Ending the ratchet

From ever closer union to a two way street

ANDREW TYRIE MP

THE AUTHOR

Andrew Tyrie MP has been Conservative Member of Parliament for Chichester since 1997. He has been Chairman of the Treasury Select Committee since 2010, and was the Chairman of the Parliamentary Commission on Banking Standards in the 2010-15 Parliament. He is the founder and Chairman of the All Party Parliamentary Group on Extraordinary Rendition. This publication reflects his personal views.

ISBN No. 978-1-910627-16-7

Printed by 4 Print, 138 Molesey Avenue, Surrey

CONTENTS

ACKNOWLEDGEMENTS

I am particularly grateful to David Doig for his extensive research in developing this paper, and to Roger Gough and Edward Smith for their editing and additional research work.

A number of senior current and former parliamentary colleagues – Sir Bill Cash MP, Rt Hon Ken Clarke MP, Damian Green MP, Rt Hon Peter Lilley MP and Rt Hon Lord Lawson of Blaby – kindly read drafts of this paper and offered valuable comments from a variety of perspectives. Charles Grant also offered helpful suggestions to improve the text.

Staff at the House of Commons Library and the Clerks to the Committees of the House were, as ever, helpful in following up a number of detailed enquiries.

I have also benefited from stimulating discussions over many years with Anthony Teasdale and Klaus Welle, two acute observers of the Brussels scene, on the evolution of the EU institutions and European politics.

Responsibility for everything is mine.

SUMMARY

- Britain's renegotiation of its membership of the EU and the EU's current crisis of legitimacy are linked. The 'ratchet' embodied in the commitment to 'ever closer union' must give way to an EU which is much more receptive to identifying and returning powers and responsibilities to Member States. The balance of power between EU institutions should be restored which, among other things, requires a strengthening of the Council, and the national parliaments that stand behind its member governments.

- The definition of subsidiarity should be strengthened and clarified. Action at EU level should be justified only where substantial gains in the efficiency and cost-effectiveness of delivery are demonstrable.

- The capacity of national parliaments to challenge EU measures on subsidiarity grounds should be enhanced. The threshold for a 'Yellow Card' challenge should be reduced and a 'Red Card' mechanism established. In addition, the Council of Ministers should be able, by Qualified Majority vote, to require the withdrawal of a draft proposal on subsidiarity

grounds. Challenges should be possible on grounds of proportionality, as well as subsidiarity.

- A new subsidiarity compliance body, linked to the Council but with operational independence, should be established: a European Subsidiarity Council (ESC). It should be led by a troika of senior figures and report its findings to the Council on all legislative proposals with respect to their compatibility with the revised and strengthened subsidiarity principles and with proportionality. It would also play a central role in reform of a feature of the current co-decision process ('trilogues'). These lack both transparency and a treaty foundation.

- The ESC should be responsible for a rolling review of the *acquis communautaire* to ensure that the original justification for a measure enacted at EU level remains valid. Where this is not the case, a 12 month sunset clause for the measure would be proposed for approval (by QMV) by the Council.

- Legislative proposals from the Commission should, unless accompanied by a full explanation of the need for their permanence, carry automatic sunset clauses. Those proposals not enacted within three years, or by the end of a Commission's term, should not remain on the table but should lapse.

- Explanatory Memorandums for new legislative proposals should address, in full, compliance with the new and strengthened subsidiarity test as well as proportionality. Impact Assessments should describe in detail and quantify all compliance costs relating to a draft legislative proposal.

- The European Court of Auditors should be strengthened. It should take on a regular programme of performance – value for money – audits, giving them the same priority as the Court's audit-compliance functions. The President of the Court

should be designated as European Auditor General, with a six-strong board of deputy EAGs from within the 28-member Court.

- The European Commission anti-fraud office OLAF should be transferred to the European Court of Auditors. Its powers and resources should be enhanced and the requirement for Member States to respond properly to its investigations strengthened.

- The European Commission should be streamlined through the creation of an inner group of eight Commissioners occupying the most senior posts. This would formalise the arrangement begun by the current Juncker Commission, with the longer-term aim of reducing the size of the Commission to this inner group. Nominations to the Commission by national governments should give greater weight to expertise in particular portfolios in addition to political nous.

- The UK should make the case for reform of EU regional funding to concentrate it on transitional support for new EU entrants and on financial transfers (financed from within the Eurogroup countries) designed to smooth out economic turbulence within the Eurozone.

- The interests of non-Euro Member States should be protected, giving them the right to observer status at Eurogroup meetings and establishing a formal declaration of support for the integrity of the 28 member Single Market. Additional measures to protect the vital interests of non-Euro Member States should also be considered.

1. INTRODUCTION

Britain is seeking to renegotiate its relationship with the EU. The Union itself is in the midst of an economic and legitimacy crisis. The two developments are linked.

This paper does not seek to identify all of Britain's demands in renegotiating its EU membership.[1] Nor does it seek to address all the arguments for and against Britain's EU membership; that is the subject of other assessments.[2] The judgement in an EU referendum will have to be made on much wider criteria than the concerns addressed in this paper. Its primary focus is instead on a much narrower, largely institutional but crucial issue: to identify the means by which the 'ratchet' embodied in the commitment to

---

1 Many issues – including migration, welfare payments and the Social Chapter – are well beyond its scope.

2 See, for example, Roger Bootle, *The Trouble with Europe*, Nicholas Brealey Publishing, 2014; Patrick Minford *et al*, *Should Britain Leave the EU? An Economic Analysis of a Troubled Relationship,* Edward Elgar/IEA, 2005; CBI, *Our Global Future: The Business Vision for a Reformed EU,* 2013; and Charles Grant *et al*, *How to Build a Modern European Union*, Centre for European Reform, 2013.

'ever closer union' can be ended. It should give way to – mixing metaphors – a demonstrably two-way legislative street.

In March 2014, David Cameron set out seven priorities[3] for renegotiating the terms of the UK's membership of the EU in the event of a Conservative Government after the May 2015 General Election. It is implicit in this list (and has been more clearly stated elsewhere) that a successful outcome to the negotiations would include the repatriation of significant powers from Brussels.

Such an objective needs reinforcement. It needs to form part of a wider package of negotiating aims. There is little point in reclaiming national control over specific areas of policy if action

---

[3] These were:

(i) More power flowing away from Brussels to Member States rather than from the Member States to the EU;

(ii) National parliaments to be able to work together to block unwanted European legislation;

(iii) Businesses to be liberated from red tape and excessive interference from Brussels, and, aside from benefitting from the strength of the EU's own market – the biggest and wealthiest on the planet – to be given access to new markets through free trade with North America and Asia;

(iv) British police and courts to be liberated from unnecessary interference from European institutions, including the European Court of Human Rights [the latter not being an EU institution];

(v) Tighter immigration controls to ensure free movement to take up work, not free benefits;

(vi) Support for the continued enlargement of the EU to new members – but with new mechanisms in place to prevent vast migrations across the continent;

(vii) Dealing properly with the concept of 'ever-closer union', enshrined in the Treaty, to which every EU country now has to sign up. "It may appeal to some countries. But it is not right for Britain and we must be sure we are no longer subject to it." David Cameron, "The EU is not working and we will change it", *Daily Telegraph*, 15 March 2014.

is not taken at the same time to address the institutional pressures within the EU towards further accretion of powers to Brussels. These pressures, coupled with an opaque decision-making structure that greatly inhibits effective accountability to national electorates and institutions – the EU's ultimate source of legitimacy – is a cause not only of British disenchantment but also of a wider nationalist resurgence that has been gathering pace in many European countries.

Tackling the legislative ratchet effect embodied in the commitment to 'ever closer union' should involve not just placing more effective constraints on future EU interventionism, but also asking searching questions about the continued justification for some parts of the existing corpus of EU law (the so-called *acquis).* An ever closer Union is neither necessary nor desirable; an ever more effective Union is essential. The EU's institutions must be reformed in order to enable (and, crucially, encourage) it – in many areas – to do less, better.

It may be argued that the current Juncker Commission is moving in this direction. The Juncker team has certainly been more cautious and consultative in its approach than previous Commissions. The Regulatory Fitness and Performance Programme (REFIT), begun under the previous Commission, aims to simplify and alleviate the impact of regulation. The First Vice-President of the Commission, Frans Timmermans, has set up a Regulatory Scrutiny Board, an overhaul and replacement of the Commission's current Impact Assessment Board, with strengthened capabilities and senior independent members.

These developments are to be warmly welcomed. However, it remains to be seen whether they will provide durable change. It may turn out that they reflect little more than a combination of individual personalities and the political circumstances of the

time, notably the strong performance by anti-EU parties in the May 2014 European Parliament elections.

Ending the 'ratchet' will require much more. Stronger legislative mechanisms are needed that allow a legislative 'two way street'. This paper proposes measures that enable policy decisions to remain with Member States unless there are compelling reasons for them to be taken at the EU level. In Euro-jargon, this approach is known as subsidiarity.[4] Attempts to make it meaningful have been thwarted, partly by integrationists, for a generation. While a repetition of the 1990s experience with subsidiarity cannot be ruled out, this need not be so. The history of the concept of subsidiarity demonstrates its ambiguities;[5] what is needed is the political will to give it substance and institutional support. That political will did not exist 25 years ago: it may well do so now.

This paper sets out how, for the first time, to give subsidiarity, and the important allied principle of proportionality, teeth – how to require the EU to shed powers and policy responsibilities which can and should lie with the Member States. Continuous review of the *acquis communautaire* is essential. It has been a damaging absurdity that EU measures have not already been subject to periodic re-examination and, where appropriate, scrapped,

---

4 'Subsidiarity', the idea that decisions should be made at the appropriate level closest to the citizen and when applied to the EU that it should not act unnecessarily in areas that should be the preserve of the Member States, has been part of the terminology and debate about the EU and its powers since the run-up to the Maastricht Treaty. Subsidiarity's role in EU decision-making is discussed on pages 13 to 21. For a discussion of the historical origins and policy implications of subsidiarity see: Andrew Adonis and Andrew Tyrie, *Subsidiarity: No Panacea*, European Policy Forum, 1992.

5 Andrew Adonis and Andrew Tyrie, "Twelve men in search of a common meaning", *Financial Times*, 7 December 1992. 'Subsidiarity is a chameleon, changing its colour to suit the beholder'.

although there has recently been some progress.[6] The work involved in such a re-examination will, in turn, require powerful institutional machinery to support it. The paper sets out one way in which this machinery may be assembled.

Meaningful subsidiarity should be accompanied by a number of other improvements to the EU's legislative process. Legislative proposals from the Commission should, in most circumstances, carry automatic sunset clauses. The scope for challenge by national parliaments should be enhanced. There should also be an end to the current practice by which Commission proposals, once initiated, can remain on the table for years. Proposals not enacted within three years, or by the end of a Commission term, should lapse.

This paper's proposals would create a counterweight to the Commission's integrationist purpose which, quite reasonably, they have been seeking to fulfil since their creation. The proposals would also do something to restore the balance of power between EU institutions, largely by bolstering the Council.[7] The provisions of the Lisbon Treaty have seriously weakened the Council, a development partly aggravated by its own negligence and internal wrangling. Strengthening the institutional weight of the Council, and of the national parliaments that stand behind its members, is essential. The European Parliament has an electoral mandate and performs a crucial role of scrutiny and challenge; nonetheless, legitimacy – in the sense of a commitment by a

---

6 The current review machinery is described on pages 29 to 31.

7 For brevity's sake the term 'Council' is used throughout this paper to describe meetings of national ministers rather than the formal term 'Council of the European Union' (formerly the Council of Ministers, though this older term is still widely used). The European Council comprises the heads of state or government of the Member States, the Council's own President and the President of the Commission.

country to EU membership and its institutions – ultimately flows from Member States and their electorates. This remains the case with all the EU's powers, however much is delegated by Treaty to innovative supranationalist institutions.

