

Call for Evidence questions on Subsidiarity, Proportionality, and Article

352 TFEU

## 12. 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.*

The principles of subsidiarity and proportionality are essential principles in a supranational organisation such as the EU.

As a body that retains some of the features of a state without being one it is important that the EU does not drift into being one by one stealth. Additionally, in any quasi-federal structure there must always be a clear delineation of power, which the principles of subsidiarity and proportionality feed into.

Subsidiarity should generally mean that the EU should do that which cannot be done by member states or lower levels as effectively.

Proportionality refers to the idea that EU action should not exceed the goals of the EU treaties.

These are solid guiding principles for the EU, which guide the basic tenets of where EU action should stop.

However, these principles are, of course, a matter of interpretation, and it is largely the interpretation where problems appear to lie.

## 13. 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?*

The EU institutions tend to culturally lean towards a pro-European frame of thought. It is, to some extent, inevitable, that they will be highly pro-European as naturally, those who work in the institutions are likely to think more positively of them and their work.

This is true of MEPs as well, with MEPs often representing the most federalist wing of their party. This means that when subsidiarity and proportionality is interpreted in the European institutions it is often interpreted in such a way as to give the broadest possible remit to the EU.

Bodies of member states will tend to be more concerned with maintaining their own power, and hence tend towards stricter subsidiarity and proportionality standards.

In recent years there has been a trend towards what might be seen as a more Eurosceptic attitude on the part of many member states.

Ultimately, however, the question about subsidiarity and proportionality should come down to a position that the general public are broadly supportive of.

#### 14. 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?*

There should be an increased role for national parliaments. The yellow card system should be expanded to include red cards (which can completely block legislation) and green cards (allowing parliaments to initiate or repeal legislation). The time for reasoned opinions should also be extended to 12 weeks to allow parliaments to gather more opinions from civil society.

In our recent publication *Close the Gap* the Electoral Reform Society argued that:

“National parliaments are often the first place voters look to for democratic accountability. MPs are more prominent than MEPs. While they are drawn from them, parliaments are also more representative than governments and as chambers for debate, they are transparent arenas for the debate of national policy.

Yet we should not pretend national parliaments are perfect either. Democratic deficits exist at the national level in almost every European country. Turnouts are decreasing across Europe in national as well as European elections, and citizens feel increasingly distant from their own governments and parliaments as well as that of the EU. A more democratic Europe is therefore dependent upon more democratic nation-states. If parliaments are to better scrutinise Brussels then they must also become more democratic. A Westminster-style parliament with strong executive control, is clearly going to be more easily cowed by the executive on European and other issues.

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Since 2006 the European Commission has been sending all national parliaments all legislative proposals. The Lisbon Treaty creates a new role for national parliaments as guarantors of the concept of subsidiarity. Legislation is now sent to national parliaments at the same time as it forwards it to the European Parliament and the Council of Ministers. Any national parliament may then give a ‘reasoned opinion’ if it considers that the proposal violates the principle of subsidiarity.

National parliaments have eight weeks to submit such an opinion, and if one third of parliaments issue such an opinion then a ‘yellow card’ is issued. In such a case the Commission has to review the proposal with a view to maintain, amend or withdraw it. If half of national parliaments submit an opinion and the Commission decides to maintain the proposal then it must submit a reasoned opinion of its own to the European Council and the Parliament, each of which can strike down the

proposal if national parliaments agree. If the Commission proposes the law again, half the national parliaments can block the proposal, this is called the 'orange card'.

In reality, the system has proven to be rather unwieldy. In 2012 (the most recent year for which data is available) national parliaments submitted 663 opinions, of which 70 were 'reasoned opinions'. In that period one 'yellow card' was issued, this was actually the first issued at that point<sup>1</sup>. Since 2012, only one further yellow card has been issued, though at least two legislative proposals have been withdrawn due to the threat of the yellow card<sup>2</sup>.

