Task Force on Subsidiarity, Proportionality and "Doing Less More Efficiently"
Presentation by Michael Dougan, University of Liverpool on 15th March 2018

Thanks very much for the invitation to attend and assist the Task Force. It is obviously a great honour and pleasure to be here.

In my short presentation, I will give an overview of (first) some key criticisms and (secondly) some key proposals as they emerge from the academic literature on subsidiarity.

Key criticisms of subsidiarity and the Early Warning Mechanism

We should acknowledge a longstanding and widespread perception that subsidiarity in general – and the EWM in particular – have had a limited impact and limited value in practice.

One should note immediately: "limited" is usually understood here primarily in terms of the number of yellow cards raised or proposals which have been "blocked" or powers "repatriated" on subsidiarity grounds – which admittedly are rather few. But most studies do not take into account the broader impact of subsidiarity or the EWM upon institutional cultures and practices, including their "anticipatory" impacts upon the Union institutions (e.g. as they conceive and formulate legislative proposals in the knowledge that the latter will need to pass subsequent subsidiarity scrutiny) – no doubt because such effects are more difficult to measure or evaluate.

But let's accept, for the sake of analysis, that there is a problem, and certainly the widespread perception of a problem, with the effective operation of the principle of subsidiarity in general and the EWM in particular.

Some of the factors that might explain the limited impact of subsidiarity are external to the Union legal order: e.g. the diversity of national parliaments, some of which are much

less likely to engage with the EWM, perhaps preferring to concentrate their efforts and limited resources on influencing or controlling their ministerial representative in Council.

But other factors are internal to the Union legal order. And above all, the fact that there is a long-standing debate – active since the Maastricht Treaty itself and still unresolved to this day – about what subsidiarity should actually mean. It is possible to identify at least three distinct understandings of subsidiarity.

- Does subsidiarity have a substantive meaning, essentially of an economic nature, driven primarily by the search for regulatory efficiency – such that Union level action can be justified wherever it is capable of delivering "added value" as compared to diverse national measures? This is the understanding which emerges most clearly from the text of Article 5(3) TEU, reinforced by the caselaw of the Court of Justice (e.g. in its 2016 "tobacco rulings").

- Or does subsidiarity have a substantive meaning, but of a more overtly political character – seeking to narrow the distance between citizen and public power and to show greater deference to divergent local policy preferences? In that sense, subsidiarity should have a much stronger decentralising potential – limiting the exercise of Union competence, even where the latter would make undoubted economic sense, particularly from the point of view of the internal market. This understanding can also find some (albeit more limited) support in the text of Article 5(3) TEU. But more importantly, it arguably resonates much stronger with widespread political and public perceptions and expectations about subsidiarity across many Member States.

- Or should subsidiarity be understood, not at all as a substantive principle with some fixed definition and content; but rather as an essentially procedural principle, which enjoys only the meaning attributed to it by the responsible institutional actors as expressed through the channels provided for under the Treaties? That understanding

may feel counter-intuitive, particularly when set against the text of Article 5(3) TEU. But it received a significant boost from the Lisbon Treaty reforms.

In particular, recall that the Lisbon reforms were based on the premise that ex post judicial enforcement of subsidiarity is and should necessarily be of a limited nature and extent; so the Treaties should move towards more effective ex ante political enforcement – and should do so by engaging those institutions which were thought to have the greatest interest in the enforcement or neglect of subsidiarity, i.e. the national parliaments. But the Lisbon reforms also reflected a broader desire to address the Union's legitimacy problems: offering national parliaments the opportunity to participate in the Union's legislative activities, could bolster the democratic credentials of the Union's legislative output – in effect, allowing the Union to draw vicariously upon the democratic legitimacy of the national parliaments.

At the very least, involving the national parliaments in subsidiarity enforcement on the grounds that they "had the most to lose" was widely interpreted as implicit support for a substantive but political understanding of subsidiarity: less concerned with regulatory efficiency; more protective of local policy preferences as an end in itself. But going further: the fact that Lisbon sought to draw upon the democratic legitimacy of national parliaments for the Union's own purposes, was widely seen as an endorsement of a purely procedural understanding of subsidiarity, i.e. it means whatever the responsible institutions say it means – the domestic legislatures alongside the Commission, the Council and the European Parliament. So subsidiarity simply means whatever the national parliaments have to say about the value of Union legislation; or at least whatever political influence their critical voice is capable of exerting upon the Union institutions.

Those 3 understandings of subsidiarity – economic, political, procedural – each have very different implications. But the Treaties give us no clear and decisive steer as to which (if any) of those interpretations should win out. Yet these tensions between different

conceptions of subsidiarity are not merely abstract or theoretical. On the contrary: they help to explain almost every single one of the significant critical reactions or mutual misunderstandings that seem to plague the interpretation and enforcement of subsidiarity within the Union legal order in practice. Let's take two examples.