In creating that counterweight, this paper proposes the establishment of a new body under the auspices of the Council. Its role would be to monitor the operation of subsidiarity and proportionality on behalf of the Council and of national parliaments, and to carry out the necessary rolling review of the *acquis*. The new body should be led by at most a handful, preferably no more than three, of senior people – politicians, former ministers or experienced domestic parliamentarians or, possibly, civil servants. They should be appointed by the Council on single, relatively long, non-renewable terms. Once appointed they should be operationally independent of the Council. They should be supported by a high-calibre staff, much of which should be seconded from the domestic civil services of Member States. The body could be called the European Subsidiarity Council (ESC).

A Council impact assessment unit should also be established and incorporated into the ESC, creating a more powerful Council capability to challenge legislative proposals. An adverse report on a Commission proposal should trigger a Council procedure to require its withdrawal. The ESC's reports could also support national parliaments' ability to scrutinise and challenge measures through the yellow card procedure. Nonetheless, the effectiveness of the ESC would not depend on such challenges; nor would the card procedure substitute for it.[8]

---

[8] For an explanation of the Yellow Card procedure see Box 2 on page 18. Whether reformed or not, it remains to be seen whether the 'card

The ESC could also play an important role in reform of the 'trilogue', the informal process by which differing versions of a legislative text (from the Council and from the relevant European Parliament Committee) are aligned.[9] The current operation of the trilogue is unacceptable. It may often achieve its aim of speeding up decision-making, but at great cost. It is opaque, secretive and without any treaty foundation.[10] Reform is essential on each of these grounds.

The Council should agree that texts or positions adopted by them should only be reopened through the trilogue process by unanimity. Any text agreed in trilogue should be reviewed by the ESC. An adverse subsidiarity or proportionality report should mean that the Council would not sign off the text, triggering an open conciliation process and scope for review by national parliaments. A procedure of this type can prise open the trilogue to more democratic scrutiny in Member States.

---

proceedings' can, in practice, empower Member States and their elected domestic parliaments to the degree hoped for. It is important to give national parliaments additional tools, but this cannot substitute for the need to rebalance power among the institutions at the heart of the EU's legislative and decision-making process.

9 This obviates the need for a formal second reading debate in the plenary session of the European Parliament or for the formal and open conciliation process between the Council and Parliament set out in the EU treaties.

10 Some senior Members of the European Parliament – including the President of the Parliament, Martin Schulz – have been strong critics of trilogues. Nonetheless, the process favours the Parliament, with its five year term, over rotating six month Council Presidencies often under pressure to show their ability to get some European business done. It is understandable that the Parliament wishes to maximise its leverage: it would be concerning if it did not. The result, however, is a further example of the unbalancing of relationships among EU institutions.

Scrutiny of Community action after policy is agreed and enacted is also currently inadequate. The European Court of Auditors is a sleeping giant. Its generally worthwhile reports are often ignored, not least by many Member States who – rather than the Commission – are often the worst offenders with respect to the unaccountable (and sometimes worse) use of EU funds. The ECA should be invigorated – and emboldened – by the acquisition of new responsibilities, resources and a more streamlined leadership. Its capacity to search for value for money in EU spending should be greatly enhanced and its corporate governance made clearer and more effective. It should also assume overall responsibility for the work of the EU's anti-fraud agency, OLAF, which also needs greater investigative powers and resources.

The government has, on several occasions, made clear that, in its view, its proposals for EU reform would require treaty change. Box 1 contains a brief examination of whether this paper's proposals would require it.

These measures do not seek to address peculiarly British interests and concerns. Nor will the proposals be without allies, as Annex 1 illustrates. It is now widely recognised that a crisis confronts the EU as a whole and its Member States.

That some of the proposals address areas that seem arcane and impenetrable reflects an EU decision-making process that is itself obscure and complex, often accessible only to lawyers, technocrats and well-heeled lobby groups. This is a major part of the problem. The distance between decision-making and the electorate, coupled with the accretion of power at the EU level, has created a crisis of legitimacy. The Eurozone's flaws – now exposed – have deepened it. It is unacceptable in the 21st century that only the unelected – the Commission – can initiate legislation.

Much of the EU's democratic shortcomings derive from the priorities of early post-war Europe. It was – and in many respects remains – a noble project. With an eye to the catastrophes of the interwar period, the early institution builders of the six original Member States were on their guard against what they saw as demagogic nationalism. As a result, they gave disproportionate weight to technocratic, even opaque solutions. Their overriding priorities were Franco-German co-operation, the rebuilding of prosperity and the development of an economic counterpart to NATO as a bulwark against communism.

The Europe of 28 now needs to address an almost entirely different set of challenges. There is still much more to do to integrate the east of the continent into the family of western nations. One part of the formerly Communist world is still recovering slowly from a nationalist war in the 1990s which left over 100,000 people dead and over two million homeless. In another, a proxy war is being waged by an increasingly hostile Russia. Upheaval in the eastern Mediterranean and beyond is generating high levels of migration, challenging another great integrationist project, the Schengen zone. A partly self-induced economic and Eurozone crisis across the continent remains unresolved. It has the capacity to generate considerable further economic and political instability. The biggest challenge, in an age of reviving nationalisms and of reduced deference, is that an increasing number of citizens are asking the same questions of the EU as they are of any institution: whom does it represent, and what does it do for them?

The EU's response must sometimes be to do less, better, often a lot less and a lot better; to establish institutions and mechanisms that will make this disciplined approach its default position, rather than a reflex towards ever greater integration; to restore some accountability through a revival of intergovernmentalism and a stronger role for national parliaments.

BOX 1: would these proposals require a new Treaty?

Any proposals for the British negotiating stance have to take into account whether or not they would require changes on a scale to require a new treaty to be implemented. For some of the major European states, treaty change is needed, but not yet; in the longer (though not very long) term, the deeper Eurozone integration required to shore up the single currency will necessitate a new treaty. However, there is no appetite for this within the time frame of the British renegotiation, especially given the high political risks associated with a French referendum on the new treaty in the run-up to the next presidential election (due in 2017).

Some of the proposals set out here could be enacted without treaty change. In other cases – such as the proposals for reform of the 'yellow card' mechanism for national parliaments to challenge Commission proposals – it could be possible to act in two stages. Initial agreement could be through a political declaration by the Commission that it would act in this way; in the longer term, the reforms could be codified in the next round of treaty change. A more formal version of this approach is that adopted under the 'Edinburgh Decision' and a series of related documents ('Conclusions of the Presidency'), following Denmark's rejection of the Maastricht Treaty in its 1992 referendum. Leaders 'meeting within the European Council' committed themselves to a series of exemptions for Denmark that would be given force in a new treaty when that was negotiated: a political commitment that would not require immediate treaty change. The 'Decision' was lodged with the United Nations as an agreement under the Vienna Convention on the Law of Treaties, giving it force in international law (but not making it an EU treaty). The Decision came into force along with the Maastricht Treaty, and its provisions were incorporated as a Protocol to the next EU Treaty (Amsterdam). This approach could be applied to many of the proposals set out in this paper. A preliminary analysis of what may be required to give force to the various measures in this paper is set out in Annex 2.

The European Parliament has an important part to play, but its ability to bridge the gap between citizens and decision-makers is limited by the absence – or at best very limited presence – of what some have called a European demos.[11] The ultimate loyalties of certainly most, if not all, of the electorates in Member States appear to rest with their respective domestic political institutions. Nor should the EU and its institutions stand in the way of greater integration among smaller groups of states – the Schengen Agreement[12] and the Eurozone are two current examples – provided that robust safeguards are in place to protect non-participants. The UK has availed itself of opt-outs from a number of such initiatives in the past and is likely to be able to do so in the future: numerous tools are available. Variable geometry is the result (see Annex 3). Nor should such close co-operation be exclusive to the EU's current membership.

This paper proposes ways in which, as part of the British renegotiations, more democratic legitimacy can be provided, and greater common sense applied, to the EU's decision-making machinery. It argues that this will probably require the creation of the ESC, a body capable, where appropriate, of reversing – and being seen by national electorates to be reversing and counterbalancing – the drive to 'ever closer union'. A rebalancing is unlikely to be achievable in any single renegotiation of the EU's powers and competences, however far-reaching. A 'full and final

---

11 For an interesting discussion on the relevance or otherwise of a 'demos' see; Daniel Innerarity, *Does Europe need a demos to be truly democratic?,* LSE Europe in Question Discussion paper series, July 2014.

12 The Schengen area and co-operation are founded on the Schengen Agreement of 1985 abolishing all internal borders creating single external border. The area currently consists of 26 States, not all of whom are EU Member States. The United Kingdom does not participate in the borders and visas aspects of the Schengen Agreement.

settlement' is likely to elude an EU of 28. But a new body such as the ESC, acting on demonstrably reasonable principles as a powerful counterweight, may make further periodic re-negotiations, whether instigated by Britain or other Member States or their electorates, less frequent. This will require the ESC to be a powerful watchdog, capable of being heard by national parliaments and electorates, particularly since it will face entrenched vested interests.

The decision-making machinery by which the EU was constructed in the middle of the last century – of technocrats operating in opaque and little understood institutions[13] – will need to give way, in the 21st century, to a form of decision-making which can be more readily explained to the electorates of Member States, one in which EU action and legislation is more demonstrably limited to those areas which domestic action cannot adequately address. Only that way can consent for that action be sustained across the Member States. This is in everyone's interest. For if it is not achieved, if common sense decentralisation from Brussels is not possible and seen to be possible, then the sense of a loss of control over their own nation states' affairs felt by many electorates will not be assuaged, still less removed. Whether sooner or later, the EU's current crisis of legitimacy may pull it apart.

---

13 The opacity was calculatedly embedded in the EU's decision-making structure at its inception, based on what became known as the 'functionalist' approach to integration, under which EU action in one area would provide justification for 'spillover' in another. The literature on functionalism is voluminous. For an interesting short blog (on the Conversable Economist website), see Timothy Taylor, *European Union: Functionalism and the Ratchet Effect*, and the longer article on which it is based: Luigi Guiso, Paola Sapienza and Luigi Zingales, *Monnet's Error?,* Brookings Panel on Economic Activity, September 2014.

2. SUBSIDIARITY

The Principle of Subsidiarity and its History

In any discussion of subsidiarity some historical context is necessary. The principle of subsidiarity within the EU – the notion that decisions should be taken as close as possible to those affected by them – was first defined in treaty (and thus made justiciable before the European Court of Justice) in 1992. Article 3(b) of the Treaty of Maastricht provided that:

> *'In areas which do not fall within its exclusive competence, the Community shall take action in accordance with the principle of subsidiarity only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community'.*

This Article was criticised for its vagueness. It certainly incorporates two different, and undefined, tests for determining the appropriate level for action. Moreover, in using the words 'sufficiently' and 'better' the Article appears to set a quantitative test against a qualitative one.

The then Prime Minister of Luxembourg, Jacques Santer, encapsulated the problem in these terms:[14]

> *'…the apparent consensus about the subsidiarity principle is only possible because it hides differences in interpretation. According to some, everything which cannot be dealt with satisfactorily at the national level should be entrusted to the Community. To others, the principle of subsidiarity should be applied in favour of states and regions. The Community may intervene only in cases where the states are incapable of doing anything.'*

These perceived flaws were partially addressed in a legally binding protocol to the Amsterdam Treaty of 1997. This required the Commission to 'consult widely before proposing legislation, and wherever appropriate, publish consultation documents', and to justify measures against the principle of subsidiarity. The new protocol also stipulated that the Commission's justification for asserting that an EU objective could be better achieved at EU level should be supported by qualitative and, where possible, quantitative, indicators. However, the protocol also stated that the principle of subsidiarity did not affect the primacy of EU law, nor did it apply to areas in which, by treaty, the Union enjoyed exclusive competence. As a result, for all practical purposes subsidiarity was provided with a legal base in form, but not substance.

