

TOOL #5. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY

1. INTRODUCTION & LEGAL BASIS

The Union can only act in areas where the Treaties confer competence. In addition, all Union actions are governed by the overarching principles of subsidiarity and proportionality³³. These principles are important. In areas not falling under its exclusive competence, the Union should only act where the principle of subsidiarity is respected. In all cases, Union actions should be restricted to what is necessary to achieve the objectives defined in the Treaties. Non-compliance with the principles of subsidiarity and proportionality may be used as a reason to challenge the lawfulness of Union acts before the Union's courts. In addition, national Parliaments have a specific role in scrutinising the Commission's respect of the subsidiarity principle³⁴. The impact assessment (IA) report should, therefore, set out **qualitative and quantitative information** to support the case for EU level action.

The IA report should describe the appropriate legal basis for action derived from the Treaty. For IAs, the choice of legal basis must be based upon the nature of the main/predominant objective and content (e.g. health, environment, internal market, etc.).

Box 1. Choice of the internal market legal base

- The internal market legal basis is commonly used as a legal basis for EU initiatives. You should be aware that its use has been criticised by some stakeholders who argue that alternative legal bases are more appropriate (health, environment etc.);
- Measures adopted on the basis of Article 114 of the Treaty of the Functioning of the European Union (TFEU) should genuinely aim to improve the conditions for the establishment and functioning of the internal market. Mere disparities between national rules and an abstract risk of future obstacles to trade or a distortion of competition are not sufficient. Action may be justified to prevent the likely emergence of such obstacles and the elimination of appreciable distortions of competition³⁵;
- The nature of the particular market should, therefore, be characterised in terms of the market participants, the extent of cross-border trade, presence/market share of companies from other Member States, territorial restraints on trade, share of foreign workers, ease of cross-border purchasing, rules related to the use/movement of capital, etc.;
- In addition, how big are the obstacles and barriers to the free movement of people, goods, services and capital? How many actors are affected in how many Member States? What are the additional costs of complying with different national rules assuming a person or business wants to operate in more than one Member State?

³³ Article 5(1) of the Treaty on European Union.

³⁴ Protocol No 2 of the TFEU on the application of the principles of subsidiarity and proportionality.

³⁵ Case C-376/98 *Federal Republic of Germany v European Parliament and the Council of the European Union*, para 84.

2. SUBSIDIARITY

The principle of subsidiarity aims to ensure that policy measures not falling under the exclusive competence of the Union are decided at a level which is as close as possible to the citizen and at Union level only where necessary.

An analysis of EU added value is also important when evaluating existing interventions. In relation to evaluation, it is often difficult to identify what the situation would be like in the absence of the EU intervention, although useful reference may be made to the baseline scenario from a previous IA. In evaluation, the EU added value questions are the flip side of the impact assessment subsidiarity analysis – looking to draw conclusions on the actual added value from EU action over and above that which could have been achieved by the Member States.

Box 2. Why a good analysis of subsidiarity is important

The Commission is bound by Protocol No 2 of the TFEU to review (and subsequently to maintain, amend, or withdraw) any proposal it makes where a sufficient number of reasoned opinions are received from national Parliaments regarding the non-respect of the principle of subsidiarity (i.e. more than one third of the 56 votes allocated to national Parliaments or one quarter in the of field freedom, security and justice on the basis of Article 76 TFEU).