In the first place, consider the apparently frustrating problem that so many "reasoned opinions" from national parliaments are not really about subsidiarity at all: they are objecting to the relevant Union proposal on alternative grounds such as legal basis, proportionality or simple political preference.

The Commission generally regards such reasoned opinions as falling outside the legitimate bounds of the EWM. Indeed, some authors have even spoken about national parliaments "abusing" their yellow card powers, by lodging objections which are not true subsidiarity concerns. But such criticisms assume that we all have a common understanding about what the principle of subsidiarity actually means – that it holds some identifiable substantive meaning, onto which the national parliaments must map their reasoned opinions.

Yet when subsidiarity is viewed from a procedural perspective, the national parliaments are doing nothing improper: they are using the institutional opportunities offered to them under Union law to express their views on Union legislative proposals; whatever influence those views might have upon the Union institutions *is* subsidiarity in action. To accuse the national parliaments of abusing their yellow card powers is nonsensical: it is the voice of national parliaments that counts, not whether their message meets some institutional pro forma.

In the second place, consider the allegation that the Commission's understanding of subsidiarity is not just substantive, but also primarily economic (rather than political) in character: this is a quest for regulatory efficiency (rather than decentralisation). Such allegations are most acute where the Commission identifies the existence of a "cross-

border dimension" to any given policy challenge and treats that as sufficient to justify the exercise of Union competence.

Many commentators are critical of this practice, for two main reasons.

1) There is always going to be some "added value" to having Union action in cross-border situations. And particularly in fields such the internal market or the area of freedom, security and justice – where the very existence of Union competence depends upon a cross-border dimension – applying effectively the same test also for subsidiarity, risks reducing Article 5(3) TEU to a mere tick-box exercise. Or worse: it feels like reversing the burden of proof, i.e. rather than the Commission having to justify proposed action in concrete terms, the national parliaments are required to adduce hard evidence to contradict the general assumption that Union action has "added value" in every cross-border case.

2) Regarding the subsidiarity enquiry as exhausted whenever there is evidence of an initial cross-border problem, does not go far enough in justifying the choices to be made about the more precise nature, extent and legal form of the Union's proposed action. In particular, many commentators reject the idea of subsidiarity as an upfront "yes or no" question; it should represent a more on-going and penetrating inquiry. Indeed, many of the subsidiarity challenges raised against Union legislation fall into stable and predictable categories of exactly such nature.

E.g. would a framework based on principles and objectives be sufficient, or are detailed technical prescriptions required?

E.g. should harmonisation be exhaustive or minimum, leaving scope for Member States to enact higher standards?

E.g. should harmonisation cover wholly internal situations as well as cross-border ones?

E.g. when it comes to implementation, is it possible to rely on Member States and national authorities, or is Union level implementation called for?

In other words: there are a whole host of important regulatory choices to be made – each one amenable to subsidiarity scrutiny of its own. However, the Union institutions do not generally provide a subsidiarity analysis going beyond the initial "yes or no" question into more specific choices and provisions. Moreover, the Court's caselaw has positively endorsed that light-touch approach, i.e. by applying judicial review on subsidiarity grounds only to the overall Union measure, not to its various provisions.

In any case: the Commission's focus on an economic test of regulatory efficiency, will inevitably fail to satisfy those who regard the proper test to be a more political one – aimed at actively encouraging the decentralisation of power and accommodation of local policy preferences (even assuming they believe subsidiarity has any substantive meaning at all).

So: many of the controversies surrounding the handling of subsidiarity issues within the Union institutional system stem not from relatively technical quibbles about deadlines or thresholds; but from more fundamental differences about what subsidiarity means, what it is intended to achieve, and who should be responsible for its enforcement. Put simply, when different actors talk or complain about subsidiarity, they are often not talking or complaining about the same thing.

Key proposals for reforming / improving subsidiarity and the EWM

Of course, there are a large number of ideas for how the application and enforcement of subsidiarity within the Union institutional system could be improved – ideas that range from minor tinkering through to much more radical reform.

We could improve the operation of the existing subsidiarity EWM:

E.g. by extending the time available for national parliaments to respond to EU proposals beyond the current 8 week period, to around 12 weeks (the timescale already accepted in principle during the negotiations over UK membership in February 2016).

E.g. by lowering the threshold requiring to trigger a formal review of the relevant Union proposal – though it is interesting to note that the Task Force Discussion Paper suggests this would not make much difference in practice, unless the threshold were lowered very considerably.

E.g. by trying to improve the consistency of national parliamentary engagement with the EWM, so that the operation of the system is not skewed in practice by the fact that some parliaments are very active and others seem much less inclined to engage at all.

E.g. by increasing the amount and quality of data supplied to national parliaments in order to explain / justify Union proposals from a subsidiarity perspective – especially the "added value" of Union action, both in internal market / AFSJ situations, and as regards other legal bases where competence does not depend upon the existence of a cross-border element.

E.g. by improving the rigour of the Commission's response to reasoned opinions: even if one believes them to be off piste, they are still the product of the primary democratic institutions within the national constitutional orders.