The large number of reasonable opinions issued without a yellow card demonstrates the difficulty in achieving consensus amongst member state parliaments and there is a perception that the parliaments do not communicate well between themselves.

This is important because, as Professor Arthur Benz has said "The more parliaments cooperate, the more they can accumulate countervailing forces against the transfer of powers to the European level. As the new mechanism does not lead into a blockade of integration but in political deliberation on issued opinions, it is likely that a more problem-oriented, flexible balance of power is achieved in the federal order of the EU."<sup>3</sup>

Strong collaboration between parliaments is therefore vital for the yellow card system to become a powerful, deliberative and constructive addition to EU decision-making processes.

Institutions exist for the collaboration of national parliaments, most notably, COSAC, the Conference of Parliamentary Committees for Union Affairs of Parliaments of the European Union, but they do not appear to have currently achieved the kind of collaboration necessary for the maturation of the yellow card system. Charles Grant, head of the Centre for European Reform, has suggested a forum of national parliamentarians should be created in Brussels, for this and other reasons to do with increasing the powers of national parliaments in the EU. This may prove unnecessary, if national parliaments can increase their effective collaboration through informal ties.

The second yellow card that was issued, was against the Commission's proposal for a European Public Prosecutor's Office to investigate fraud against the EU budget. 14 parliamentary chambers in 11 member states issued reasoned opinions for the yellow card. MPs expressed concerns about the new Office, saying that current national prosecutors, and existing European agencies could cover the work.

This yellow card was subsequently rejected by the European Commission and they decided to 'maintain' the policy<sup>4</sup>.

Previously 'yellow cards' had been treated as a virtual veto, with the Commission withdrawing the Monti II legislation on the right to strike after the first use of the yellow card, and actively working to modify a 2012 directive on public procurement, and one on pensions to prevent one<sup>5</sup>.

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<sup>1</sup> Stats from European Commission's 2012 annual report on relations between the European Commission and national parliaments available here:

[http://ec.europa.eu/dgs/secretariat\\_general/relation/relation\\_other/npo/docs/ar\\_2012\\_en.pdf](http://ec.europa.eu/dgs/secretariat_general/relation/relation_other/npo/docs/ar_2012_en.pdf)

<sup>2</sup> <http://www.cer.org.uk/insights/eus-yellow-card-comes-age-subsidiarity-unbound>

<sup>3</sup> Prof. Arthur Benz *Linking multiple demoi. Inter-parliamentary relations in the EU*, 2011, available at <http://deposit.fernuni-hagen.de/2856/1/benziev-online2011nr1.pdf>

<sup>4</sup> See Commission decision here: [http://ec.europa.eu/commission\\_2010-2014/sefcovic/documents/2013\\_11\\_27\\_com851\\_public\\_prosecutor\\_en.pdf](http://ec.europa.eu/commission_2010-2014/sefcovic/documents/2013_11_27_com851_public_prosecutor_en.pdf)

<sup>5</sup> <http://www.cer.org.uk/insights/eus-yellow-card-comes-age-subsidiarity-unbound>

The Commission's insistence on maintaining the Public Prosecutor legislation therefore changed the nature of the yellow card system and set a fresh precedent. This could undermine the system in the future and make national parliaments more reluctant to go through the work of creating reasoned opinions, especially as so many fail to create the groundswell necessary for a yellow card.

The hunger for more power for national parliaments has not been satisfied by yellow cards alone, however. There have been calls for the consultation period for national parliaments to be extended from eight weeks to twelve weeks. As well as giving parliaments more time to respond, increased time could allow for some limited consultation with domestic civil society.

Similar there have been calls for a 'red card' to be created by figures including William Hague<sup>6</sup>, allowing parliaments to completely block European policies. Half of national parliaments providing a reasoned opinion would seem an appropriate threshold for such a policy.

