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

Scope

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.

Although open to interpretation, the broad idea of acting/legislating/regulating at the level most appropriate to obtain the desired policy outcome is an effective way to establish a framework for EU action. An understanding of subsidiarity as 'European where necessary, national where possible' as suggested in the Dutch review of competences is particularly helpful.

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?

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?
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?

It makes sense to differentiate the two principles, as one determines the most appropriate level for action (subsidiarity), whereas proportionality limits the scope for a proposed action. Changes introduced by the TFEU have increased the scope for participation and oversight of the principle of subsidiarity by national Parliaments, however Proportionality concerns can only be registered in reasoned opinions and do not trigger yellow or orange cards procedures. It would seem reasonable to allow fuller participation in case of proportionality to domestic parliaments along the same procedure.

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?

An important issue that is not overtly highlighted in the background document or these questions- namely the external aspects of EU action. Increasingly EU interactions with third parties (e.g. TTIP negotiations) have an effect on domestic legislation and regulation issues and will affect subsidiarity. 'Deep' trade agreements of the type the EU (European Commission DG Trade) is negotiating on behalf of the EU and Member States, and in particular TTIP with the USA, cover shared competence areas (energy, agriculture, fisheries, consumer protection, environment) and even some areas of supportive competence (industry, tourism). Although the European Commission is restricted by the Member States through the mandate, the oversight function of the Trade Committee, and the INTA Committee of the European Parliament, the move towards co-creation of regulation at the international or bilateral level, and towards economic governance at a higher level, will have effects on the division of competences between the EU and Member States. To fully participate in the international negotiations and the implementing bodies international agreements create, more action will be required at the EU level. This will not breach the principle of subsidiarity, as in this case action at the EU level may be necessary. Indeed, over time, for pragmatic reasons each Treaty revision has granted the European Commission's greater powers to negotiate on more policy areas in the international arena. Nonetheless it is important to raise awareness to this fact. Calls for a revision of the principles of subsidiarity and proportionality are hinged on a desire for more efficient legislation and for less burdensome EU regulation and interference in domestic levels of governance, however, we are simultaneously witnessing the introduction of another level of governance through international trade and other agreements (particularly in the area of market creation and harmonisation) which may lead to decisions taken at levels even further removed from citizens, and to institutional arrangements which may in turn be more challenging to control at lower levels of governance.

Article 352 TFEU ('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?

Given the element of uncertainty in policy-making, it is necessary to have such an Article providing a legal base for action, in order to allow the desired policy outputs. Unanimity in the Council and approval by the EP are sensible measures to ensure the Article is not abused. At the voting stage, the Council and EP could possibly also agree on a specific mandate setting out the room for manoeuvre for the Commission in the particular instance, so as to further control the Commission and assuage concerns about potential Commission over-reach.

7. Which alternative approaches to the scope, interpretation and application of Article 352

might be beneficial?

Other

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 with other policy areas increasing the input legitimacy of the policy-making process by enabling broad deliberation within and between national parliaments, European Parliament, European Commission, Council of the EU, Governments, EESC, CoR, civil society is a mark of good governance and a process to be encouraged, the increased pressure placed on the various institutions (not least domestic parliaments) leads to insufficient time for deliberation and active engagement. Increasing 'reasoned opinion' times from 8 to 12 weeks would not lengthen the policy process excessively and may allow more time for careful consideration of matters.

The matter of aligning EU member states' electoral cycles has been debated in the past, and shelved given the degree of complexity, however it would facilitate domestic parliaments' involvement in EU and national policy-making by freeing up time from 'pre-election posturing' as this would be limited to a set period (final year) of the legislatures. Parliaments would be better able to spend the previous 3-4 years working with other parliaments, and with the EU level institutions.

Please send any responses or comments regarding one or all of these questions to:

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