

Response to the Government's consultation on its Review of the Balance of Competences: Subsidiarity and Proportionality

June 2014

Wildlife and Countryside Link (Link) brings together 44 voluntary organisations concerned with the conservation and protection of wildlife and the countryside. Our members practise and advocate environmentally sensitive land management, and encourage respect for and enjoyment of natural landscapes and features, the historic and marine environment and biodiversity. Taken together our members have the support of over 8 million people in the UK and manage over 750,000 hectares of land.

This response is supported by the following members of Link:

- Buglife – The Invertebrate Conservation Trust
- Client Earth
- Friends of the Earth
- John Muir Trust
- Open Spaces Society
- Ramblers
- Royal Society for the Protection of Birds

Introduction

Link welcomes the opportunity to submit evidence on Subsidiarity and Proportionality as part of the final Semester of the Government's Balance of Competencies Review.

Link does not seek to repeat points made in evidence submitted on the Environment and Climate Change in Semester 2. However, in light of the Government's response to evidence submitted on Environment and Climate Change¹, Link's Legal Strategy Group (LSG) has prepared a focused submission on the subject of access to environmental justice in the context of Subsidiarity and Proportionality.

The Government's response (above) referenced a number of areas in which respondents noted that action would be more appropriate at national rather than EU-Level, including planning, noise, protection of soil, flooding and environmental justice. The Response also confirmed that "*the Prime Minister's Business Taskforce has called on the EU to withdraw proposals on access to justice in environmental matters which it believed would constitute a barrier to business expansion*"². Presumably as a result of this type of pressure, the European Commission has indicated that it may withdraw a contested proposal on access to environmental justice³.

Link believes that the withdrawal of this proposal would be a reactive and unhelpful step. We believe that the development of draft legislation in this area is urgently needed, and one that does not breach the principles of Subsidiarity or Proportionality. The purpose of this

¹ Published in February 2014 and available at:
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284500/environment-climate-change-documents-final-report.pdf

² *Ibid*, paragraph 2.133

³ *Ibid*, paragraph 1.29

submission is to highlight our ongoing concerns in this area and draw the Government's attention to recent research demonstrating the need for legislation on the part of the EU.

Subsidiarity and Proportionality

The EU can only act where it has been given the power to do so by its 28 Member States, in one of its Treaties (the principle of conferral). In areas where the EU and Member States share the right to act (such as the environment), the principle of Subsidiarity arises in order to clarify at which level decisions should be taken.

Subsidiarity is a cross-cutting principle in the EU context, applicable whenever there is a choice between EU and national (or regional or local) action. It regulates the exercise of powers at EU level. In areas of shared or supporting competence, the EU should act only where action at EU level is more effective than action taken at national, regional or local level. Article 5(3) of the Treaty on European Union provides:

“Under the principle of Subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.”

Where these conditions are not met, it would be contrary to the principle of Subsidiarity for the EU to act.

Proportionality is the principle that where the EU acts, it should do no more than is necessary to achieve the objectives behind the action. Specifically, Article 5(4), paragraph 1 TFEU states:

“Under the principle of Proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.”

This means that, where the EU acts, that action must be suitable to achieve the desired objective, and that the action should not go beyond what is necessary in order to achieve that objective. This includes a requirement that where there are differing ways to achieve an objective, the least onerous should be taken. Essentially this principle aims to prevent EU actions going beyond what is necessary to achieve the intended outcome.

Access to environmental justice

Link's evidence on Environment and Climate Change underlined the environmental benefits arising from the adoption and implementation of the EC Public Participation Directive (2003/35/EC)(PPD). The PPD incorporates key provisions of the UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters⁴ (the “Aarhus Convention”) into EC Directives on Environmental Impact Assessment (EIA) and Integrated Pollution Prevention and Control (IPPC). These included provisions of the Convention concerning “prohibitive expense” that resulted in

⁴ Articles 3(7)(4) and 4(4)(5) of the PPD incorporate Articles 7 and 9 of the Aarhus Convention (concerning public participation in respect of certain plans and programmes and access to justice respectively) into EC Directives 85/337/EEC and 96/61/EC

significant amendments to the costs regime for environmental Judicial Reviews in the Civil Procedure Rules (CPR) as of 1st April 2013⁵.