Yet this would not necessarily need *de jure* treaty changes. A *de facto* red card system could be created by the Commission simply agreeing to treat such a threshold as a *de facto* red card, just as the Commission began accepting reasoned opinions prior to the Lisbon Treaty.

Perhaps, most radically, The Dutch House of Representatives has suggested the creation of a 'Green Card', which would allow national parliaments to come together to ask for the creation of new legislation, or the repeal of old legislation<sup>7</sup>. At a stage when the Commission, Council, Parliament (*de facto*) and citizens (through the European Citizen Initiative) have the capability to propose EU legislation, this seems a fair addition. "

Yet a major issue is also the form of interactions with the EU by the UK itself. Most interaction with the EU happens via European Council or the Council of the European Union. Such diplomatic interactions happen largely behind closed doors with poor transparency and poor accountability.

The structures of scrutiny of council meetings should be changed in the UK.

In *Close the Gap* we argued that:

"The second portion of the power of national parliaments in the EU structure comes in the form of domestic scrutiny. European member states' parliaments have European Affairs Committees which scrutinise the EU, evaluate its policies and which hold EU governments to account in their dealings in the European Council and the Council of Ministers.

Different EU member states have, naturally, set up different rules for their committees and for EU scrutiny in general.

Britain's scrutiny is principally focused in the House of Commons' European Scrutiny Committee and the House of Lords EU Select Committee.

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<sup>6</sup> See <http://www.bbc.co.uk/news/world-europe-22730226>

<sup>7</sup> See Tweede Kamer report *Democratic Legitimacy in the EU and the role of national parliaments* [http://www.tweedekamer.nl/images/Position\\_paper\\_Dutch\\_House\\_of\\_Representatives\\_on\\_democratic\\_legitimacy\\_in\\_the\\_EU\\_final\\_181-236782.pdf](http://www.tweedekamer.nl/images/Position_paper_Dutch_House_of_Representatives_on_democratic_legitimacy_in_the_EU_final_181-236782.pdf)

A 2013 study, on scrutiny of the European Council, by the EU's Directorate-General for Internal Policies described Britain's system of European Scrutiny as a 'government accountability system', in which scrutiny is relatively developed ex-post, but undeveloped post-ante<sup>8</sup>.

In the government accountability model there are few debates on European Council decisions before European Council summits. Instead there are plenary sessions of the whole parliament after the summit. These provide particularly good opportunities for the opposition to voice concerns, but there are fewer opportunities to affect government policy in this case, as it happens after the fact.

The report's authors conclude that Denmark's system, which they dub 'Full Europeanisation' provides the largest amount of scrutiny and accountability. In the Danish model, government stances at the Council are scrutinised both before and after summits, and both in committee and in plenary meetings of the whole parliament, providing both the expertise of committee and the public questioning of plenary.

The Danish European Affairs Committee has long been seen as Europe's strongest committee.

The key function of the Danish committee as opposed to other committees is its 'mandate' system in which ministers must provide an oral description of the Council agenda and the government's negotiating position to the Committee. The Committee is then asked to provide approval for the government stance. Committee members then deliberate over the negotiating position, and the Chair closes the meeting when he or she feels that members of the committee numbering representing parties which hold a majority of seats in the *Folketing* do not oppose the proposed negotiating position. If a consensus cannot be found the Committee can reject the ministers mandate and they will have to return at a later date (though, in practice this happens rarely). A written report is then produced detailing the position and the leading minister's discretion to deviate from this position<sup>9</sup>.

Once a Council meeting is over, the responsible minister must submit a report to the Committee in which they summarise the meeting proceedings. If the Committee is unsatisfied with the report then they can initiate further scrutiny measures such as demanding a plenary discussion, or further questioning, however, the follow-up is rarely used.

This scrutiny throughout allows for a strong scrutinising of the behaviour of the government in its dealings with other European states.

Scrutiny of European policy also involves other committees in Denmark, so that European agriculture policy is analysed by the Agricultural Committee.

