EU wide binding rules where the latter would be incompatible with the principle of subsidiarity and/or proportionality. In such a context optional regimes would allow the EU institutions to be fully engaged in the laying down of a regime at EU level, while leaving the implementation (or not) of that regime to business choice, and/or the choice of the democratic process at the appropriate level in Member States.

Once an optional regime had been put in place which provided an option for market operators, that regime would stand or fall as a result of the market attractiveness of the regime, without stifling alternative existing or potential national regimes. This "bench testing" of legal regimes in the market place would allow not only businesses to try out the regimes, but would also allow empirical analysis of the success of the regimes to be undertaken and published. This has happened in the case of the European Company Statute, which has been the subject of such empirical studies.[15] Once an optional regime had been put in place which provided an option for Member States, the extent of its adoption in the Member States would depend on the democratic choice of national or sub national authorities in those States. As noted above, an optional regime might contain options *both* for market operators, *and* for national authorities.

An example of the sort of proposed measure which might have turned out to be a candidate for adoption as an optional regime had that possibility been available to national Parliaments is that for gender balance in the non-executive directors on the boards of quoted companies. This is a measure proposed against a background of a well nigh overwhelming consensus in favour of improving gender balance, but considerable differences at national level as to how to achieve this objective. Although the proposal has considerable support in the European Parliament, there are differences at national level as to the desirability of binding quotas. An EU optional regime would allow debate and progress towards gender balance to continue against the background of that regime, with Member States free to adopt a binding quota model or not, or free to adopt a binding quota model which allowed companies to opt out conditionally or unconditionally. In the actual event, this proposal passed subsidiarity scrutiny. National Parliamentary chambers from 6 Member States adopted reasoned opinions indicating that the Commission's

[15] See e.g., H Eidenmüller, A Engert, and L Hornuf , 'How does the Market React to the Societas Europaea?' (2010) 11 *European Business Organization Law Review*, 35.

proposal did not comply with the principle of subsidiarity. This was not enough for a yellow card, and would not be enough to trigger conversion to an optional regime under the proposal under discussion.

As is often the case not all national Parliaments completed subsidiarity checks on the proposal for gender balance of non executive directors on company boards. The present time limit of 8 weeks is not enough for many national Parliaments to undertake sufficient analysis of a proposal and come to a reasoned conclusion. The track record of the UK parliament is good but should not be assumed to be typical of what can reasonably be achieved by national Parliaments in all Member States. There might be more checks and more thorough checks of EU proposals if the time for completing such check were more realistic - I would personally favour 16 weeks rather than 8 weeks.[16] Given the relatively slow pace at which much EU legislation negotiates the EU legislative process, and the relative lack of urgency of many proposals, it is wholly unreasonable that national Parliaments should be squeezed into the present tight timescale for an element in the legislative process which is designed to police fundamental requirements of the EU legal order.

In cases where a proposal is subject to a legislative process which requires the Council to act by unanimity, it makes no sense to require adverse subsidiarity opinions to amount to one third of the votes allocated to national Parliaments for a "yellow card" under the current rules. It would equally make no sense to require the same threshold to apply under a new procedure designed to allow national Parliaments to insist that a proposal for a binding measure be replaced with a proposal for an optional regime. The reason is that a proposal which attracts such a large number of parliamentary objections realistically has no chance at all of being adopted unanimously in the Council.

There should clearly be a special rule in the Protocol dealing with proposals for measures which are to be adopted by a unanimous vote in the Council. I address this question below, after considering replacing the current "orange card" procedure with a more potent "red card" procedure.

I described above how the current procedure for an "orange card" applies, or at any rate will apply, with effect from November 2014, subject to transitional provisions, which end on 31 March 2017. I have suggested that this procedure gives little or nothing to national Parliaments which would not be likely to come about in any event under the rules for qualified majority voting, and that it subordinates the political judgments of the national Parliaments for those of the EU institutions. The votes of the equivalent of 15 national Parliaments (simple majority) are needed to object to a proposal which can only be blocked on subsidiarity grounds if 16 Member States (55% of the Council) (or a majority of the European Parliament) then vote against it. But such a proposal would on the face of it have had little chance of negotiating the ordinary legislative procedure in any event, since if the proposal had attracted sufficient opposition at the outset to muster negative votes from the equivalent of 15 national Parliaments (and then 16 adverse votes in Council), it would also have been

[16] The Protocol in the Constitution Treaty provided for 6 weeks. This was increased to 8 weeks by the Lisbon Treaty.

likely to have been opposed by the representatives of sufficient Member States (13) to reject the proposal in any event in the course of the EU legislative process.