The current rules on subsidiarity were established by the Lisbon Treaty in 2009. This replaced the former Article 3(b) of the Treaty on European Union (TEU) with a new Article 5, the key passage in which reads:

---

[14] Proceedings of the Delors Colloquium on Subsidiarity, Maastricht, 21 and 22 March 1991.

'Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level, or at regional and local level, but can rather, by reason of the scale or the effects of the proposed action, be better achieved at Union level.'

The key change compared with the equivalent wording of the previous Article on subsidiarity was the addition after the phrase 'cannot be sufficiently achieved by the Member States' of the words 'either at central level or at regional and local level'. This amendment slightly broadened the scope for action at national level, although arguably this was already implicit in the previous version of the Article.

A further principle: proportionality

A second test has developed for assessing the appropriateness of legislation at EU level – namely proportionality.[15] This principle is linked with, but additional to, that of subsidiarity. The application of proportionality has developed through the case law of the European Court of Justice, and (like subsidiarity) became part of the debate over treaty changes at the time of Maastricht. In December 1992, the Edinburgh European Council

---

15 'Proportionality consists of numerous, related principles: measures must be appropriate; they must be necessary in order to achieve legitimate objectives; when there is a choice between several appropriate measures, recourse must be had to the least onerous; and the disadvantages caused must not be disproportionate to the aims pursued', Damian Chalmers and Adam Tomkins, *European Union Public Law,* 2007. The ECJ has proved cautious in its application of subsidiarity, but has been prepared to apply proportionality. A Teasdale and T Bainbridge, *The Penguin Companion to European Union,* 4th ed, 2012, p. 683.

issued guidelines on subsidiarity and proportionality, which were later reflected in Protocol 2 on Subsidiarity and Proportionality to the 1999 Amsterdam Treaty. The terms of the proportionality principle are set out in Article 5(4) of the Treaty on European Union, as amended by the Lisbon Treaty, as follows :

> *'Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.'*

Proportionality is at one level a simple expression of common sense ('don't use a sledgehammer to crack a nut'), though its application in EU case law is much more complex.[16] It can be applied across the board to EU law, whereas subsidiarity is not applied to areas of exclusive EU competence.

Explanatory Material on Subsidiarity

The explanatory memorandum[17] which accompanies every draft EU legislative proposal must include a statement by the Commission confirming its compliance with the principle of subsidiarity.[18] In the UK the Government, as part of the domestic EU scrutiny procedure, publishes its own explanatory memorandum. This addresses, among other things, the issue of subsidiarity. A supplementary memorandum is laid before Parliament if the measure in question has been amended to such

---

16 See the Balance of Competences Review, *Subsidiarity and Proportionality*, p. 34.

17 Explanatory memorandums are discussed in more detail separately in this paper (see pages 44 to 46).

18 Subsidiarity is usually also addressed in the Commission's separate Impact Assessment accompanying each draft EU proposal (see pages 46 to 50).

an extent as to call into question its compliance with the subsidiarity principle.

A New Role for National Parliaments on Subsidiarity

Under Protocols 1 and 2 to the EU Treaties, as amended by the Lisbon Treaty, a new role in the legislative process[19] was established for national parliaments, enabling them to challenge EU measures on subsidiarity grounds. Such challenges can take three different forms – the so-called Yellow and Orange Cards, and a procedure under which a national parliament, working through its national government, can bring a challenge to already adopted proposals to the European Court of Justice.[20] The system as it relates to Yellow and Orange Cards is set out in detail in Box 2.

Since the coming into force of the Lisbon Treaty in December 2009, two Yellow Cards have been triggered, but no Orange Card.

---

19 ie the Ordinary Legislative Procedure, incorporating co-decision.

20 See pages 20 to 21. This procedure is sometimes described (for example, by the House of Lords EU Committee) as a 'red card'. However, the term is not normally applied to this procedure in debates on institutional issues in Brussels, and has (confusingly) been applied to alternative reform proposals (discussed below). The Government concluded, in its Balance of Competences Review, not to use this terminology. HM Government, *Review of the Balance of Competences Between the United Kingdom and the European Union: Subsidiarity and Proportionality*, December 2014, p. 86 n. 18.

BOX 2: Yellow and Orange Cards

The European Union Committee of the House of Lords has described the Yellow and Orange Card procedures as follows:[21]

'Within eight weeks [of receiving a draft legislative Act from the Commission], each national parliament, or chamber, may issue a 'Reasoned Opinion', stating why it considers that the draft in question does not comply with the principle of subsidiarity (Article 6, Protocol 2).

A Reasoned Opinion from one of the 15 unicameral parliaments counts as two votes; a Reasoned Opinion from a chamber in one of the 13 bicameral parliaments counts as a single vote. There are thus 56 votes available in total.

If Reasoned Opinions are submitted comprising more than one third of the total votes (a Yellow Card), the Commission must review the proposal and 'may decide to maintain, amend or withdraw' it. 'Reasons must be given for this decision'. (Article 7(2) Protocol 2). For legislative proposals concerning police co-operation or criminal justice, the threshold is one quarter of the votes, not one third.

If Reasoned Opinions comprising over half the total votes are submitted (an Orange Card), the Commission must review the proposal and, if it nonetheless wishes to proceed, justify why it considers the proposal complies with the principle of subsidiarity (Article 7(3), Protocol 2). If the Commission does proceed, a majority vote in the European Parliament, or a vote of 55 per cent of the Member States in the Council, will block the proposal.

These procedures do not apply in areas where the Union has exclusive competence (Customs Union; competition rules necessary for the internal market; monetary policy; conservation of marine resources under the Common Fisheries policy; common commercial policy).

The procedures do apply to any legislative initiatives from institutions other than the Commission, for example: groups of Member States; the European Parliament; the European Central Bank; and the European Investment Bank.'

---

[21] House of Lords European Union Committee, *The Role of National Parliaments in the European Union*, 9th Report of 2013-141 Session, 24 March 2014, p. 21.

The two Yellow Cards related to the following legislative proposals:

- The Monti II Proposals. The first Yellow Card was triggered in 2012 in the case of the 'Monti II' proposals on *the Right to take collective action in the context of the freedom of establishment and the freedom to provide services (COM[2012] 130 final)*; in other words, concerning the right to strike under circumstances which could conflict with the freedom of companies to offer cross-border services within the Single Market. The Monti II regulation attracted 12 Reasoned Opinions constituting 19 out of 56 votes. The Commission withdrew the proposal, but in its annual report on subsidiarity and proportionality stated that its reason for doing so was not that it acknowledged a breach of subsidiarity, but that there would not have been sufficient support for the proposal in the Council and the European Parliament. The Commission minutes of 10 October 2012 do not record this view, however.

- The EPPO Proposal. By the deadline of 28 October 2013, the Parliaments of 11 Member States had expressed concerns about the Commission's proposal for a Council Regulation on the establishment of a European Public Prosecutor's Office (EPPO) (*COM [2013] 534 final, 17 July 2013*), a judicial body able to investigate and prosecute EU fraud and other offences affecting the financial interests of the EU. The Yellow Card threshold for this category of legislation was reached with 18 Reasoned Opinion votes out of 56.[22] The

[22] The EPPO proposal was treated as relating to criminal justice and therefore as having a Yellow Card trigger threshold of a quarter of the total votes – i.e. 15.

German Bundesrat, Polish Senate and Austrian National Council did not issue ROs but reported serious concerns about the proposal. After reviewing the proposal the Commission decided, in December 2013, to proceed with the draft Regulation unamended, stating that during the legislative process it would 'take due account of the Reasoned Opinions of the national parliaments'. The UK and Ireland have opted out of the proposal.

Between October 2010 and February 2014, the United Kingdom Parliament issued 14 ROs. A full list is provided in Annex 3. The issues covered by these ROs included, in addition to those which eventually became the subjects of Yellow Cards:

- Investor Compensation Schemes
- Common Consolidated Corporate Tax Base
- Common European Sales Law
- Gender Balance on Corporate Boards
- Financial Services Benchmarks
- Presumption of Innocence
- Animal Cloning

References to the European Court of Justice on subsidiarity grounds

The Lisbon Treaty established an additional procedure, giving a right for national parliaments to apply to the ECJ for a judicial review of an EU measure on grounds of its alleged breach of the subsidiarity rule. This procedure applies, however, only after a legislative proposal has been formally adopted. Its details form the subject of a Memorandum of Understanding between the Chairmen of the Scrutiny Committees of the two Houses of the UK Parliament and the Minister for Europe. A related

Memorandum of Understanding, concerning the funding by Parliament of such a legal challenge, has been signed between the Clerks of the two Houses (in their capacity as Accounting Officers) and the Minister. Thus far, under this procedure, the ECJ has not annulled any EU measure on subsidiarity grounds.

There has so far been no successful legal challenge to an EU measure on subsidiarity grounds. There are two principal reasons for the ECJ's reluctance to become involved in this area. The first is that the Court has hitherto viewed the terms of the subsidiarity principle as being too vague to be effectively justiciable. The second is that the Court has thought it right to defer to the Council in what it sees as a matter of essentially political debate.

It is to be hoped, therefore, that the Court would take note of the proposed strengthening of the subsidiarity principle (and in particular the requirement for Commission statements of subsidiarity compliance to be supported as far as possible by empirical evidence). If it did so, the Court might feel encouraged to take a more active role in entertaining subsidiarity-related cases. A judicial as well as a political route for making challenges on subsidiarity grounds is of significant value.

It is worth noting in this context that courts in Europe generally appear to have found no difficulty in accepting the justicability of concepts such as necessity and proportionality. Issues of this kind are, for example, regular features of cases brought under the European Convention on Human Rights.[23]

---

[23] Under the ECHR state institutions may breach Convention rights only if the relevant action or legislation is *necessary* to achieve a legitimate purpose in a democratic society and is *proportionate* to the achievement of that objective.

Reform of the Subsidiarity Procedure

The fact that, despite 70 subsidiarity-related ROs having been produced in 2012 alone, only two Yellow Cards have been issued since 2010 is significant. It is possible that the existence of the card procedure is acting as a deterrent to inappropriate proposals. More plausibly, the procedure is not working as effectively, to check the pace and breadth of EU legislation, as had been hoped at its inception. Two factors in particular may have been to blame. The first relates to the definition of subsidiarity itself; the second is the mechanism for triggering a Yellow Card. Both require some modification.

The Definition of Subsidiarity

(i) The Sufficiency Test

The current definition of subsidiarity is weak and hence conducive to 'competence creep'. Under the subsidiarity principle, a measure can be taken forward at EU level if its objectives cannot be 'sufficiently' achieved by Member States. What constitutes sufficiency in this context is left unclear and open to wide interpretation. This test should therefore be tightened so as to raise the bar for legislative intervention. In future, action at EU level should be justified only when a measure is of such importance to the achievement of single market or other EU Treaty-related policy goals, that decisions on (a) whether to adopt it and, in certain cases, (b) how to implement it, cannot be left to Member States without putting at risk the attainment of the objectives in question.

The definition would greatly benefit from still further strengthening. An amendment to the wording of the Treaty (Article 5) to make it similarly more robust would have merit, and should be sought in the negotiations. Nonetheless, provided the Council can demonstrate the will to reform its own procedures, immediate treaty change may

not be essential. This is because the creation of a subsidiarity body – the ESC – under the auspices of the Council, operating on the basis of its own more robust definition, may be able to take subsidiarity out of the legal and in to the political sphere (the creation of the ESC is discussed on pages 32 to 35 below).

(ii) The Meaning of 'Better Achieved'

The use of the words 'sufficiently' and 'better' in the two limbs of the main paragraph of the subsidiarity principle leaves open the possibility that a measure's introduction at EU level could be justified even though its aims could be adequately achieved by Member States acting separately. This anomaly should be addressed by inserting before 'better' the words 'substantially and measurably'. This would ensure that the loss of direct scrutiny and accountability at national level resulting from EU action would not be trumped by a minor improvement in the delivery of the relevant objective. And the term 'better' itself needs to be given a sharper definition. This aim could be secured by specifying that any advantage claimed for EU over national action must be justified by reference to substantial gains in the efficiency and/or cost-effectiveness of delivery.