Since 2011 the committee structure in Ireland has been 'mainstreamed'. Detailed consideration of EU draft legislation and other policy documents was devolved to the relevant sectoral committees. This allowed for Ireland's expert legislators to scrutinise EU proposals relating to their sector.

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<sup>8</sup> *Democratic Control in the Member States of the European Council and the Euro zone summits* available at [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/474392/IPOL-AFCO\\_ET\(2013\)474392\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/474392/IPOL-AFCO_ET(2013)474392_EN.pdf)

<sup>9</sup> Work of the Danish European Affairs Committee detailed here: [http://aei.pitt.edu/33634/1/pw\\_127.pdf](http://aei.pitt.edu/33634/1/pw_127.pdf) and [http://www.eu-ophlysningen.dk/upload/application/pdf/77305369/euo\\_europaudvalg\\_jan2012\\_uk\\_web.pdf%3Fdownload%3D1](http://www.eu-ophlysningen.dk/upload/application/pdf/77305369/euo_europaudvalg_jan2012_uk_web.pdf%3Fdownload%3D1)

Mainstreaming has also allowed the Oireachtas European Affairs Committee to have a more targeted role<sup>10</sup>.

The European Scrutiny Committee was described by Chris Heaton-Harris, a member of the Committee, at a recent OpenEurope conference as a committee that one is “put on” rather than one one chooses to be on as the level of work is so large-scale. According to the European Scrutiny Committee around 1,000 documents are deposited in the UK parliament every year<sup>11</sup>. A more mainstreamed system may make the work of the Committee less strenuous and allow it to dedicate itself to new forms of scrutiny.

In addition, the hiving off of ‘European’ into a single committee treats EU policy as if it is a specialised branch of foreign policy when in reality it touches on all types of policy.

Select committees in the UK have strengthened in recent years<sup>12</sup>. The recent strengthening of select committees combined with a hung parliament and the work of enterprising Committee chairs has led to perhaps the strongest British parliament in a generation.”

Superior scrutiny of both European policy and government negotiations would create superior subsidiarity and proportionality as EU legislation would be more sensitively implemented and thus impact on the UK more appropriately. It would also lead to superior scrutiny and transparency of British negotiations in Brussels.

We also argued that devolved institutions should be given more of a chance to influence EU matters:

“Much of EU policy is actually implemented at the sub-state level, by regional and local governments. For instance, many EU structural funds are designed to be implemented at regional level. Devolution has created fresh issues in Scotland and Wales however. For instance, the Welsh First Minister outlined what he described as the ‘Bridgend Question’ (to go alongside the West Lothian Question) in a speech in 2012<sup>13</sup>. The question notes that at the Council of Ministers, the UK is, for instance, represented on agricultural issues by the UK minister for the Department of Environment, Food and Rural Affairs. Yet agriculture is a devolved issue, but it is the UK minister who negotiates on behalf of the whole UK, regardless of the three other agriculture ministers in Holyrood, Stormont and Cardiff Bay.

The devolved institutions, have their own scrutiny mechanisms for the EU. In Scotland, for instance, there is a dedicated European and External Affairs Committee, though EU issues show an element of mainstreaming, with debates held in the appropriate subject committee and in the whole chamber on EU legislation.

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<sup>10</sup> See written evidence to House of Lords European Scrutiny inquiry, page 17:

<http://www.parliament.uk/documents/lords-committees/eu-select/Role%20of%20national%20parliaments/nationalparliamentsevidence.pdf>

<sup>11</sup> Page 23 of the European Scrutiny Committee’s report on reforming the system of Scrutiny:

<http://www.publications.parliament.uk/pa/cm201314/cmselect/cmeuleg/109/109.pdf>

<sup>12</sup> See, for instance, the work of Patrick Dunleavy and Dominic Muir at:

<http://blogs.lse.ac.uk/politicsandpolicy/archives/35054>

<sup>13</sup> Speech transcript available at: <http://www.clickonwales.org/2012/04/wales-and-the-future-of-the-united-kingdom/>

Sub-national levels of government are also represented in Brussels through the Committee of the Regions, an advisory committee made up of representatives from local and regional governments. The UK delegation includes two members of the London Assembly, National Assembly of Wales, Scottish Parliament and Northern Irish Assembly, and also includes two alternates from the Scottish Parliament.