If national Parliaments are to play an effective role in curbing what I regard as the excessive enthusiasm of the EU legislature to legislate, then the rules should allow national Parliaments alone to show a "red card" to EU proposals,[17] and to do so under voting rules which have the potential, and are clearly seen to have the potential, to produce results other than those likely to result in any event from the application of the normal qualified majority voting rules in Council (i.e., for the purpose of the present discussion, the rules applicable with effect from November 2014, subject to the transitional provisions which end on 31 March 2017). Under those rules, it will be recalled that a proposal can be rejected if more than 45% of the Member States in the Council vote against it, thus precluding a qualified majority of 55%. If the national Parliaments are to be able, and are to be seen to be able, to exercise an influence which is distinct from that exercised by the governmental representatives of the Member States in the Council, then they should be able to reject a proposal which they consider to be contrary to the principles of subsidiarity and/or proportionality (show a "red card") if adverse votes are cast which are equivalent to a number of national Parliaments which is *less* than the number of Member States which would constitute a blocking minority in the Council. At the same time, if that number were to be significantly less, then the effect would be or would seem to be to undermine or contradict the voting rules of the Council.

Yet if the threshold for rejection by national Parliaments of EU proposals should be set below (but not too far below) the threshold of a potential blocking minority in the Council, should account also be taken of the fact that the voting rules for the Council are based on a *double* qualified majority - a 55% majority of the Council, and a 65% majority of the national populations which comprise the European Union? Adopting a threshold based on the votes allocated to national Parliaments respects the principle of equality of the Member States - a principle which is respected in the voting rules in the Council, which require 55% of the Council to vote in favour of a proposal in the course of the legislative process. But, just as the voting rules in Council respect the principle of equality of Member States, while also taking account of the large and sometimes very large disparities between the populations of the Member States, it would seem to be possible, and indeed necessary, to do the same as regards the thresholds for rejection of EU proposals by national Parliaments on grounds of infringement of the principle of subsidiarity and/or proportionality. This could be achieved by setting one threshold for a "red card" solely by reference to the votes allocated to national Parliaments, and setting another by reference to a combination of votes allocated to national Parliaments, and the populations of Member States whose parliaments had cast the votes in question. I consider both possibilities below.

[17] Prior to the inclusion of national parliamentary scrutiny of EU proposals for subsidiarity compliance in the Constitution Treaty, there had been debate about a parliamentary "red card" whereby two thirds of national parliaments could reject an EU proposal on subsidiarity grounds. More recently, press reports refer to statements by the Foreign Secretary, Mr William Hague, advocating a "red card" option for national parliaments. The press reports I have read give few details of this proposed option. My reference to a "red card" is solely to the version which I propose in this evidence, and is not intended to contain any implicit comment on the Foreign Secretary's statements about a possible "red card" procedure.

If the proportion of adverse parliamentary votes necessary to reject a proposal were set at 45% (only just less than the proportion for a blocking minority in Council), this would mean that the national Parliamentary threshold for a "red card" would be broadly equivalent to potentially adverse votes by 13 Member States in a 28 Member State EU, and 14 Member States in a 29 or 30 Member State EU.[18] But the number of Member States needed to block a qualified majority in Council would in any event be 13 in a 28 Member EU, and 14 in a 29 or 30 Member EU. Adopting a threshold of 45% would thus produce a system of voting by national Parliaments which still failed to demonstrate the possibility of outcomes different from those which result in any event from the qualified majority voting rules for the Council. For this reason I think that for a red card to work effectively it should be capable of being triggered if the adverse opinions of national Parliaments on the compatibility of a proposal with the principle of subsidiarity and/or that of proportionality is equal to 40% of the votes allocated to national Parliaments. In an EU of 28, 29 or 30 Member States, this would require votes equal to those of 12 national Parliaments. This seems an entirely defensible threshold. In the face of such widespread parliamentary conviction that a proposed EU measure would be incompatible with the principle of subsidiarity and/or that of proportionality, that measure should not proceed to adoption through the EU legislative process.

I do not exclude the possibility that a lower threshold for a red card, in terms of votes allocated to national Parliaments, might be thought to be appropriate, in general, or in respect of a particular category of proposals. And in respect of proposals relating to judicial and police cooperation in criminal matters I think the threshold certainly should be lower. The present position is that for a "yellow card" in respect of these matters (that is to say, matters referred to in Article 76 TFEU) the threshold of 33% of the votes of national Parliaments is reduced to a threshold of 25%. This is because of the sensitivity of these issues. These issues are indeed sensitive. Sufficiently sensitive for the threshold for the "red card" which I propose to be set at 33% of the votes of the national Parliaments, rather than the 40% threshold referred to above.