Explanatory Material

It is axiomatic that the explanatory memorandums published by both the Commission and national governments in support of EU measures should contain detailed information about, and rationalisation of, any purported compliance with the subsidiarity principle. This, together with the wider question of the nature and scope of such explanatory material, is dealt with separately in this paper.[24]

---

[24] See pages 44 to 46.

The Operation of the Yellow and Orange Card Procedures

The low uptake of the coloured card procedure probably reflects the demanding nature of the triggering criteria. To achieve the number of votes needed for a Yellow Card, Reasoned Opinions from as many as 19 chambers could be required, if no unicameral parliament were to be involved. The minimum number of chambers whose Reasoned Opinions would be sufficient to achieve the same outcome is ten (all unicameral), or nine unicameral and one bicameral. So it is hardly surprising that only two Yellow Cards have been issued since the coloured card mechanism was introduced in 2010. And it is also possible that, in addition to defeating subsidiarity challenges in individual cases, the high threshold for triggering a Yellow or Orange Card has exerted a wider chilling effect on national parliaments' enthusiasm for engaging with the process.

Reforming the card procedures

The existing machinery of different coloured cards and other mechanisms embodying graduated challenges by national parliaments to EU measures on subsidiarity grounds is cumbersome, confusing and ineffective. It is cumbersome because it contains at least one unnecessary layer (the Orange Card has never been deployed). It is confusing because it blurs the distinction between a political procedure (the Yellow and Orange Cards) and a judicial process (the scope to challenge at the ECJ). And it is ineffective because it has so far failed to halt any proposed EU measure.[25] It should be both streamlined and made more accessible for national parliaments.

---

[25] As indicated on page 19, the Commission did not accept that its withdrawal of the Monti II proposals was subsidiarity-related; and it has decided to proceed with the proposal for an EPPO, despite the issuing of a Yellow Card.

A more rational system would retain a separate avenue for national parliaments to mount a legal challenge on subsidiarity grounds by taking a case to the ECJ, but it would merge the existing Yellow and Orange cards. In order for such a revised system to be truly effective (and thus act as a disincentive to the Commission to push at the boundaries of subsidiarity), it needs to combine a less onerous trigger point than the current Yellow Card with the broad procedural consequences generated (in theory) by the Orange Card.

In summary, a new Yellow Card procedure might work in the following way:

- The trigger point for a Yellow Card would be at least one quarter of the available votes (14)[26] in the form of Reasoned Opinions issued by individual national parliamentary chambers, provided that the 14 votes came from at least eight national parliaments. (In order to reach the current Yellow Card threshold of more than one third (or 19) votes, a minimum of ten parliaments must be involved in producing Reasoned Opinions).[27]

- If a Yellow Card is issued, the Commission must review the relevant proposal. If, having done so, it nevertheless wishes to proceed with the measure it must:

---

[26] One quarter is already the trigger point for measures relating to police co-operation and criminal justice.

[27] Ten unicameral parliaments casting two votes each, *or* nine unicameral parliaments and one bicameral chamber, *or* eight unicameral parliaments and two bicameral chambers, and so on.

(a) publish a detailed response to the subsidiarity challenge(s), and,

(b) obtain a simple majority for the proposal in the European Parliament, as well as a Qualified Majority in the Council.

Reducing the Yellow Card threshold in the way proposed above will increase proportionately the power of national chambers and parliaments, acting collectively, to challenge the Commission on subsidiarity grounds. Such a reform will throw into starker relief the gap in democratic legitimacy between directly elected and unelected chambers. In the UK context this argues strongly in favour of a convention whereby the House of Lords, in exercising its powers under the Reasoned Opinion procedure, should not – save in the most exceptional circumstances – act in a manner inconsistent with any equivalent decision by the House of Commons. This is, of course, a matter for discussion domestically rather than as part of the negotiations with the EU.

In addition to a strengthened Yellow Card, there should be a Red Card procedure under which a number of Reasoned Opinions from national parliaments would be sufficient not merely to challenge a legislative proposal but to force the Commission to withdraw it. The concept of a Red Card was debated at the Convention on the Future of Europe, and in the subsequent negotiations on the Lisbon Treaty. There has been support for it from a number of Member States, reportedly including the Netherlands, the Nordic countries and states from central and eastern Europe.[28] The British government has already argued for a Red Card.

---

[28] House of Commons Library, *Reforming the EU: UK plans, proposals and prospects*, pp. 19-20.

There is a strong case – and this was argued at the Convention – for the number of votes from national parliaments necessary for a Red Card to match the blocking minority under QMV. This would be logical. However, the Lisbon Treaty rules for QMV established the need for a 'double majority' of both states and population (55 per cent of states representing 65 per cent of EU population). It is not clear how this could best be applied to a combination of unicameral and bicameral legislatures. One possibility would be to apply a single test based on the Yellow Card weightings without reference to a population criterion. Another would be to include a population criterion with each chamber in a bicameral system counting for half the country's population weighting. These are matters to be resolved through the detail of negotiation, but the principle of a Red Card should continue to be a major objective for the British government.

Even in cases where a Yellow Card is not triggered, ROs issued by national parliaments still perform a valuable scrutiny function, especially in relation to subsidiarity. But for the system to be effective it is essential that the Commission provide timely and comprehensive responses[29] to ROs. There is evidence to suggest that this is not always the case. In a letter dated 26 June 2013 the Chairman of the House of Commons European Scrutiny Committee, Sir Bill Cash, wrote to the Vice President of the Commission criticising the timing and quality of Commission responses to ROs.

On the first of these points, the letter stated:

---

[29] Although the Commission is not required to respond to ROs unless the threshold for triggering a Yellow Card is met, it has undertaken to do so as part of its dialogue with national parliaments.

'It would be of great assistance to the Committee if the Commission could respond more quickly to the House's Reasoned Opinions. This would enable us to raise points arising from the Commission response to the Government before first negotiations with the European Parliament begin. The average response time is approximately six months. In the case of the Common European Sales Law, a response was received ten months after the Reasoned Opinion was submitted'.

As to the substance of Commission responses to ROs, the Committee's concerns were summarised as follows:

'Most replies are, in terms of content, of questionable brevity. They are on average two pages long including preliminary paragraphs which restate the questions raised in the Reasoned Opinions, or the general policy context of the proposal, or the basis for the EU's competence to act (which is not a relevant subsidiarity consideration). The replies are, as a consequence, too general. They fail to focus on the detailed subsidiarity concerns contained in the Reasoned Opinions forwarded by the Commons.'

Although the Commission's reply to the Committee was broadly constructive in tone, it remains the case that the Commission needs to respond more quickly and much more thoroughly if this aspect of the scrutiny procedure for EU legislation is to be fully effective. Monitoring progress in this area will be important.[30]

---

[30] See the proposal for a new subsidiarity compliance body (page 32 to 35).

Proportionality and National Parliaments

Alongside a more workable definition of subsidiarity, and a more effective mechanism for national parliaments to challenge proposed legislation on subsidiarity grounds, there is a strong case for enabling parliaments to enter Reasoned Opinions on proportionality grounds. This was proposed, but not taken forward, during the pre-Lisbon Treaty Convention on the Future of Europe. The Dutch Parliament among others has expressed its support for it. Proportionality offers further scope for limiting unnecessarily intrusive EU action. Applying it can also strengthen the case for opening up subsidiarity: there has been a strong link between the two concepts since Maastricht. Following on from the findings of the Balance of Competences Review, the UK government should make the case for challenges on the basis of proportionality as well as subsidiarity.[31]

Oversight and Enforcement of the Subsidiarity Principle: Current Arrangements

A number of different bodies at EU level are, or have been, involved – in differing ways and to various degrees – in the process of developing and scrutinising the application of the subsidiarity principle. These are listed in Box 3.

---

[31] Balance of Competences Review, *Subsidiarity and Proportionality*, pp. 91-2; House of Lords European Union Committee, *The Role of National Parliaments in the European Union.*

BOX 3: Bodies involved in development of the subsidiarity principle

- A working group established by COSAC[32] in 2001, comprising representatives of European Affairs Committees of national parliaments and the European Parliament, and with the aim of increasing the role of national parliaments in determining the future of the EU, including the operation of the subsidiarity principle.
- A further working group established by COSAC in 2008 to examine the application of the principles of subsidiarity and proportionality, as enshrined in Protocol 2 of the Treaty of Lisbon. The conclusions of the working group were subsequently taken forward in a number of COSAC forums. Among the ideas discussed were the possibility of creating, within the framework of COSAC, a permanent working group on subsidiarity.
- A working group established in 2001 by the Convention on the Future of Europe on the principle of subsidiarity, which recommended a greater role for national parliaments in upholding the principle; out of those proposals grew the dual system of political and judicial challenges on subsidiarity grounds in the form of the coloured card and other procedures.
- A working group set up in 2004 by the Conference of European Regional Legislative Assemblies (CALRE) to consider ways of giving regional EU legislatures a greater role in the making of EU law, with particular reference to the subsidiarity principle. This led, among other things, to the insertion of an explicit reference in the subsidiarity principle, as developed in the Lisbon Treaty, to the role of regional and local assemblies.
- The Impact Assessment Board (IAB), now being overhauled to become the Regulatory Scrutiny Board, which operates under the authority of the President of the Commission, examines Impact Assessments produced by the Commission in respect of proposed EU legislative measures. Its remit therefore covers the subsidiarity component of Impact Assessments. In 2012 the IAB considered 97 Impact Assessments and issued 144 Opinions, a third of which contained some reference to the subsidiarity principle.
- In the European Parliament both the Committee examining a draft proposal and the Parliament's Legal Affairs Committee have a role in scrutinising subsidiarity-compliance.

---

[32] The organisation representing the European Affairs Committees of national parliaments.

Of all the bodies listed in Box 3, the IAB has played the most direct role in scrutinising the implementation of the subsidiarity principle. Nor has it been without effect, asking the Commission for fuller justifications for its proposed action in some cases. But it suffers from two serious drawbacks:

- Subsidiarity forms only a part of its remit within the wider field of economic, financial, social and environmental impacts.
- Given its operation under the aegis of the Commission President, it lacks the independence necessary to command public confidence. Indeed, it looks too much as if the Commission is marking its own homework.

The Commission sought to address a number of these concerns by a significant reform announced in May 2015, replacing the IAB with a new Regulatory Scrutiny Board. The new Board's remit will be widened to cover retrospective evaluations and 'fitness checks' of existing policies. It will have a Chair and six person Board. Three members will be appointed from within the Commission's staff, but three will be external appointments, serving a single three year term.[33] This is a worthwhile step, and an important element of First Vice President Frans Timmermans' remit to enhance the rigour of the Commission's impact assessments and wider decision-making process. However, what is needed – which the development of the Regulatory Scrutiny Board does not give – is a body with a much stronger focus on subsidiarity. Nor does it provide a rebalancing of power among the EU institutions and a revival of intergovernmentalism. These are the subject of the next section.

---

[33] European Commission, 'Communication to the Commission: Regulatory Scrutiny Board: Mission, tasks and staff', C (2015) 3262 Final, 19 May 2015.

3. SUBSIDIARITY AND THE COUNCIL

The relationship between EU institutions has been out of kilter in recent years, to the disadvantage of the Council, the body most likely to defend and give substance to subsidiarity. In part this reflects the trend of treaty changes – notably the Lisbon Treaty – to strengthen the role of the Parliament. But the Council has also, too often, been distracted by its internal wrangles. Ministers in the Council have seen themselves as intergovernmental negotiators and have failed to give enough attention to their role as decision-makers in an EU institution. This must change. There needs to be a rebalancing of the power of EU institutions in favour of the Council and the national parliaments that stand behind the governments represented in it. Such a shift would give a stronger institutional base in support of subsidiarity and establish a counterweight to the forces pushing towards ever greater integration.

