

# Deciding how and when the European Union should act

**In 2014, the Foreign & Commonwealth Office carried out a Review of the Balance of Competences between the UK and the European Union.**

Competences, found in the Treaties, determine when the EU can act. This principle of conferral is a cornerstone of the EU. The principles of subsidiary and proportionality, by contrast, guide when and how the EU should act. Subsidiary thereby informs when EU action is better than action by Member States.

**There are problems with the way these principles have been interpreted by the EU Courts in the past.** Subsidiarity is under-interpreted while proportionality is over-interpreted by the EU Courts; and there have also been instances where the national parliaments have been confused as to when which principle applies.



“**The best way to protect national spaces for action is via “complementary” or “supporting competences”**”

Professor Robert Schütze

## **Reform Proposals:**

Protecting national scope to act via complementarity or supporting competences.

Where there are shared competences, the EU should only lay down minimum standards.

The scope of EU action should be mitigated by extending the yellow card mechanism to the principle of proportionality.

Need to understand subsidiarity as including the question of the harmonisation method chosen by the EU.

# “The principle of subsidiarity still lacks clear judicial contours; the only way that it seems to be enforceable is via the yellow card mechanism.”

Professor Robert Schütze

## Combine the principles of Subsidiarity and Proportionality

**Subsidiary** is a principle used by the EU to decide whether or not to exercise its competence. Subsidiarity governs the choice of who should act, with a preference for the institution closest to the citizens.

**Proportionality** means that whatever action is taken it should be no more than is needed.

### Options for enforcement:

**Yellow Card** — if one third of national parliaments issue reasoned opinions on a proposal, it must be reviewed.

**Red Card** — would allow a majority of national parliaments to block an EU Commission initiative.

Yet the introduction of a red card system is not advisable:

- time limits are too tight,
- the decision-making processes are already very complex,
- a red card mechanism would not give the Westminster Parliament a unilateral veto right.

The EU Treaties treat subsidiarity differently from proportionality. Simplification is here needed because the two principles get confused and they are currently enforced by different mechanisms:

- Confusion has arisen when asking about the intensity or degree of EU action. It is often seen as a question of proportionality, but it is a question for subsidiarity.

- The principle of subsidiary is enforceable through a political, ‘yellow card’ system. However, the proportionality principle has no political mechanism to enforce it, rather the decision on proportionate action rests with the European Court of Justice.

It does not make sense to separate the principles, instead they should be combined.

There are two ways they could be combined:

(1) Political enforcement via the ‘yellow card’ mechanism could be applied to the principle of proportionality, or

(2) Subsidiarity should be tied to the question of the harmonisation method chosen by the EU. Subsidiarity would here be “constitutionalised” by insisting that the Union is confined to adopting minimum harmonisation rules.

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### References

R Schütze, ‘Subsidiarity after Lisbon: Reinforcing the Safeguards of Federalism?’ (2009) 68(3) Cambridge Law Journal 525-536

R Schütze, ‘Organized Change towards an “Ever Closer Union” Article 308 EC and the Limits to the Community’s Legislative Competence’ (2003) 22 Yearbook of European Law 79-115

This research was cited in HM Government, ‘Review of the Balances of Competences between the United Kingdom and the European Union: Subsidiarity and Proportionality’ (December 2014)

Please cite this document as: R Schütze, (2015) ‘Deciding when the EU should act’, Durham Law School Briefing Document, Durham University