I turn now to the question whether there should be a threshold for a "red card" based both on votes allocated to national Parliaments, and on the populations of the Member States whose parliaments have cast their votes against a proposal. I am convinced that such an alternative threshold is justified and should be adopted. The rationale of entrusting national Parliaments with the task of assessing EU proposals for compliance with the principles of subsidiarity and proportionality is that national Parliaments have the democratic legitimacy to address the policy and political issues which figure so largely in such an assessment, and that national Parliaments are independent of the EU institutions. National Parliamentary assessment of EU proposals is part of the political process which comprises EU lawmaking, and the

[18] In a 29 or 30 Member State EU 45% of the votes allocated to national parliaments would amount to the votes of 13 and a half national parliaments, but 15 of the current Member States have unicameral legislatures and if there is an adverse vote both votes will be cast against a proposal. It will be common for an adverse vote from one house in a bicameral legislature to be accompanied by an adverse vote from the other. For example, in the opinions adverse to the gender balance on boards proposal both houses cast their votes in the same way in the Netherlands, Poland and the UK, whereas in the Czech Republic only one house cast its vote against the proposal.

weight to be given to national Parliamentary opinions cannot appropriately reflect this political element unless it takes some account the populations for which national Parliaments speak.

I suggested above that the threshold for rejection by national Parliaments of EU proposals should be set below (but not too far below) the threshold of a potential blocking minority in the Council. In terms of Member States, 13 Member States may currently always block a proposal, irrespective of population. In terms of populations a blocking minority is currently 177 million, subject to at least 4 Member States voting against the proposal.[19] I would suggest that the alternative threshold for a red card be set at adverse votes amounting to at least 25% of the votes allocated to national Parliaments, representing at least 33% of the population of the Union. This would mean that in the current 28 Member State EU, for the 25% threshold to be met, the equivalent of 7 national Parliaments would have to vote against the proposal. As I have already indicated, 13 Member States have bicameral legislatures. Whereas each unicameral legislature may cast 2 votes, each house of a bicameral legislature may cast a vote of its own. How should one deal with an adverse vote from only one house of a bicameral legislature when calculating the population element of the threshold? Would that score half the population of the Member State in question? My own inclination is that that would be artificial and that national population should only come into play if both votes of a bicameral legislature are cast against an EU proposal. If the population threshold were set at 33%, this would amount to approx 167 million people, just 10 million fewer than the 177 million which would comprise a blocking minority in a vote in Council. My conclusion, in summary, is that national Parliaments should be able to reject an EU proposal for incompatibility with the principles of subsidiarity and/or proportionality if at least 25% of the votes allocated to national Parliaments are cast against the proposal, and those votes have been cast by the national Parliaments of Member States comprising 33% of the population of the European Union.

The foregoing suggestions to increase the powers of national Parliaments as regards the adoption of an optional regime instead of binding harmonization, or showing a “red card”, are far from radical. They would certainly not inhibit the EU from achieving its objectives. To put these suggestions into perspective, the practice to date of national Parliaments indicates that it would not be common for a sufficient number of parliaments to object to an EU proposal for any of the thresholds I have suggested should apply, to be reached. This would be likely to continue to be the case, even if the period for consideration by national Parliaments were extended, as I suggest it should be, to 16 weeks. That said, I believe that an increased opportunity for national Parliaments to participate in the EU legislative process would be likely to provide an increased incentive to them to assess EU proposals for compliance with the principles of subsidiarity and proportionality. Any increased scrutiny on the part of national Parliaments as a result would be a justified expression of their unique democratic legitimacy in the EU legislative process, and the fact that such scrutiny had taken place could only enhance the democratic credentials of EU legislation.

I noted above that there should be a special rule in the Protocol dealing with

[19] The 177 million estimate is based on Eurostat statistics, with a little rounding.

proposals for measures which are to be adopted by a unanimous vote in the Council. It would be illogical to require a significant proportion of national Parliaments to object to a proposal on subsidiarity or proportionality grounds in order to amount to a red card, where any single Member State may in any event veto the proposal in the course of the legislative process, since this would deprive national Parliamentary scrutiny of any real significance or useful effect. On the other hand, where a measure is subject to unanimous voting in the Council, the risk of a measure being adopted which is contrary to the principles of subsidiarity and/ or proportionality must be very considerably less than where voting in the Council is by qualified majority. That being the case, the need for protection against violations of the principles of subsidiarity and proportionality, which is afforded by national Parliamentary oversight, is much reduced. And if the threshold for a national Parliamentary "red card" were set too low, there would be a risk that proposals might be rejected at the outset because of features which could and very likely would be modified in the course of a legislative procedure in which any Member State should be able to ensure that its concerns were adequately addressed. I would accordingly suggest that the threshold for a red card by national Parliaments of a proposal for a measure which would require unanimity in Council should be set at 8 of the votes allocated to the national Parliaments, which is equivalent to the adverse votes of 4 national Parliaments.