Oversight and enforcement of the subsidiarity principle: a European Subsidiarity Council

A new, single and autonomous scrutiny body is required, operating within the ambit of, but with operational independence from, the EU institutions. It could be called the European

Subsidiarity Council (ESC). This body should be charged with examining all aspects of the subsidiarity-compliance (as well as the proportionality) of proposed EU legislative measures. In order to be able to carry out this remit effectively it should receive proposals from the Commission as early as possible in the legislative process – as soon as a working text is available, but before a measure has been formally adopted by the Commission. It is crucial that the ESC should have the opportunity to offer a view before significant institutional and political capital has been invested in a draft measure. Specifically, the ESC should:

- Be constituted under the auspices of the Council, but with full operational independence. Although the Council is itself part of the EU legislative process – and can therefore be said to have a vested interest in it – it is not as deeply embedded in the process as the European Parliament or the Commission. Crucially, unlike the other two institutions, it has a membership directly accountable to national parliaments.[34]

- Have at the heart of its remit the revised terms of the subsidiarity principle, as proposed earlier in this paper,[35] together with the principle of proportionality.

---

[34] The proposal has its risks: the result could be an EU quango that existing organisations find ways of bypassing, or the Council could fail to develop a suitably streamlined organisation. The implications of the latter case – demonstrating that the Council was unable to agree even on developing an organisation that would strengthen its own capacity and effectiveness to express the views of its constituent electorates – would be very serious for the long term future of the EU.

[35] See pages 22 to 23.

- Be adequately resourced, from the Council budget, scrutinised by the Court of Auditors.

- Be staffed by secondees from national administrations, supported by some persons recruited specifically for the purpose and specialists on time-limited secondments, largely from the ECA. (This would mirror the use of secondments from the UK National Audit Office to assist departmental select committees in the House of Commons).

- Report to the Council its findings, in respect of both subsidiarity and proportionality, on every legislative proposal (including any substantive amendments to legislation made by the European Parliament). At the same time those findings should be sent directly to national parliaments (to enable them to reach timelier and more fully informed decisions on whether to issue ROs).

- Examine particularly closely, in carrying out its remit in relation to subsidiarity and proportionality, the justification contained in the Commission's EM for the *necessity* to act at EU level.[36]

- Play a central role in the reform of the current co-decision procedure.

- Carry out rolling reviews of the *acquis* and make recommendations, where appropriate on subsidiarity grounds, for the repeal of legislative acts, in whole or in part.[37]

---

[36] See page 44.

[37] See pages 56 to 57.

- Keep under periodic review the terms of, and the machinery for enforcing, the subsidiarity principle.
- Monitor the operation of the subsidiarity principle in terms of the number of new measures either proposed informally or introduced by the Commission, but not proceeded with on subsidiarity grounds (or proceeded with only after substantive modification).
- Enable national parliaments more straightforwardly to launch a challenge to EU actions or proposals, on grounds of proportionality and subsidiarity.
- Carry out audits of Impact Assessments.[38]
- Monitor the quality and timing of Commission responses to ROs.

Establishing the principle of proportionality alongside subsidiarity at the heart of the EU's decision-making machinery should be seen as tackling a tendency, on the part of both the Commission and the Parliament, to over-legislate. This is in many ways the mirror image of 'gold-plating' in the implementation at national level of EU directives.

Subsidiarity and proportionality are separate, but important, elements in the justification for legislating at EU level. Both need to be applied rigorously. For example, a draft EU measure might meet the subsidiarity criteria but fail the proportionality test. It is important that this duality is clearly recognised in the terms of reference of the ESC.

---

[38] See pages 51 to 52.

An adverse report by the ESC on a Commission proposal should trigger the Council procedure to consider whether to require its withdrawal by Qualified Majority Vote.

The ESC should be led by a small, high-quality executive Board; probably a 'troika' of senior ex-politicians or officials with political weight ('High Representatives of the Council', perhaps) who would serve for a lengthy, single non-renewable term.

The operational independence of the ESC will be crucial to establishing its credibility and authority. Its leadership must be free to manage it on a day-to-day basis without external influence or pressure. There are various ways of giving this autonomy a legal underpinning. Although not an exact parallel, the founding statutes of the European Central Bank might offer a model to be drawn upon in seeking to ensure its independence.

The test of the ESC's effectiveness – for which it should be held to account – will be its track record in:

- Establishing the primacy of subsidiarity and proportionality in the actions and decisions of the EU institutions.
- Demonstrating that, through the clarity and persuasiveness of its findings, it can act as a deterrent to the temptation on the part of the Commission (and the Parliament) to turn to legislation at EU level as a first, rather than a last, resort.
- Forging constructive but robust relationships with the other EU institutions such that it can carve out for itself a scrutinising role at the earliest possible point in the legislative process.

These objectives should be clearly spelt out in the ESC's terms of reference.

It is for consideration whether, where the 'High Representatives' of the Council's subsidiarity troika are unanimous that a legislative proposal breaches the subsidiarity principle, it should have the authority – where it considers such action necessary – to refer the proposal to the European Council. This body, for the most part, acts by consensus.[39] Such a change may give the troika greater authority. It would certainly give the troika an added incentive to reach agreement.

The establishment of the ESC should be part of a wider strengthening of the capacity of the Council. The limitations of the Impact Assessment Board have already been described:[40] the Regulatory Scrutiny Board offers the prospect of improvement, but it will still be linked to the Commission. One possible solution would be to transfer the IAB's functions to the ESC. However, it is legitimate for the Commission to carry out impact assessment work; what matters is to establish a truly independent source of challenge. This is why the Council should develop an impact assessment function of its own, to be incorporated within the ESC.

The ESC could also assist the development of policy capability within the Council Secretariat. This would help the Council in the co-decision process. The current Secretariat assists the Council on process only, leaving weaker presidencies dependent on the Commission for policy support. In the past, there had been concerns about creating an over-powerful Council Secretariat. The reality today – according to those with direct personal

---

39 Article 15.4 of the TEU provides that: "Except where the Treaties provide otherwise, decisions of the European Council shall be taken by consensus."

40 See pages 46 to 49.

experience whom the author has consulted – is of a considerably weakened Council.

Co-Decision

The ESC would also play an important role in ensuring that subsidiarity is protected in the course of the EU's legislative process, shaped increasingly since Maastricht by co-decision. Under co-decision, many Commission proposals are the subject of informal discussions ('trilogues') between the European Parliament, the Council and the Commission to align differing versions of a legislative text (from the Council and from the relevant European Parliament Committee). The original aim of the trilogue, at least to some degree, was to speed up decision-making, bypassing both important stages of the European Parliament's process (notably a formal second reading debate in plenary session) and the formal and open conciliation process between the Council and the Parliament set out in EU treaties. But this is having pernicious effects. The shift of decision-making to private meetings removes them from the constraints of formal procedure. As a result, the current operation of the trilogue is unacceptable. It may often achieve its aim of speeding up decision-making, but at great cost. It is opaque, even secretive and without any treaty foundation. The European Parliament's report on Co-decision and Conciliation[41] appears pretty much to agree:

> *'First reading agreements alone represented eighty-five per cent of adopted co-decision files in 2009-2014, and they have become one of the defining features of the EU's primary legislative procedure. But with the parallel rise of informal trilogue negotiations, valid questions have been asked about the transparency of co-decision, and Parliament therefore*

---

41 Report for the period 14 July 2009 to 30 June 2013.

took a further step towards improving the openness and accountability of its internal working methods on inter-institutional negotiations, once more fine-tuning its Rules of Procedure. Perhaps the time has now come for the institutions to reflect together on how to address some of the legitimate concerns raised by citizens'.

The Parliament's President, Martin Schulz, has since his acceptance speech on his election in January 2012 been a critic of the trilogue process in its current form. Its transparency is also being examined by the EU Ombudsman.

Co-decision has made the European Parliament a legislative partner of the Council. Parliament's role has evolved from that of scrutiniser to promoter and developer of legislation. In practice, trilogues have favoured the Parliament relative to the Council. Each six monthly rotating Council presidency is under great pressure to show that it can get European business done during its term of office, whereas the Parliamentary Committee, in post for five years, can wait. The lack of capacity on the part of the Council Secretariat reinforces this, as do internal divisions within the Council: Member States sometimes use their MEPs in the parliamentary committee to reopen issues that they lost in the initial Council negotiation. It also means that the publicly established position of the Council – the 'general approach' – can be unpicked amid the more private and informal arrangements of the trilogue.

It is understandable and reasonable that the Parliament seeks to maximise its leverage. It would be alarming if it did not. It is essential that they provide vigorous oversight. The Council, however, now needs to strengthen its role in the process. With its direct involvement in the co-decision procedure, the Council is well placed to receive early warning of changes to Commission

proposals, whether in the form of potential modifications discussed in the trilogue, or of actual amendments – often far-reaching – formally agreed by the Parliament. By contrast, under current arrangements national parliaments can be 'blindsided' by the secrecy and speed of the trilogue process, and thus be unable to act in time if a subsidiarity issue arises.

Accordingly there is great merit in empowering the Council, at any legislative stage of the co-decision procedure and by a Qualified Majority Vote (QMV), to require the withdrawal of a draft EU proposal on subsidiarity or proportionality grounds.[42] The Commission should be precluded from reintroducing the measure unless it has been substantively modified to meet these subsidiarity or proportionality concerns. As an aid to transparency, the Commission could be required formally to publish annually a list of measures which it has withdrawn on subsidiarity or proportionality grounds.

In addition, the Council could establish its own internal rules on when it will reopen its agreed text in a trilogue, which should only be reopened by unanimity. If this were not achieved, then the trilogue would cease and the proposal would go to both formal second reading in Parliament and, if necessary, to the Council-Parliament conciliation process.

The ESC can and should also play an important role in reviewing any text agreed in trilogue, with subsidiarity, proportionality and impact assessments in mind. An adverse report should mean that the Council could not sign off the agreement. This would provide an opportunity to bring the excluded national parliaments back

---

[42] The case for this approach is made forcefully in Charles Grant et al, *How to Build a Modern European Union*, p. 21

into the process. They should be consulted on the basis of the ESC's report, with the possibility of triggering the yellow card process. In addition, the second reading in the European Parliament and the conciliation process could also follow from an adverse ESC report. The new process by which EU legislation would be enacted by these proposals, and the role of the respective participants, are set out in Box 4.

BOX 4: A proposed new legislative process

European Commission

- Proposes draft legislation (however, in the longer term the question of its monopoly right of initiative should be considered).[43]
- Legislative proposals are to include sunset clauses unless the Commission provides a statement of reasons for permanence.
- If not enacted, measures are dropped after 3 years or at the end of the Commission term.

Council of the European Union ('the Council')

- Can require Commission proposals to be withdrawn by QMV (at any time).
- Amends its practices to require a vote (by QMV) for withdrawal of a proposal if there is a negative report from the ESC.

Council and European Parliament (Co-decision)

- The formal and open reconciliation process, including plenary sessions of Parliament, to be effectively reinstated as the norm.
- Informal reconciliation process – known as trilogues – to take place only if the Council agrees by unanimity to reopen the legislative text that it has agreed (the 'general approach').
- Trilogue and parliamentary amendments are subject to review by the ESC.

National Parliaments

- Can raise (reformed) Yellow Card if chambers representing one quarter of votes issue Reasoned Opinions objecting on grounds of subsidiarity (down from a third at present) or proportionality.
- If the Commission still proceeds, it must give a full explanation and secure simple majority in EP, QMV in Council (the Yellow Card therefore subsumes the procedures currently under the Orange Card, which is scrapped).

---

[43] Under the Lisbon Treaty, there was a small modification of the Commission's monopoly on the right of initiative; in three areas of Justice and Home Affairs (judicial co-operation concerning criminal matters, police co-operation and administrative co-operation), proposals can also come from a quarter of Member States.

Box 4: continued

- Can also raise Red Cards, forcing withdrawal of a Commission proposal; serious consideration should be given to this being triggered by the equivalent of a blocking minority under QMV.
- National Parliaments are to be better equipped to challenge legislation, by receiving ESC reports on draft legislation and also on the outcomes of trilogues.