The subsidiarity principle does not apply in areas where the Union has exclusive competence such as commercial policy or competition (see Article 3 TFEU). In addition, in other areas it is exceptionally considered that the Union has an exclusive competence “by nature”. These are budgetary and institutional matters where it is clear that only the Union can, or even has to act, and where the action of the Member States is not possible (e.g. the draft budget, own resources, the multiannual financial framework regulation, while the individual MFF programmes follow their particular legal bases, the citizens' initiative, the comitology regulation, rules on access to documents of the EU institutions and bodies, data protection rules for the institutions, establishment of a European Voluntary Humanitarian Aid Corps, codifications of existing legislation).³⁶

In other areas, and where competence has been conferred on the Union, subsidiarity means that the Union should only act:

- **If, and in so far as, the objective of the action cannot be achieved sufficiently by the Member States (at national, regional and local levels); but can rather**
- **be better achieved at Union level by reason of the scale or effects of the proposed action.**

Subsidiarity should be assessed at an early stage of the IA process and as part of the EU added value assessment in an evaluation or fitness check. It should complement the problem definition section of an IA report which should establish the "EU relevance" of the problem (for an IA) or the intervention (for an evaluation) which should be described and quantified as far as possible.

³⁶ Internal practical guidelines on the implementation of Protocol 2 on the application of the principles of subsidiarity and proportionality (Ref. Ares (2013)1752339, of 5 June 2013), p. 6.

Subsidiarity needs to be verified for both legislative and non-legislative initiatives. The emphasis of the analysis should be to assess whether or not action at the national level is/would have been sufficient to achieve the objective of the initiative and whether in consequence, by reason of the scale or effects of the proposed measure, Union action would have an added value compared to action by the Member States.

The following steps can help when assessing subsidiarity:

I. Verify whether the Union has exclusive competences or not	
Question	Does the legal basis (action under consideration) fall within one of the areas where the Treaty gives the Union exclusive competence (as defined by Article 3 of the TFEU) or is it an exclusive competence by its nature (i.e. where only the Union can/must act; see below in the section on relevant issues)?
If yes	State in the report that the subsidiarity principle is being respected (for example: "Trade policy and the negotiation of international trade agreements are areas of exclusive EU competence pursuant to Article 207 of the Treaty and therefore the subsidiarity principle does not apply").
If no	move to step II and III below
Relevant issues	The point of departure is shared competence. Exclusive competence applies in the areas defined in Article 3 of the TFEU. In addition, the Commission takes the view that in exceptional cases, certain legislative acts can be considered as falling under exclusive competence by their nature. These mainly concern budgetary and institutional matters where it is clear that only the Union can (or even must) act such as the draft budget, own resources, the multiannual financial framework regulation, the European Citizens' Initiative, the Comitology Regulation, Rules on access to documents of the EU institutions, data protection rules, the establishment of a voluntary humanitarian aid corps. Codification of Union law is an exclusive competence whilst recast is not and it is the specific legal basis which determines whether the proposal falls under the subsidiarity control mechanism.

II. Perform the necessity/relevance test	
Question	Can/have the objectives of the (proposed) action be(en) achieved sufficiently by Member States acting alone?
Relevant issues	<p>A key part of the analysis should be to qualify the "Union relevance" of the initiative being considered. The greater the relevance the more likely Member State action alone will/would have be(en) insufficient. Key issues/questions to consider are:</p> <ul style="list-style-type: none"> • How does the problem (e.g. negative externalities) vary across the national, regional and local levels of the EU? • Is the problem widespread across the EU or limited to a few Member States? • Does the problem have the same or different underlying cause across the EU?

	<ul style="list-style-type: none"> • How do the views/preferred courses of action of national, regional and local authorities differ across the EU? • To what extent do Member States have the ability or possibility to enact appropriate measures? • Would national action or the absence of EU level action conflict with the Treaty or significantly damage the interests of other Member States? • Are there transnational/cross-border aspects to the problem? Have these been quantified? • Will there be increased costs or problems if action is left only to the Member States?
If yes	Union action in the area cannot be justified. In the context of IAs, the initiative under consideration should be abandoned or refocused as appropriate. In the context of evaluations, the recommendation should clearly stipulate that EU intervention can no longer be justified.
If no	Illustrate the specific limits of Member States' action, their underlying drivers, and why they would/have not be(en) "sufficient". Move to next step.
Examples	Relevant situations could involve cross-border effects (e.g. pollution) or obstacles to the free movement of persons, goods, services and capital, or common challenges (such as migration) or serious risks that could affect large parts of the Union (e.g. pan-epidemic health risks).