Despite these amendments, Link members remain concerned about the UK's compliance with Article 9 of the Aarhus Convention, with particular emphasis on the limited scope of Judicial Review (Article 9(2)) and the requirement for legal review mechanisms to be "*fair, equitable, timely and not prohibitively expensive*" (Article 9(4)). These concerns are shared by the Aarhus Convention Compliance Committee which, whilst welcoming progress made by the UK on this issue, requires the government to take further steps before it is considered to be in compliance with Article 9(4) of the Convention. These concerns include, *inter alia*: (i) the caps on adverse liability are too high for many individuals and civil society groups; (ii) ambiguity as to the applicability of the caps on appeal; (iii) the exclusion of statutory reviews and private law cases from costs protection; and (iv) lack of certainty with regard to the availability of injunctive relief⁶.

Link believes that an EC Directive on Access to Justice is needed to bring the UK into compliance with Article 9 of the Aarhus Convention and to give equivalent weight to the third pillar of the Convention (pillars 1 (access to environmental information) and 2 (public participation in decision-making) have already been implemented by way of EC Directives⁷).

Moreover, recent research undertaken by the European Commission demonstrates that legislation in this area is required in order to bring the review procedures of other Member States into compliance with Article 9 of the Convention and to provide a level playing field across the EU⁸.

In 2012/2013, the Commission contracted the Chair of the Aarhus Convention Task Force on Access to Justice (Professor Jan Darpö) and a number of national experts to examine the implementation of Articles 9(3) and (4) of the Aarhus Convention in 28 Member States (the studies can be found on DG Environment's website). Professor Darpö also prepared a synthesis report that concluded:

"From the national reports in this study, I think it is obvious that a common legal framework is needed to bring all Member States in line with Articles 9(3) and 9(4) of the Aarhus Convention. There is a basic uncertainty and also opposing opinions about the requirements of Article 9.3 - what measures are needed, what kind of decisions are covered, what kind of body (administrative or judicial) should undertake the review, what kind of review is needed, etc.? My conclusion is that in order to furnish a level playing field and to promote predictability and legal certainty, there is a need for a Union directive on access to justice in environmental matters".

⁵ As of 1st April 2013, CPR 45.43 caps the adverse costs liability for unsuccessful claimants in environmental judicial reviews at £5,000 for individuals and £10,000 for 'all other cases'.

Costs protection applies from the time the application is made to the court (unless contested by the defendant). With respect to injunctive relief, the court must have regard to the question of prohibitive expense when considering whether a cross-undertaking in damages is required and must make necessary directions to ensure the case is heard at the earliest opportunity

⁶ See Report prepared by the Compliance Committee on "Compliance by the United Kingdom of Great Britain and Northern Ireland with its obligations under the Convention" for the Fifth Meeting of the Parties to the Convention in Maastricht in July 2014 on the UNECE website: http://www.unece.org/fileadmin/DAM/env/pp/mop5/Documents/Category_II_documents/ece.m.p.pp.2014.23_aec.pdf

⁷ EC Directives 2003/4/EC and 2003/35/EC respectively

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The synthesis report specifically addressed the question of whether the appropriate mechanism to address shortfalls should be a draft Directive as opposed to, for example, Member States relying on Article 258 TFEU alone or waiting to see how the case-law under Article 267 will develop. The report concluded that relying on Article 258 TFEU would be “*ineffective, time consuming, and too piecemeal*” and also pointed out that a number of Member States have not yet adapted their legislation to *Janecek* (Case C-237/07), despite five years elapsing since the CJEU’s judgment. Professor Darpö thus concluded that relying on the CJEU and the national adaption to its case law alone is “*too uncertain and slow*”. The synthesis report concluded by listing a number of issues that a draft Directive could usefully cover (e.g. standing, scope of review, costs and remedies).

Conclusion

Link believes a draft Directive on access to environmental justice is urgently needed, not only to bring the UK into compliance with Article 9 of the Aarhus Convention, but to ensure that other Member States are similarly compliant. A Directive on access to environmental justice would not offend the principles of Subsidiarity or Proportionality because intervention at EU level is clearly necessary in order to bring Member States across the territory of the EU into compliance with their international commitments. Link urges the government to reflect this view in its response to evidence on Subsidiarity and Proportionality received as part of the final Semester of the Balance of Competencies Review.



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