Subsidiarity body (European Subsidiarity Council)

- Reviews draft legislation on subsidiarity or proportionality grounds for Council, as well as reviewing Impact Assessments; it also informs national Parliaments.
- An adverse report will act, under reformed Council rules, to trigger a Council vote (by QMV) to require withdrawal of draft.
- Reviews trilogue texts; an adverse report can block the conclusions of the trilogue and require full conciliation process between Council and Parliament.
- By joint public statement of the troika, it can refer text to the European Council; this would apply particularly when the trilogue process was seen to be abused.
- Rolling review of acquis communautaire; proposals go to Council to establish (by QMV) a sunset clause on measures, the rationale for which has expired.

European Council

- Reviews texts referred (by unanimity among the Troika) by the ESC.
- The current role of the European Council to act as a 'soft brake' – under which sensitive issues are referred to it – to be enhanced. It proceeds by consensus rather than unanimity.

4. EXPLANATORY MEMORANDUMS AND IMPACT ASSESSMENTS

Explanatory memorandums

The provision of explanatory material about a proposed EU measure is an essential part of the legislative process. It is necessary in the interests of openness and transparency. Detailed and comprehensive information in this form is vital for effective scrutiny. This is true, as discussed earlier in this paper, in the context of the subsidiarity principle. But it matters in other areas as well.

Under current arrangements the Commission must publish an Explanatory Memorandum to accompany any draft measure on its formal introduction. The document includes, as part of the statement of compliance with the subsidiarity principle:

- The treaty base (that is to say the legal authority, by reference to a specific Article or Articles, which underpins the decision to act at EU level). The treaty base is also cited in the preamble to the measure itself.

- The legal justification for the specific choice of legislative vehicle (regulations, directive etc); this has subsidiarity

implications since a directive affords a certain amount of latitude to national governments in determining how it should be transposed into domestic law.

- A statement of the measure's compliance with the terms of the subsidiarity principle.

Subsidiarity

It is the treatment of the last of these legal issues addressed in the explanatory memorandum which most needs improvement. As argued earlier in this paper, both limbs of the subsidiarity principle require strengthening to ensure that the case for legislation at EU level is based on more testing criteria. By the same token, the Commission's justification for acting must be open, robust and comprehensive. And it should be presented in a way which is both logical and easy to follow. Through the vehicle of EMs the Commission should therefore, in addressing both the subsidiarity and proportionality tests, answer the following questions:

- What is the nature of the problem or policy issue which calls for action by the Commission?
- On what basis is legislative (as opposed to administrative or exhortatory) action necessary?
- What is the treaty base which underpins legislative action?
- Even if there is power to legislate at EU level, does the EU *need* to act?
- If so, are there *significant* benefits from acting at Community level which cannot be achieved by EU states acting separately?

- If so, what are these benefits and how are they demonstrated by reference to evidence, including economic, social and business efficiency gains, as well as cost-effectiveness?

- Are the scope and extent of the proposed legislation proportionate, i.e strictly limited to the achievement of objectives specified in the Treaties?

Impact Assessments

As well as issuing an EM justifying in legal terms its decision to act at EU level, the Commission is required, and at the same time, to produce an Impact Assessment setting out the principal effects (including cost implications) of a draft measure. The final version of this document is supposed to reflect any comments or representations received during a consultation process, which the Commission is required to undertake before the introduction of a draft proposal. As already outlined above, every Impact Assessment is considered, and reported on, by the Impact Assessment Board, which operates under the auspices of the Commission President.

Impact Assessments currently cover the broad social, economic and environmental consequences of a proposed measure. They do not always (and, if they do, not systematically and comprehensively) address important ancillary effects such as compliance costs in Member States. This is a serious omission.

By way of examples, this paper considers in some detail the Commission's Impact Assessment and the report of the Impact Assessment Board respectively in relation to three Commission legislative proposals from 2014. These case studies are set out in Box 5.

BOX 5: Three Case Studies Illustrating the role of Impact Assessments and the Impact Assessment Board

1. Strategy for Reducing Heavy-Duty Vehicles' Fuel Consumption and CO2 Emissions.

Impact Assessment

This proposal sets enforceable minimum standards for the fuel efficiency and emissions of heavy-duty vehicles. The Impact Assessment is a 141 page document setting out the purpose of the proposal, its technical and practical details, as well as other options for achieving the stated objectives. Financial impacts are mentioned, but only in the context of macro-economic, public expenditure and economic activity effects. Compliance costs (and more particularly business compliance costs) are mentioned only tangentially. Even where such costs are acknowledged there is an assumption that they will be insignificant, and, in any case, will be absorbed under competitive pressures. What are referred to as competitiveness impacts are addressed more directly in an annex to the main document. Specifically, the implications for labour costs, administrative overheads, and capital investment are discussed, but without any detailed analysis or other indication as to how the conclusions have been arrived at. This is in sharp contrast to the treatment of the benefits claimed for the proposal, which are laid out in considerable depth.

Report of the Impact Assessment Board

The IAB's two and a half page report provides a positive, if terse, evaluation of the Commission's Impact Assessment. It recommends a number of improvements to its content and presentation. However, it makes no specific mention of compliance costs.

Box 5: continued

2. Proposed Regulation on a European Network of Employment Services, Workers' Access to Mobility Services, and the Further Integration of Labour Markets.

Impact Assessment

The main purpose of the proposal is to promote greater cross-border labour mobility through better co-ordination and information-sharing by national employment services, in particular under the auspices of the Network of European Employment Services (EURES). The Impact Assessment for this proposal devotes considerably more space to its claimed benefits than to the possible costs, including business compliance costs. Whilst there are numerous references to the impact on affected businesses (in this case private providers of employment services) very few figures are quoted. No attempt is made to analyse and explain the reasoning behind the broad assessment that compliance costs will be largely insignificant. This proposition may be true, however no information is provided in the document to test the assertion.

Report of the Impact Assessment Board

The IAB's two and a half page report on this proposal is negative. Among the criticisms of various aspects of the Assessment, the IAB report concludes: 'Whilst the report provides some administrative estimates of implementation costs, it remains unclear to what extent these correspond to the changes required in the *Member States'. The IAB report adds: 'Whilst having provided some feedback on stakeholders' views, including Member States' reaction to the 2012 decision, no consultation has been carried out on the envisaged options/measures and their estimated impacts, thus falling short of the Commission's minimum standards on consultation'*.

Box 5: continued

3. White Paper: Towards More Effective EU Merger Control.

Impact Assessment

The Assessment gives a detailed analysis of the underlying objectives of the proposal, which are to extend the regulatory framework for industrial mergers to include minority shareholdings. The Assessment asserts that overall costs to affected businesses will be limited, but few figures are quoted and there is no supporting evidence, nor any indication of the methodology employed in arriving at that conclusion. The same is true for the comparative tables analysing the different implementation options, which show low-cost impacts but without any attempt to quantify them in any meaningful way.

Report of the Impact Assessment Board

The IAB report is broadly positive, but it criticises the quality of the analysis leading to the conclusion of the Impact Assessment that a legislative approach to increasing shareholder transparency would be 'only slightly more burdensome for businesses and national authorities than a system of self-assessment'. And the report adds that the Assessment should 'better acknowledge the numerous critical views of stakeholders' and explain more fully its reasons for overriding them.

A decade ago, the Commission's Impact Assessments were described as 'lacking in detail and of negligible worth.[44] Taken together, the three case studies in Box 5 show a common pattern in relation to the Impact Assessments:

- Although lengthy and detailed, they are not complete.
- Compliance costs are not adequately addressed, if at all. If mentioned at all, compliance costs are discussed in a manner bordering on the perfunctory.
- Instead of being dealt with as a separate issue, important in its own right, the impact on business costs is subsumed within the more general impact.
- Little or no attempt is made to show on what basis, and using which criteria, compliance costs have been estimated, if at all.

Impact Assessments, in order to be comprehensive, should therefore in future describe and quantify all relevant compliance costs, with a full assessment of the costs both to Member State governments and to businesses and individuals. This analysis should include:

- Details of the net additional costs to business and others directly affected of complying with any new legal and other regulatory requirements.

---

[44] Clifford Chance Public Policy Briefing, *Implementation of EU Legislation,* cited in John Tate and Greg Clark, *Reversing the Drivers of Regulation: the European Union,* Policy Unit, Conservative Research Department, 2004. There have doubtless been improvements since then but grounds for concern remain.

- Administrative costs incurred by national governments, or other public agencies, in implementing EU measures.

- Any costs reasonably attributable to the enforcement of an EU measure, including those borne by law and order and regulatory agencies.

- Any indirect costs arising from behavioural changes resulting from an EU measure.

It has been argued earlier in this paper that the IAB, operating as it does under the aegis of the Commission President, lacks the independence required to command public confidence in its objectivity. The creation of the Regulatory Scrutiny Board seeks to address this, to some degree at least. However, the stronger remedy – as previously suggested – is for the Council to develop its own Impact Assessment capability and for this to be within the remit of the new subsidiarity compliance body, the ESC.[45] The ESC should conduct a vigorous assessment of the compliance cost analysis contained in the Commission's Impact Assessment to ensure that it has been carried out along the lines proposed here. By QMV the Council should be able to require an audit of amendments to legislation passed by Parliament which have compliance cost implications.

If such an audit concludes that the Impact Assessment has failed to demonstrate that a legislative proposal would confer significant benefits (taking full account of any properly estimated compliance costs) the Commission should withdraw the proposal. It should not be reintroduced unless the compliance

---

[45] See page 35.

cost issues have been addressed, as confirmed by the Council by a Qualified Majority.

In the interests of transparency, the Commission should publish each year a list of those measures which have been withdrawn in accordance with the procedures outlined above.

These proposals would mean three separate impact assessment bodies in the EU – Commission, Parliament and the Council – which, at first blush, might seem two too many. But three such bodies are probably inevitable given the EU's institutional structure. They are also desirable if independent views are to be formed by the ESC. And the three bodies would, in any case, perform subtly, but significantly, different roles:

- The Commission would, as now, produce Impact Assessments as part of its justification for legislating at EU level.

- The Parliament would continue to examine Impact Assessments as part of the legislative scrutiny process.

- The Council, through the ESC, would be equipped to satisfy itself that any net additional costs falling on Member States – which the Council represents – have been properly evaluated.

5. THE ACQUIS COMMUNAUTAIRE

The *acquis communautaire* (or *acquis*) comprises the accumulated body of EU law, including treaties, regulations and directives, as well as legislation enacted at national level which transposes directives into domestic law.

The *acquis* can be broken down further into the following categories:

- The content, principles and political objectives of the treaties.
- The legislation adopted in application of the treaties and the case law of the European Court of Justice.
- The declarations and resolutions adopted by the EU.
- Measures relating to the Common Foreign and Security policy.
- Measures relating to Justice and Home Affairs.
- International agreements concluded by the Union, and those concluded by the Member States between themselves in the areas of the EU's activities.

Precise figures for the size and scope of the *acquis* are notoriously difficult to come by, but the following estimates or calculations have been made:

- Nearly 38,000 EU legal Acts.
- 13,000 ECJ judgements.
- 52,000 international standards.[46]

In addition EUABC.com has estimated that between 2005 and 2009/10 the *acquis* grew by an average of 1,887 legal instruments a year.

The overall volume of the *acquis* has been variously estimated by academic and journalistic studies at between 80,000 and 120,000 pages (depending on the specific definitions used). Larger figures have been cited by the former Commission President Jose-Manuel Barroso and in an article on the Legal and Judicial Reform website – 150,000 and 300,000 pages, respectively.

The overwhelming majority of EU law is implemented by statutory instrument (SI) in the UK, mostly under the European Communities Act 1972. Although EU-derived SIs account for a significant proportion of UK secondary legislation, the figures fall well short of the claims made by some Eurosceptic groups. The data for the period 1987-97, for example, ranges from the then Ministry of Agriculture (51 per cent of all SIs Euro-related) to 7.9 per cent (Home Office and Environment). The combined figure for all departments is 15.8 per cent.[47]

---

[46] EUABC.com is an internet dictionary specialising in EU terms and jargon.