III. Perform the EU added value test

Question	Can/have the objectives of the proposed action be(en) better achieved at Union level by reason of the scale or effects of that action?
Relevant issues	Key issues/questions to consider are: <ul style="list-style-type: none"> • Are there clear benefits from EU level action? • Are there economies of scale? Can the objectives be met more efficiently at EU level? • Are there benefits in replacing different national policies and rules with a more homogenous policy approach? • Will the functioning of the internal market be improved? If so, how will it be improved?³⁷
If yes	Explain why for the case at hand, explicitly describing both the advantages and the disadvantages that Union action may have relative to Member States action.

³⁷ It is insufficient merely to find differences between national laws. There must be more than an abstract risk that such differences could present an impediment to the exercise of the fundamental freedoms.

	The principle of subsidiarity is complied with.
If no	Union action in the area would not be justified on the basis of subsidiarity. In the context of IA, the initiative under consideration should be abandoned or refocused as needed. In an evaluation this may lead to a recommendation to consider modifying the scope or stopping the intervention.
Examples	Situations where EU action produces clear benefits compared to action at Member State level by reason of its scale or its effectiveness or efficiency. Equivalent legal rights for individuals and business can ensure equity and remove distortions of competition.

Assessing subsidiarity is not always a black and white case as evidence may not univocally point in one direction. It is therefore important to **gather stakeholders' views**. When presenting the assessment in the IA/evaluation, **general statements and circular reasoning should be avoided** in favour of concrete arguments specific to the issues being analysed. Points should be substantiated with qualitative, and where possible, quantitative evidence³⁸.

National Parliaments and the Committee of the Regions have rights and powers to monitor the application of the principle of subsidiarity and they will critically examine any related analysis provided by the Commission alongside its proposals.

Don't just say:	Explain that:
The subsidiarity principle is respected because the initiative's objectives cannot/could not be achieved sufficiently by Member States.	Action by Member States could not solve the problem for the following reasons (e.g. spill-over effects, insufficient scale of the project...)
EU action is/has been necessary to level the playing field	Only EU action could eliminate the costs (of up to €X on average) that EU enterprises incur to apply for additional authorisations in every EU host country they wish to operate in.
EU action is/has been needed to avoid the fragmentation of the internal market	EU action is needed to eliminate the following obstacles faced by producers to enter into other national markets.... As shown in the problem section, this is estimated to...
EU action is/has been needed due to the strong diversity of policies/practices across Member States.	The negative consequences resulting from diverse/non-harmonised policies/practices lead to significant market entry obstacles, such as higher establishment costs amounting up to.....

³⁸ To be referred to rather than repeated if already presented in the problem analysis.

Box 3. Illustrative examples of qualitative subsidiarity analyses³⁹

- Portability of digital on-line content: SWD(2015) 270 (section 3, page 19).
- Emissions from non-road mobile machinery: SWD(2014) 282 (section 3.5, page 16).
- Protective measures against plant pests: SWD(2013) 169 (section 2.6, page 21).
- Indices/benchmarks in financial instruments and transactions: SWD(2013) 316 (section 6, page 18).

3. PROPORTIONALITY

The content and form of Union action must not go beyond what is necessary to meet the objectives of the Treaties⁴⁰. Respect for the principle of proportionality is about ensuring that the policy approach and its intensity match the identified problem/objective. Proportionality should be clearly referred to in the SWDs reporting the results of the IA⁴¹, evaluation or fitness check.

