

Balance of Competences Review – Subsidiarity and Proportionality event 29 April – UKREP Brussels

Summary of discussions in the group chaired by Susannah Montgomery

Although attendees felt that the public debate on subsidiarity and proportionality was not particularly well informed, the group highlighted several problem areas, and even proposed solutions. A key theme was that the Commission was not seen as taking either subsidiarity or proportionality seriously, widely ignoring the concerns of third parties and member states. The group suggested that improved coordination of national parliaments, the Council holding the Commission to account, and effective scrutiny of impact assessments would all help improve the role of subsidiarity.

Scope: On the question of scope, there was some debate as to whether or not subsidiarity and proportionality should be bundled together as often as they are. Several attendees agreed that it was important not to conflate the two, although there was some concern that proportionality was not treated in the same way as subsidiarity, with subsidiarity being seen as a more high-profile issue.

Some members also expressed the belief that subsidiarity is effectively **a political decision** and making that judgment is much more difficult than it sometimes seems. There was some disagreement as to whether or not proportionality was an easier judgment to make. Regardless, one attendee suggested that the UK might be more concerned about subsidiarity than other Member states because of a lack of familiarity with federalism and constitutional law.

The group also noted that it is often forgotten that questions of subsidiarity do not legally apply in cases of exclusive EU competence and that the treaties limit the number of areas where subsidiarity can be called into question. **Shared competences** were seen as the main source disagreement on the question of subsidiarity. The UK provides an interesting comparison. Some attendees marvelled at the ability of the UK not to have major subsidiarity issues with devolved administrations. There was no agreement as to whether or not this was cultural, or because there were very few shared competences. It was noted that countries such as Spain had a much more difficult relationship in that regard.

One contributor claimed that subsidiarity is not really a major problem, because he could only think of two cases where the Commission had overstepped its boundaries (**EPPO, Monti II**), although most attendees disagreed with this view. Regardless, there was wide condemnation of the Commission's handling of these subsidiarity questions, where the National Parliaments' yellow cards were not seen to have had any impact on the Commission for these issues.

One attendee argued that there might be scope for subsidiarity questions to be raised more frequently by Member States as they only focus on issues affecting their level of government. They are not seen to be taking sufficient interest in issues which do not affect them (i.e. decisions affecting local regulation), even though they have the power to block legislation where local governments do not. For example, there was a Regulation on **Common Standards for Civil Registry Documents**, on which

there was a question of subsidiarity, but as it did not affect Member State governments directly, they did not have the resources to act.

On proportionality, the **European Arrest Warrant** was seen as a glowing example of the principle of proportionality being ignored. Had there been more reference to proportionality in the drafting process, this could have been avoided. It was also felt that the Court of Justice ruling had missed an opportunity to highlight this oversight.

Interpretation: The Parliament's Legal Committee has a role in deciding what constitutes a 'Reasoned Opinion' and is increasingly likely to side with a national parliament, over the Commission, as was seen in a recent unspecified case between Germany and the Commission. The reason for this trend was because Members of the European Parliament are innately sensitive to the opinions of National Governments and Parliaments.

There was wide agreement that the Commission exploited interpretations to marginalise questions of subsidiarity in a range of ways, but even when there was agreement that the issue was one of subsidiarity, the European Commission would only provide cursory responses, both to independent organisations and Member States. The **Common European Sales Proposal** was seen by some organisations as clearly violating the principles of subsidiarity and proportionality. These organisations tried to submit evidence to that effect, receiving perfunctory responses from the Commission.

Variation in the activism of national parliaments hampers the efficacy of regulating subsidiarity. Parliamentary scrutiny was also highlighted as an area where some Member States were more effective than others, with the Netherlands, the UK and Denmark being highlighted as particularly effective examples. The Danish system of scrutiny was also considered particularly effective, with scrutiny being divided across the relevant thematic committees, rather than one or two EU-specific committees.

Impact Assessments were raised as a key point at which questions of subsidiarity, and particularly proportionality, should be raised. There seemed to be a consensus among the group that the quality of Impact Assessments was uneven and that the process of consulting during these assessments was not sufficiently transparent.

The UK was highlighted as providing a strong standard of impact assessments, when it did them, but Council impact assessments could be used to stop Commission impact assessments that have incorrectly dismissed subsidiarity and proportionality concerns. The group complained that impact assessments are assigned to consultancies with insufficient time to conduct the proper assessments and use overly narrow parameters. Several members of the group complained that their evidence, when submitted to the Commission, had not even been accepted because it did not fit the unnecessarily rigid terms of reference. Even when evidence was accepted, there was no way of knowing if it had really been considered. The **Working Time Directive** was given as a prime example. An unspecified case was mentioned where evidence from a specific region was rejected because other geographic regions had been selected as case studies.

It was broadly agreed that National Parliaments have a lot of power and **better coordination** is the key to unlocking that power. National Parliaments should shape law, by informing their governments before the legislation is completed, thus giving them more leverage than simply a blocking mechanism. Similarly for regional authorities, better coordination is important, and the Committee of the Regions was seen as being ineffective in this regard and becoming a facsimile of the European Parliament.

Questions about subsidiarity could be prevented through the Council providing greater detail into its input for the Commission's **Action Plan**. One attendee raised the concern that the Council's input for the next 5 year programme on Justice was looking likely to be high level, thus giving the Commission more room to act independently and flout subsidiarity concerns. The Council, on the other hand, must also do better in **holding the Commission to account** on the Council's priorities.

Application: The Common European Sales Law was seen as a good example of the principle of subsidiarity being ignored. Ideas were submitted where improving the efficacy of other services (small claim courts, mediation) would be a more appropriate and local level to achieve the outcomes desired by the legislation. Only when those options had been discounted, would legislation at a European level have been appropriate. This evidence was then seen to be ignored.

On the yellow card process, eight weeks was widely seen as too short for getting National Parliaments' views. National Parliaments should call in Commissioners to provide evidence on subsidiarity issues, because Commissioners respond better to the scrutiny of other politicians.

In EU **legislation** the reference to subsidiarity in the preamble is at best pointless, and at worst misleading. The Commission only pays lip service to the concept, using standard wording, where it should be required to justify the subsidiarity case in more detail.

Article 352 'The Flexibility Clause': Seen as the embodiment of 'ever closer union' – The group did not believe the article was being inappropriately used. Rather, some attendees suggested the article *wasn't* being used where it *should* have been used (e.g. Women on Boards). The European Parliament was seen as reluctant to use it because it wanted to co-legislate rather than simply a veto. However, it was argued that the attendee who felt most strongly that Article 352 should have been used, was only interested in its use, because it was easier to contest.

Additional Concerns: The increasing use of **Delegated Acts** and **European Agencies** was thought not to bode well for the principle of subsidiarity, as there were fewer channels to prevent the misuse of the principles. The Commission was also seen to be doing a 'quick and dirty' job on **REFIT** due to a lack of resources.

Attendees in the group:

Susannah Montgomery, FCO

Fabian Seshadri, FCO

Robert Bray, DG Internal Policies, European Parliament

Serafin Pazos-Vidal, Convention of Scottish Local Authorities

Bob Rayner, DIAGEO

Evanna Fruithof, Bar Council of England and Wales

Robert Kaye, Law Society

Sietse Wijnsma, Office of Andrew Duff MEP

Burt Kuby, Committee of the Regions