E.g. by providing for a reconsultation of national parliaments, where subsequent amendments to Union legislation could have significant subsidiarity implications, going beyond the original Commission proposal.

We could extend the scope of the EWM beyond subsidiarity per se, e.g. to cover also the existence of EU competence; the proportionality of EU action; specific objections based on the "national constitutional identify" clause; or even the very political desirability of EU action. From the Commission's perspective, that would of course represent a significant extension of the scope of the EWM – though for adherents of a procedural understanding of subsidiarity, it would merely be formalising a power or prerogative that exists already.

We could strengthen the potency of the national parliaments' voice, by moving from a yellow card to a red card system. That idea was already given concrete form during the UK "renegotiation deal" of February 2016: if 55% of the votes from national parliaments participating in a proposal for Union legislation objected to its contents on subsidiarity

grounds, within 12 weeks from being notified of the draft text, then the Council committed itself to dropping the initiative altogether, unless it could find a way to accommodate those domestic concerns. That mechanism was to be introduced without direct Treaty amendment, as part of the internal institutional procedures of the Council. As such, it raised all sorts of interesting questions – especially concerning how the "red card" might be enforced, if the Council decided to override the objections of the national parliaments and continue with a legislative proposal anyhow.

On the one hand, just because the UK deal is dead shouldn't automatically mean that all of its ideas should die along with it. Should the "red card" be resurrected, either as an internal Council procedure, or in a future Treaty amendment? On the other hand, such a proposal provides a good example of where our current lack of a common understanding about what subsidiarity actually means, could cause more harm than good. If the reasoned opinions of national parliaments are to be capable of having much stronger legal effects within the Union legal order – perhaps even entailing the death of entire legislative initiatives – then we need to know, much more clearly and unambiguously than is evidently the case today – which reasoned opinions are to be considered legitimate and which should be treated as falling outside the scope of the national parliaments' powers. At the moment, there is a real risk that introducing a "red card" (or otherwise bolstering the concrete legal consequences of reasoned opinions) will simply lead to greater frustration by the Commission about the system being misused and / or greater frustration by the national parliaments that their concerns are being side-lined or ignored.

And of course, there are other ideas to increase the influence of national parliaments, e.g. formalising a collective power to request the Commission to bring forward new legislative proposals (inspired by the experience of the citizens' initiative); which could include a power to request the amendment or even repeal of existing Union legislation.

We could think about novel institutional structures to strengthen subsidiarity monitoring, e.g. as with the proposed creation of a "competence scrutiny panel" (including representatives of the national parliaments) at a relatively early stage in the

formulation of draft legislative proposals or at least in the subsequent Union legislative process.

It should be noted that all of those proposals seek to enhance the position of national parliaments within the Union system – a prospect which also has some important implications for the Union's existing institutional balance. In particular, consider the important work of Andrew Woodhouse (CMLRev, 2017): the more extensive the functions of national parliaments within the Union order, the greater the danger that they are given power without commensurate responsibility, not least since there is no single institutional structure through which national parliamentary power is channelled and that could attract certain duties of loyal cooperation under Union law.

Concluding remarks

Our analysis suggests two key challenges.

First, what is striking about so many of the ideas for subsidiarity reform is that they still dance around and remain dependent upon the more fundamental, unresolved tensions we discussed before: the fact that subsidiarity itself carries different and potentially contradictory understandings (economic, political and procedural); and that the involvement of the national parliaments has not only made the institutional framework more complex, but also exacerbated the lack of any consensus about the meaning and purpose of subsidiarity; whilst also raising the stakes and potential costs – especially in terms of legitimacy – if subsidiarity is perceived to be "failing".

Even if it is not possible to bring the various actors towards a clearer common understanding of what subsidiarity means in practice, one should at least be wary of proposing institutional reforms (such as a red card system) whose successful operation necessarily presupposes the existence of precisely such a common understanding. If we are to agree to differ, even in our basic understanding of what subsidiarity means, then

such differences need to be managed within an essentially political framework (rather than through harder legal effects).

Secondly, subsidiarity is one of those principles which must not only be done, but needs also and manifestly to be seen to be done. Even if one could honestly and in all objectivity say that "subsidiarity" is being observed and enforced rigorously and scrupulously across the work of the Union institutions, it would count for little if the perception persists that "subsidiarity" is little more than a tick-box exercise or that legitimate concerns are not being listened to.

On the one hand, the success of subsidiarity is therefore as much about effective dialogue, communication and engagement, as it is about simply cutting back on the number or scope or depth of Union legislative proposals as some end in itself. On the other hand, all relevant actors have a responsibility not to set up expectations or apply tests which are bound to be disappointed or to register only failure. Well managed, subsidiarity has the potential to improve the quality and outputs of the Union's democratic processes; but as experience has arguably show, subsidiarity also risks becoming a "fight that can never be won" and thus a source of perpetual disappointment.