The following questions should help in assessing whether a measure adheres to the principle of proportionality:

- Does the initiative go beyond what is necessary to achieve the problem/objective satisfactorily?
- Is the initiative limited to those aspects that Member States cannot achieve satisfactorily on their own, and where the Union can do better? (boundary test)
- Is the form of Union action (choice of instrument) as simple as possible, and coherent with satisfactory achievement of the objective and effective enforcement?
- Does the initiative create unjustified financial or administrative cost for the Union, national governments, regional or local authorities, economic operators or citizens? Are these costs commensurate with the objective to be achieved?
- Does the Union action leave as much scope for national decision as possible while achieving satisfactorily the objectives set?
- Is there a solid justification for the choice of instrument - regulation, (framework) directive, or alternative regulatory methods?
- While respecting Union law, are special circumstances applying in individual Member States taken into account?

³⁹ http://ec.europa.eu/smart-regulation/impact/ia_carried_out/cia_2016_en.htm

⁴⁰ Article 5(4) of the Treaty on European Union.

⁴¹ In the context of IA, proportionality is a key criterion to consider in the comparison of the policy options.

Case law examples of disproportionate/proportionate measures	
<i>Fedesa</i> ⁴²	The prohibition on the use of hormones in livestock rearing was proportionate because other measures (such as consumer information) would have been less effective in relation to the objective of ensuring public health. This objective was also sufficiently important to outweigh the economic impacts on the livestock industry.
<i>ABNA</i> ⁴³	Union legislation was adopted which concerned making information available about the content of animal feed so that contaminated ingredients could be identified more rapidly. However, the requirement that producers of animal feed provide the precise composition of feedstuffs to customers was disproportionate in relation to this objective as it needlessly infringed the economic interests of feed manufacturers (who wanted to safeguard secret feed formulations) who were already obliged to indicate the ranges of composition of each ingredient on labels attached to the animal feed they sold.
<i>Affish</i> ⁴⁴	An EU Decision to ban the import of Japanese fish into the EU was challenged for being disproportionate in relation to public health objectives. Not all Japanese fish factories had hygiene problems but because it was not practical to check the hygiene standards of all Japanese fish factories and because a representative sample had been checked, it was deemed proportionate to ban all imports of Japanese fish.
<i>Swedish Match</i> ⁴⁵	The prohibition of tobacco for oral use in Union legislation was proportionate notwithstanding intellectual property rights and the right to pursue a trade or profession in the EU. The objective of public health protection and the lack of alternative effective measures justified the ban's proportionate nature.
<i>Cotton Support</i> ⁴⁶	The reform of the cotton support scheme under the Common Agriculture Policy reduced direct support by 65% (but complemented by an additional crop-independent single farm payment). This was deemed to be manifestly disproportionate in respect of the objective of maintaining cotton production because the Council had not considered employment costs of cotton production or the economic impacts on cotton "ginning" undertakings when exercising its discretion.
<i>Kadi</i> ⁴⁷	Council Regulation (EC) No 881/2002 imposed certain anti-terrorism measures (assets freeze) against certain persons. These measures represented a disproportionate interference with the right to property because there were no procedural safeguards enabling the affected persons to have their case heard by national authorities.

⁴² [C-331/88 Queen, v Minister of Agriculture, Fisheries and Food and Secretary State for Health ex. Parte Fedesa et al. \[1990\] ECR I-4023.](#)

⁴³ [Joined cases C-453/03, C-11/04, C-12/04 and C-194/04; ABNA Ltd and Others v Secretary of State for Health and Others \[2005\] ECR I-10423;](#)

⁴⁴ C-183/95 *Affish BV v Rijksdienst voor de Keuring van Vee en Vlees* [1997] ECR I-4315

⁴⁵ [C-210/03 Swedish Match AB and Swedish Match UK Ltd \[2004\] ECR I-11893](#)

⁴⁶ [C-310/04 Spain v Council \(Cotton support scheme\) \[2006\] ECR I-7285](#)

⁴⁷ [Joined Cases C-402/05 and C-415/05 Yassin Kadi and Al Barakaat International Foundation v Council and Commission \[2008\] ECR I-6351](#)