

Balance of Competences Review

Call for Evidence on Subsidiarity, Proportionality and Article 352 TFEU

Submission by Michael Emerson

Centre for European Policy Studies (CEPS), Brussels

1. As the last and 32nd review of the Balance of Competences review process, the present call for evidence on subsidiarity and proportionality is unlike all the preceding reviews in addressing not a sector of policy, but rather inviting a summary of the entire project.
2. Should the principle of subsidiarity have been found wanting in the policies of the EU, then this should have been thrown up in the evidence collected under the 31 preceding reviews. At the time of writing only about half of the reviews have been published, but the basic message so far has been that the competences of the EU have been found to be 'about right'. This implies that, so far, the principle of subsidiarity has not on the whole been found to have been abused on any large scale. Criticisms of EU policies have mainly been of a different character, namely that many policies and instruments could see 'better regulation'. Efficiency of specific actions appears as the most recurrent issue, rather than questioning whether there was a case for such actions to have been undertaken at the EU level.
3. In order to go beyond these very general conclusions one can discuss the key characteristics of a number of examples or types of action.
4. Category no 1 identifies cases of 'absurd micro-regulation'. There have been two such cases surfacing in the course of the last year: the olive oil packaging affair (restaurants should be required to put olive oil on the table only in the producer's packaging), and the proposal for regulating the health and safety conditions of hairdressers. The Commission proposal for olive oil packaging provoked such immediate public protests that it was promptly withdrawn. The request by hairdressing trade organisations for a regulation became publicly ridiculed ('Brussels bans high heels for hair dressers'), and the Commission declined to propose a regulation. These two small if not trivial examples are nonetheless suggesting a first important conclusion, namely that the subsidiarity principle is alive and well. It is understood and has become an acknowledged basis for rejecting inappropriate micro-regulation. However it is also significant that such cases seem these days to be few and far between. A further characteristic of these two cases is that they are comprehensible to everybody, such that anybody can intervene in debate on

grounds of common sense. No technical knowledge is needed, and hence such cases readily occupy the headlines of the popular press. *While cases of absurd micro-regulation do still emerge at least as proposals, the EU institutions seem nowadays well trained to avoid or drop such proposals when the subsidiarity principle would risk being clearly abused.*

5. Category no 2 concerns health and safety standards in the agri-food sector. Here is a huge amount of product and process regulation, and much of the public criticism about over-regulation by Brussels arises in this sector. However when it becomes a matter of identifying precisely where and how such regulations are offending the subsidiarity principle, the evidence is not so forthcoming. In fact the contrary appears more often to be the case, notably when some food safety scandal erupts, as was the case last year over horsemeat. *The basic conclusion from this and other episodes is that the agri-food sector needs much strict regulation at the EU level, and the main faults in the system are found in ineffective implementation by various national agencies.*
6. Category no 3 concerns heavily regulated industrial products. A case in point is the chemicals sector, which is regulated by the REACH directive, which is notorious for the heavy and very costly burdens it places upon producers, and especially so for small and medium-sized enterprises. This seems to be raising a proportionality issue, more than one of subsidiarity. Nobody doubts that dangerous chemicals have to be seriously regulated, but the argument from stakeholders is suggesting that implementation burdens are disproportionate for small and medium sized enterprises, the rules having been set largely under the influence of major enterprises. The problem here however is that the subject matter is extremely difficult technically for comprehensible public debate. *Criticisms of over-burdensome specification of regulations have emerged in many of the Balance of Competence reviews, and these 'proportionality' (rather than 'subsidiarity') issues have to be met by serious impact assessments, both ex-ante and ex-post.*
7. Category no 4 concerns heavily regulated network industries, such as telecommunications. This is another example where the need for EU level regulation is not contested, but the technical quality of the regulations in question is contested as being out of step with the fast changing technology in this sector. *So this type of case concerns regulatory quality, rather than either subsidiarity or proportionality, and also has to be met by impact assessment such as under the regulatory fitness (REFIT) programme.*
8. Category no 5 concerns heavily regulated service sectors where the subsidiarity principle is turned upside down, namely where national regulators have held on to their competences long after it became objectively justified to move up to the level of EU regulation. The major example here is the financial services sector, where the origins of the hugely costly financial crisis starting in 2008-2009 is attributed to

systemic failings in the national regulatory regimes. This has been subject now to major reforms strengthening EU financial market regulation. *For balanced debate it is important to remember that the subsidiarity principle can cut both ways, with cases where the national level may hold on to competences which it can no longer properly manage.*

9. Finally, category no 6 concerns the case of macro-economic policy regulation, which can be argued to have become at least for the Eurozone an example of excess transfer of competence to the EU level. This involves the complex apparatus of macro-economic governance, with the 'European semester', the 'six-pack', 'two-pack' and new treaty provisions intended to constrain national budgets within given rules and parameters. This is a controversial domain, involving crucial issues of systemic importance of the Eurozone, and therefore not so relevant for the UK. The argument made by many economists is that the Eurozone needs a more clear separation of powers, with the Eurozone endowed with greater fiscal capacity of its own, leaving the national level with clearer responsibility for the details of national budgets. By contrast the emerging system of Eurozone governance sees highly complex power sharing arrangements, leaving neither the EU nor national levels happy. *But it is still relevant for the subsidiarity debate, to emphasise that the subject matter is not only a matter of 'micro' regulatory policies, but reaches up also into major features of the macro-economic system.*
10. Both the UK and the Netherlands have laid much stress on the need to give greater effect to the principles of subsidiarity and proportionality. Interestingly at a seminar organised in January 2014 at the Clingendael Institute in The Hague there was an opportunity to test the views of the member states on this topic, since the attendance list comprised senior officials from all 28 member states in addition to various independent think tankers¹. This was in fact a unique opportunity to test informally whether or not there are grounds to justify a major EU-wide reform programme flagged under these headings, and thus anticipate what the response might be at the level of the EU as and when an attempted negotiation (or in UK language 're-negotiation') might be attempted. The main conclusion of the conference report was headlined as "More Focus on Regulatory Quality in the Context of Better Governance". The present author's reading of the debate is that there is actually a need for 'proportionality' in advocacy of a reform process organised around the subsidiarity principle. Sentiment critical of excessive EU 'interference' in the affairs of the member states fairly widespread, but it proves difficult to tie down exactly where the excesses are to be identified, and how they should be corrected. The examples listed above are consistent with this view. *There is clearly a broad-ranging concern for regulatory quality, but by contrast virtually no*

¹ 'From Subsidiarity to Better EU Governance: A Practical Reform Agenda for the EU', Steven Blockmans, Judith Hoevenaars, Adriaan Schout and Jan Marinus Wiersma, Clingendael/CEPS Report, March 2014

support for any repatriation of competences, which would have been the logical conclusion if the subsidiarity principle had been abused on a large scale.

11. An objection to this conclusion can be to ask why should euro-scepticism and criticisms of EU 'interference' have developed so widely and strongly across the EU. There are possible answers to this objection, but since these lie outside the terms of reference for the present call for evidence, they should be simply mentioned for illustrative purposes. A first argument is that the Eurozone crisis has not only had serious macroeconomic costs. It has also fed euro-scepticism, but this could to a degree be reversed by a resumption of buoyant growth. A second argument is that the EU has failed to deliver in the foreign and security policy domain what its citizens expect of it, as illustrated dramatically by the current crisis over Ukraine. But here the subsidiarity argument is turned on its head, since the continuing inter-governmentalist approach to foreign policy is showing its limits for the 21st century.