[47] Edward Page, *Public Administration,* Vol 76, Issue 4.

For the period between 1997-98 and the end of 2013, the equivalent figures for the percentage of the total number of SIs which were EU-related ranged from 5.5 per cent (2010) to 16.5 per cent (2003-4).[48] The overall percentage for the period 1987-2013 was 12.5 per cent. It should be noted, of course, that these figures relate to the *number* of SIs, rather than to their volume in terms of pages or the scale of their effects.

The scale and scope of the *acquis* matters a great deal as:

- It defines and sometimes enlarges the legislative footprint of the EU.
- It establishes precedents for legislating in particular areas of policy and so makes it more difficult to argue against future interventions on related subjects.
- It provides a jumping-off point for new legislation which builds on the existing corpus of EU law and extends it outwards.

If left to itself the *acquis* will continue to expand under the pressure of the ratchet effect which is built into the EU's legislative process, and particularly by the monopoly power of legislative initiative vested in the Commission. It is true that over recent years the Commission has taken steps to simplify the *acquis* by repealing redundant and spent measures and by consolidating laws, and subsequent amendments to them, into single texts. Furthermore, the Commission's REFIT programme, launched in 2012, undertakes regular screening of the *acquis* to "identify burdens, inconsistencies, gaps and ineffective measures."[49] In a review of

---

48 House of Commons Library.

49 European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social

REFIT in June 2014, the Commission argued that some 6,145 "legal acts" had been repealed since 2005, and the Commission has proposed an 'interinstitutional agreement' with the Council and the Parliament to enhance work on better regulation, including REFIT.[50] This is a valuable step in the right direction, but its focus is on the reduction of costs and administrative burdens: an important consideration, but a different perspective from one that focuses on subsidiarity. Something more radical is needed if the one way ratchet effect is to be addressed.

This should take the form of an independent process for keeping the *acquis* under rolling review. Specifically this new process should involve:

- Regular reviews of the *acquis* by the ESC to ensure that the original justification for a measure enacted at EU level remained valid and, where necessary, to make recommendations to the Council for the repeal (or substantive amendment) of any EU laws which do not pass this test. The effect of such a recommendation, if supported by a Qualified Majority in the Council as part of the normal co-decision process, should be to apply an automatic 12 months sunset provision to the measure (or part of a measure) in question. The Commission would then have the opportunity

---

Committee and the Committee of the Regions: EU Regulatory Fitness', 12 December 2012, p. 3.

50 European Commission Memo, 'REFIT: State of play and outlook: Questions and Answers', 18 June 2014; 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Better regulation for better results: an EU agenda', 19 May 2015, p. 8. The figure for 'legislative acts' repealed includes the period before the launch of REFIT, though the initiative had precursors such as 'fitness checks'.

within that time to reinstate the proposal by obtaining a simple majority in the Parliament, plus a Qualified Majority in the Council.

- Examinations – possibly in the light of the cumulative effect of decisions by the Council under the preceding heading – of the continuing justification for particular areas of policy or administration to remain a matter of EU competence, and to make recommendations accordingly to the Council.[51]

Reasons for concluding that the case for intervention at EU level is no longer valid might include:

- Changes in economic or political circumstances.
- Changes in public opinion.
- Developments in thinking about the future nature and functions of the EU.
- The passage of time.

The new process for keeping the *acquis* under review would sit naturally within the remit of the ESC, which could then bring forward proposals for consideration under the usual European decision-making process, involving the Council and the Parliament.[52]

---

[51] This would have to be for consideration and perhaps a political declaration by the Council; however, the EU having competence to act in a particular area derives from the Treaty and could only be adjusted by Treaty change.

[52] See pages 42 to 43.

6. EUROPEAN COURT OF AUDITORS

The European Court of Auditors (ECA) is the official audit body for the EU's institutions and programmes.[53] Its remit and *modus operandi* are set out in Box 6.

The Court audits the budget of the EU. This exercise constitutes a formal external audit and the results are contained in an annual report to the Council and the Parliament. The Court has signed off the relevant accounts for each year up to 2012 (the most recent year for which accounts have been audited). It has, however, frequently qualified its approval of the accounts of specific EU programmes by reference to 'irregularities'. These do not amount to fraud. Dishonesty is not necessarily involved. They often spring from errors in interpreting and applying the rules governing the use of EU funds. In relation to the 2012 accounts, the ECA estimated that 4.8 per cent of payments were affected by 'material error' (ie irregularities), compared with a figure of 3.9 per cent in 2011.

---

[53] Grant et al, *How to build a modern European Union*, pp. 29-32, provides a full analysis of both the ECA and OLAF, and argues for similar reforms to those set out in this and the subsequent section.

BOX 6: The ECA's Remit and Modus Operandi

- The ECA is organised into five chambers to which members and audit staff are assigned.
- There are four chambers with responsibility for the audit of the different areas of EU expenditure and for revenue, together with a 'horizontal' chamber responsible for co-ordination, evaluation, assurance and development.
- Each chamber has two functions within its area of responsibility: first, to adopt special reports, specific annual reports, and opinions; and secondly to prepare the annual reports on the EU budget and the European development funds for adoption by the Court as a whole.
- The full ECA Court of 28 members meets around twice a month to discuss and adopt documents such as the ECA's main annual publications, including the annual reports on the general budgets of the EU and of the European development funds.
- The ECA is headed by a President elected for a renewable three-year term by the members of the Court from among their number. The President of the ECA is responsible for ensuring that ECA decisions are implemented and that the institution functions efficiently and effectively.
- The members of the ECA are appointed by the Council for a renewable term of six years after consultation with the European Parliament, following nomination by their respective Member States.
- The underlying audit work is carried out by the ECA's own audit staff co-ordinated by the member responsible.
- Audit reports are presented to the full Court for adoption and then to the European Parliament, Council and other interested parties.
- The Secretary General of the ECA, who is appointed by the Court for a renewable period of six years, is responsible for the day-to-day management of the ECA's staff and administration.[54]

---

[54] Source: European Court of Auditors' Website.

It is important to note that over 80 per cent of the EU budget is spent under so-called 'shared management', which means that Member States, not the Commission, are responsible for disbursing the funds. The ECA audit reports are therefore mainly concerned with systems that Member States (including the UK) have put in place to manage EU funds. Many of the irregularities may therefore have occurred as a result of shortcomings in Member States' own financial management systems.

A robust and well-resourced audit system is a vital precondition for ensuring public confidence in the EU's stewardship of taxpayer funds. Although the Court's basic auditing functions appear to be carried out well, its reports still take too long to see the light of day. This delay weakens their impact. The current scope of the ECA's audit work is appropriate as far as it goes – which is to 'provide assurance' to the European Parliament and the Council about the regularity of expenditure on EU programmes. It answers the questions: 'Have these funds been disbursed legally and in accordance with the EU's rules; are appropriate management systems in place, both at EU and at Member State level, to ensure financial regularity; and have the funds been fully and correctly accounted for?'

The good quality output in the Court's basic audit-compliance function does not, however, appear to be matched by its record in other areas of scrutiny, notably that of performance audit. This has become a fast-growing area of activity among 'supreme audit bodies' worldwide, pioneered by the US Government Accountability Office (GAO). Performance audit seeks to answer the question: 'Has the EU-funded programme provided value for money?' The Court's performance audits, though expanded somewhat over recent years, are seen by critics as lacking sharp focus and as being sporadic rather than systematic, partly, no

doubt, because their purpose is not clear from the Court's current terms of reference. As in the case with its basic audit reports, the ECA's performance audit studies are very slow and lengthy. Their average gestation period of two years means that their findings may be out of date, making it more difficult for the European Parliament or the Council to respond effectively and to take any necessary remedial action.

As an indication of the scope and methodology of the ECA's performance audits, a recent example, which looked at EU-funded airport infrastructure[55] is described in Box 7.

It is, however, the *quality* of performance audit reports which gives some cause of concern. For example, the Court's role in carrying out performance audits was recently criticised by a review panel comprising auditors from Member States. While acknowledging some improvements since the previous review, the panel concluded that:

- Performance audits were still largely influenced by the compliance audit methodology.
- The ECA should 'develop sustainable capacity in conducting performance audits'.
- In relation to the delay in producing performance audit reports, 'simplifying the procedure and clarifying decision-making may speed up the process'.
- Performance audit conclusions and recommendations are sometimes 'too vague'.

---

55 EU-funded airport infrastructures: Special Report EN no 21, 2014.

BOX 7: ECA Performance Audit Report on Airport Infrastructure Projects

Between 2000 and 2013 the EU allocated €4.5 billion (about £3.4 billion) to airport infrastructure projects. The money came principally from the European Regional Development Fund and was supplemented by loans from the European Investment Bank and other EU sources of financing. In its format at least, the ECA's report on the projects has many of the features of a Value for Money study by the UK National Audit Office (NAO). Its starting point is to ask the following questions about the programme under review:

- Whether there was a demonstrated need for the investment by the EU.
- Whether constructions were completed on time and on budget.
- Whether the newly built or upgraded infrastructure was fully used.
- Whether the investment led to an improved service for end-users.
- Whether the facilities generated by the investment were financially sustainable.

The report concluded that the investments were not cost-effective and represented poor value for money. The ECA recommended that in future the Commission should, before approving such a programme, carry out more rigorous assessments of the need for EU funding and of the financial viability of the relevant infrastructure. The report further recommended that the Commission should co-ordinate such programmes more effectively with national infrastructure projects, and exercise closer supervision of their progress.

- In developing audit recommendations, the ECA could consider more systematically whether they are convincing and how they can be implemented; and the Court would add value to its reports by putting more emphasis on analysing the causes of problems, errors and weaknesses, for instance when performance is poor or varies significantly between Member States.

The Court has undertaken to consider the panel's findings as part of its 2013-17 strategy. But this is still work in progress. One commentator has concluded that the Court is a 'sleeping, bumbling giant'. [56]

If the way in which the ECA carries out performance audits leaves something to be desired, then their priority within the Court's work programme also seems questionable. Currently the ECA produces only about 20 special reports a year and not all of those examine value for money in the sense understood by, for example, the National Audit Office in the United Kingdom. This compares with a figure of 66 VfM studies conducted by the NAO in 2013-14, which consumed about 28 per cent of its net resource requirement.

In order to transform the ECA into a more effective organisation, capable of carrying out a full range of audit functions, a number of changes are needed:

- The ECA's formal terms of reference should be amended to make clear that a regular programme of performance audits is of equal priority and value to the Court's audit-compliance functions.

---

[56] Hugo Brady, '*The EU's Court of Auditors: Europe's sleeping giant?*' ESharp, May 2013.

- The allocation of resources by the ECA should reflect these more nearly equal priorities.

- Performance audit should be defined as an examination of EU-funded programmes to determine the economy, effectiveness[57] and efficiency with which they have been managed and implemented.

- The Court should be set a target of completing its annual report on the EU accounts within six months of the end of the year to which they relate.

- Performance audit studies should normally be completed within six months.

- The ECA should have a formal duty to explain, on a regular basis, to Member States and hence to electorates the steps it has taken towards the fulfilment of its remit.

- As part of its duty to build public confidence in the robustness of its performance audit functions, the ECA should be required to consider *bona fide* requests from individual EU citizens, or bodies representing EU citizens, to conduct investigations of specific EU-financed programmes. Where it declines to agree to such a request, the ECA should publish the reasons for its decision.