It might be said that some safeguard should exist to guard against abuse by national Parliaments of the prerogatives that the proposed new "optional option" and "red card" procedures described above would bestow upon them. I would disagree. The suggestions I make above are designed to give a distinct and independent power to national Parliaments to influence the course of the EU legislative process at the outset by ensuring that the principles of subsidiarity and proportionality are complied with. There is an undoubted element of policy assessment and political judgment involved in deciding whether a draft EU act complies with these principles. It would defeat the purpose of these proposed changes if the decisions of national Parliaments could be countered or undermined by decisions of the Commission, Council or European Parliament, when the very purpose of the powers given to the national Parliaments is to operate as a constraint on the propensities of these latter EU bodies.

There remains the question whether under the proposed system there should be the possibility of judicial review before the Court of Justice of the opinions of the national Parliaments which collectively comprise the red card in a particular case. I am convinced that such a review by the Court of Justice would be inappropriate.

The practical problems of undertaking such a review would be enormous. In order to exercise such a jurisdiction, the Court of Justice would have to consider the opinions of numerous chambers of national Parliaments.[20]

[20] Typically, in a 28 Member State EU, adverse opinions amounting to 40% of the votes allocated to national parliaments would amount to the opinions of/equivalent to 12 national parliaments. But 13 of the parliaments of Member States are bicameral, and 15 unicameral. Adverse opinions from 12 national parliaments might well involve 15 to 20 separate opinions from parliamentary chambers which would have to be reviewed for legality by the Court of Justice.

But practical problems aside, the rationale of increasing the powers of national Parliaments as regards subsidiarity and proportionality review, is that they are uniquely qualified to exercise a review of EU proposals which embraces policy and political elements which are beyond the reach of judicial control. Subjecting the decisions of the national Parliaments to the jurisdiction of the Court of Justice would inevitably encroach upon and be inimical to that role, however the Court's jurisdiction were formulated. The only way to ensure that national Parliamentary review of EU proposals for compliance with subsidiarity and proportionality is a distinct and independent role is to place that role beyond the reach of the EU institutions, including the EU Courts.

Article 352 ('flexibility clause')

6. In your opinion, based on particular examples, is it useful to have a catch-all treaty base for EU action? How appropriately has Article 352 been used?

Consistently with its wording, Article 352 TFEU has been interpreted as being solely applicable in cases where it is necessary to achieve a Treaty objective, but no *specific* power to achieve that objective has been provided. I proceed on the basis that in the cases where Article 352 and its predecessors have been invoked as a basis for legislation, no specific power has been available, so in the absence of Article 352, no action could have been taken. Whatever the theoretical scope for abuse of the article, in practice I think it has been applied reasonably, at least in recent years. I would single out as a mundane but extremely valuable use of the article the regulation providing that in general only the electronic version of the EU Official Journal shall be authentic and have legal effects.

I would also give qualified endorsement to the use to which Article 352 TFEU and its predecessors have been put in order to establish optional regimes for European level corporate bodies, viz., Regulations for the European Economic Interest Grouping (the EEIG), the European Company, and the European Cooperative Society. In this context I would refer also to the optional regime for the Community Trade Mark. The Court of Justice has confirmed that provisions of the TFEU on the approximation of national laws and particular Article 114 TFEU do not cover a measure such as the regulation for a European Cooperative society since the latter provided for a new legal form, left intact existing national rules, and could not be regarded as approximating national rules on cooperative societies (see Case C-436/03). The optional regimes referred to, which allow economic operators to choose a European corporate form, or opt for a Community Trade Mark, while leaving intact national laws, represent a more desirable solution than harmonisation, for the very reason that they do leave national laws intact, and apply solely to those economic operators which choose to take advantage of them. I note that the Commission's proposal for a European Sales Law is a proposal for an optional regime, and that the Commission proposes Article 114 TFEU as its Treaty base. On the face of it, that regime would have to be based on Article 352 TFEU rather than Article 114 TFEU in light of Case C-436/03, referred to above.

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

NO COMMENTS ARE INCLUDED UNDER THIS HEADING

Other

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?

NO COMMENTS ARE INCLUDED UNDER THIS HEADING

12 JUNE 2014