The devolved institutions also have offices in Brussels so as to maintain lobbying activities.

Therefore it is not true, to say, perhaps that devolved institutions have no sway over EU legislation. However, there still remain clear democratic gaps. It is still possible for a UK minister to negotiate policy in Brussels with no reference to devolved areas. Yet, it should, of course, be noted that England makes up 84% of the population of the UK. Clearly the council of ministers cannot represent all four ministers around the table and, legally, UK ministers do represent the whole UK.

Clearly, therefore, superior consultation is required. As with the UK parliament a requirement to bring forwards the agenda of meeting to the relevant committee could be created, with the Committee perhaps able to call the minister in question before the committee if it has any particular objections to the UK position. In the age of video conferencing this needn't mean long journeys to Edinburgh or Belfast. Such question and answer suggestions would have to be non-binding but could provide for a healthy exchange of views between devolved institutions and the UK government."

True subsidiarity must mean subsidiarity *within* the UK, not just between the national and European levels.

Yet the balance should not be decided fully by parliaments. We suggested setting up a system to pilot giving government and parliament the ability to get citizens more involved in EU law-making:

"The problem with parliaments, of course, is that they are not necessarily representative of the views of the general public themselves. Indeed, no parliament could ever hope to exactly replicate the views of the entire general public, hence why we have representatives rather than delegates, to mimic Burke's famous statement.

The Lisbon Treaty created the first direct European citizen involvement in EU law-making by giving European citizens the capability to come together to propose European legislation. The European Citizens Initiative allows for citizens to propose EU policies with more than one million signatures in 7 of the EU's 28 member states. Unfortunately the process for an Initiative is very complex, having ten steps which may take up to 21 months to complete. At the time of writing there are only seven open initiatives and only two initiatives have reached the threshold necessary to initiate the legislative process.

An alternative process for engaging EU citizens in EU legislative processes is the use of publics in policy formation. Publics are spheres of deliberative policy making involving citizens.

Tools such as citizens juries (with around 12-24 members) and citizens assemblies (with closer to 100 members) allow for institutionalised forms of deliberative democracy, involving a representative sample of citizens (which could be taken from the electoral roll as with judicial juries). While such participative democratic institutions have not been tried in the EU proper, NGOs, such as European

Alternatives, have used such techniques in their work. Citizen juries have been used by both local and national government in the UK<sup>14</sup>. Citizens' assemblies have been used in British Columbia, Ontario and Canada on electoral reform issues.

Such participatory mechanisms work by taking a representative sample of citizens, informing them of the issues at hand, perhaps with a series of presentation and then allowing them to discuss and deliberate on the issues, in an attempt to come to a consensus.

These mechanisms can help to instil trust in a decision by demonstrating that a group of citizens, rather than elites, when appropriately informed of the issues, have buy in from 'normal' citizens.

Deliberative mechanisms could be deployed to investigate particularly salient EU issues, such as the negotiation of new treaties, or particularly controversial EU policies, on the request of either Parliament or the Government. The use of deliberative tools in this area could be easily piloted. Initially such mechanisms could be nonbinding, though certainly there would be a moral imperative to follow the conclusions of a jury or assembly."

Our view at the ERS is that power should broadly lie where people feel it is appropriate. Power should be negotiated between different levels of representation more. We should aim to create a multi-level EU with more input from below the EU structures in Brussels and member state governments.

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<sup>14</sup> For a summation of Citizens' Juries work up until 2007, see the House of Commons library note here: <http://www.parliament.uk/documents/commons/lib/research/briefings/snpc-04546.pdf>