The structure of the Court of Auditors appears to be cumbersome and unwieldy. A body 28 strong, even one operating partially through subgroups (chambers), may not be conducive to clear

---

[57] This is the wording contained in Part II of the UK's National Audit Act 1983, which defines the scope and purpose of Value for Money work carried out by the National Audit Office.

strategy and crisp decision-making. While there are doubtless strong political and diplomatic pressures for every Member State to be represented on the governing body (even of an auditing organisation), this should not preclude development of a stronger core leadership group. The Commission is treading this path under the Juncker Presidency. A smaller team would be likely to provide more effective decision-making and more sharply focused priorities. This should involve establishing a more corporate form of governance. Accordingly, the titular head of the Court – instead of being chosen by his peers and thus *primus inter pares* – would be clearly designated as the person in sole charge of the organisation's administration.

A set of reforms is required to achieve these overarching objectives:

- The President of the ECA should be renamed European Auditor General (EAG) in recognition of his or her primary responsibility. He or she should be appointed for a fixed, probably non-renewable, term by the Council.

- From within the 28 members of the Court, currently nominated by the Member States, a six-strong board of deputy EAGs should be created, also appointed by the Council, who would provide strategic guidance and leadership, and with whom the EAG would be responsible for the conduct of the audit programme in its various forms.

- To ensure that the ECA's priorities reflect the broad policies and objectives of the EU, and in recognition of the importance of the ECA's work for building wider public confidence in the EU's use of taxpayer funds, it would be highly desirable that the deputy EAGs had experience of

working with domestic Parliamentary scrutiny or audit bodies.[58]

The Council should establish an immediate review of the ECA's legal powers and resources in order to ensure that they are sufficient to support the revised functions outlined above. As part of that review an independent and appropriately qualified body should conduct a full audit of the ECA's own financial controls and management systems.

A stronger, more prominent, ECA could achieve a good deal, not just by identifying value for money savings or fraud, but in doing so, by helping to bolster the electorates' confidence in the EU as a whole.

---

[58] For example, the Public Accounts Committee in the UK.

7. THE ANTI-FRAUD OFFICE (OLAF)

The European anti-fraud office (OLAF) has three main functions:

- It protects the financial interests of the EU by investigating fraud, corruption and any other illegal activities.
- It detects and investigates serious matters relating to the discharge of professional duties by members and staff of the EU institutions and bodies that could result in disciplinary or criminal proceedings.
- It supports the EU institutions, in particular the European Commission, in the development and implementation of anti-fraud legislation and policies.

Although organisationally part of the Commission, OLAF enjoys a measure of budgetary and administrative autonomy. It has powers to conduct:

- Internal investigations, ie inside any EU institutional body or body funded by the EU budget.
- External investigations, ie at national level, wherever the EU budget is at stake. For this purpose OLAF may conduct on-

the-spot checks and inspections on the premises of economic operators, in close co-operation with the relevant Member State and third country authorities.

Any allegation of fraud received by OLAF undergoes an initial assessment to determine whether it falls within the remit of the Office and meets the criteria for opening a formal investigation. When a case is opened, it is classified under one of the following four categories:

- **Internal Investigations:** these are administrative investigations within the European Union institutions and bodies for the purpose of detecting fraud, corruption and any other illegal activity affecting the EU's financial interests including serious matters relating to the discharge of professional duties.

- **External Investigations:** these are administrative investigations outside the EU institutions and bodies for the purpose of detecting fraud or other irregular conduct by natural or legal persons. Cases are classified as external investigations where OLAF provides the majority of the professional input.

- **Co-ordination Cases:** in these OLAF contributes to investigations carried out by national authorities or other EU departments by facilitating the gathering and exchange of information and contacts.

- **Criminal Assistance Cases:** in these cases the competent authorities of a Member State or third country carry out a criminal investigation with assistance from OLAF.

In June 2014, the Commission announced proposals to reform OLAF, including the establishment of a so-called Controller of

Procedural Guarantees. The holder of this post would have two main functions:

- Responsibility for ensuring that OLAF observes due process, including by reviewing and reaching conclusions on complaints lodged by anyone implicated in an OLAF investigation.
- Authorising OLAF, where appropriate, to inspect the offices of the staff of EU institutions, and to remove any documents and data from them.

This proposal, which is intended to complement the proposal for a European Public Prosecutor's Office and other anti-fraud initiatives, has not yet been approved by the EU institutions.

OLAF has been the subject of frequent criticism, both over its handling of particular cases and, in the eyes of a number of national prosecution authorities, for the poor quality of some of its investigation files. It is also seen as under-resourced, a problem illustrated by the fact that only about 20 OLAF investigators are allocated to pursuing inquiries into the management of expenditure on regional funds, a sector which accounts for a significant proportion of EU-related fraud. Addressing these deficiencies should form part of a wide-ranging shake up of OLAF and the way it operates.

An important first step in reforming OLAF should be to remove it from the purview of the Commission. This is an historical anomaly. It creates a conflict of interest. An anti-fraud body cannot command public confidence if it is, for all practical purposes, constituted as part of an organisation whose activities it may from time to time need to investigate.

A more appropriate location for OLAF would be within the European Court of Auditors, operating as the Court's investigative and enforcement arm. Irregularity and fraud lie at opposite ends of the same spectrum and there is already substantial interaction between the two bodies. Any savings on administrative costs from merging the ECA and OLAF should be ploughed back into investigatory resources.

There should in addition be an independent review of OLAF's operation. This review would benefit from evidence from national prosecuting authorities and anti-fraud agencies. It should, among other things, address the following issues:

- The level of resources available to anti-fraud investigations, in the light of the current nature and scale of fraud and the need both to secure prosecutions where appropriate and to provide deterrence.

- The qualifications and level of training of investigators, with an emphasis on special skills, including forensic accountancy.

- The management and maintenance of high standards of anti-fraud investigation.

- The need to ensure that the deployment of investigative resources matches the areas of EU expenditure which are most vulnerable to fraud (for example regional funds).

The Council should commit itself to providing any reasonable increase in funding or other resources identified as necessary by the review.

In order to bolster the authority of OLAF, one further reform is needed. OLAF has no direct prosecuting capability of its own, but

instead sends files to national prosecuting bodies. It is therefore important that when a prosecutor in a Member State declines to act on a file received from OLAF, its reasons for doing so are made public (subject to the need, where justified, to protect individual privacy or to preserve the integrity of other legal proceedings). And where there is a pattern of refusals to act on the part of a Member State OLAF should have the power to bring the matter to the attention of the European Council.

These essential reforms to OLAF should not be delayed by discussions over the possibility of establishing a European Public Prosecutor's Office which, if approved, could subsume many of OLAF's functions. There is – understandably – as yet no agreement on this proposal. Improvements to OLAF need not await their conclusion.

8. THE EUROPEAN COMMISSION

The EU depends for its effectiveness on a well-functioning Commission. Without the Commission there would be no European Civil Service, no promoter and guarantor of the single market, and no impartial upholder of the rules and conventions by which the Community works (especially important in protecting the interests of smaller countries against their larger counterparts). This overarching role gives the Commission enormous, perhaps excessive, powers of initiative, particularly in terms of proposing new legislation and also in setting the EU's agenda. In a union of 21st century democracies, it is curious that a monopoly of legislative initiative lies in the hands of an unelected body.

It is therefore unsurprising that the Commission has been the subject of growing criticisms over recent years, chief among which has been concern about its legislative role. This criticism relates not only to the volume of new proposals that the Commission instigates, although it has fallen somewhat recently, but particularly to its alleged disregard in some cases for the principle of subsidiarity. Among recent examples cited of the latter tendency have been measures to:

- Ban restaurants from serving olive oil in reusable bottles.
- Introduce quotas for women on corporate boards.
- Set an EU-wide single drink-drive limit on blood/alcohol levels.
- Regulate the sale of electronic cigarettes.
- Ban the sale of menthol cigarettes.

Although only the last of these proposals was adopted – and they may have been proposed with the best of intentions – stopping the others from proceeding further imposed its own costs in terms of administrative, political and commercial effort.[59]

Twenty-five years ago, *Subsidiarity: No Panacea* identified 17 areas of EU legislation which, at that time, could be considered for repatriation.[60] The majority of them were probably not appropriate for EU-wide action. This paper has not attempted to carry out a full list of current examples. It would not be difficult, however, to assemble such a list. In the financial field alone, the Alternative Investment Fund Managers Directive (AIFMD) is "an example of legislation which is disproportionate in its impact and coverage, and without clear cross-border benefits that might have justified its introduction on subsidiarity grounds", while the Solvency II capital adequacy regime for the insurance industry, which comes into force in January 2016, raised 'concerns about the challenge presented by the process of developing and agreeing the new regime and the outcome in terms of subsidiarity and

---

59 That so many of these proposals were dropped or amended suggests that early challenge through the mechanisms to enhance subsidiarity set out in this paper would have been merited.

60 Andrew Adonis and Andrew Tyrie, op. cit.

proportionality'.[61] Building on the recently completed Balance of Competences Review, the UK Government should itself perform this task across the full range of policy areas, focusing on subsidiarity and proportionality, and publish some of its results.[62]

Other criticisms of the Commission include:

- Its alleged slowness to respond to developing problems.
- A lack of focus on the major issues facing Europe.
- Its close (some would say, cosy) relationship with the European Parliament.

The third of these concerns reflects the perception that the Commission is sometimes unwilling to incur the displeasure of the European Parliament by refusing to introduce legislation urged on it by MEPs – especially at the beginning of its five year term – often in response to aggressive lobbying by NGOs and other special interest groups. This in turn leads to suspicion and a lessening of confidence in the Commission on the part of national governments. The problem has been exacerbated, in the eyes of many observers, by the way in which the co-decision procedure operates. As argued earlier in this paper, by according the Parliament a greater role in the consideration and adoption of new legislative measures, co-decision has turned it from a largely scrutinising body into a legislative partner with the

---

61 Balance of Competences Review, *The Single Market: Financial Services and the Free Movement of Capital*, pp. 79-81. These examples are symptomatic of the more general problem underlying much of European securities and financial regulation, that the benefits of Europe-wide action in many cases may be offset, or may seek to displace the efforts of countries such as the UK where high-quality regulatory protection is of particular importance, given the significance of the UK's financial sector.

62 This suggestion is discussed further on page 87.

Council. This is resulting in a close relationship with the Commission – which has a monopoly power to initiate legislative proposals – the primary body which the Parliament should be scrutinising.

There is, moreover, a structural problem at the heart of the Commission. The policy of appointing one Commissioner per Member State means that the Commission is now 28 strong. While in the earlier years of the EU this may have been both politically unavoidable and practically workable, it is no longer the best way to operate.

Such a large executive body is both cumbersome and unwieldy. In particular:

- Discussions tend to be protracted and decision-making more difficult.
- The one Commissioner per country rule, each with their own portfolio, stretches to breaking point the notion of a meaningful division of responsibilities.
- Some portfolios are much more important than others.
- The fragmentation of responsibilities among 28 Commissioners encourages overlap and duplication.
- Appointing Commissioners by Member State means that the most able candidates for the job are not always selected.
- The larger the number of Commissioners the greater the tendency of some to act as though they were there to represent the interests of their own country, contrary to the founding principles of the EU.

- The fact that some portfolios have relatively little administrative content creates a temptation for the Commissioners in question to justify their existence by proposing new legislation (or by supporting proposals emanating from the Parliament).

Many of the matters raised in this chapter – particularly relating to reform of the Commission – are sensitive and will be difficult to negotiate, however strong the case for them. Nevertheless, the following changes are proposed in the Commission's structure and modus operandi:

- An inner group of about eight Commissioners occupying the most senior posts[63] should be created to act as the Commission's executive board.[64]

- The Council should make strenuous efforts, in collaboration with national governments and parliaments, to ensure that candidates for the Commission are of the highest calibre and that, wherever possible, they have expertise in their field as well as political nous. The Council should, after the appointment of a Commission President and before the nomination by Member States of their candidates for appointment as the remaining commissioners, agree with him or her the allocation of portfolio responsibilities between the Member States'

---

63 For example: Foreign Affairs; Trade; Single Market; Competition; Energy, Climate and Environment; Economy; Budget (including Farming and Regional Aid); and Justice and Home Affairs.

64 The initiative by current Commission President Jean-Claude Juncker to cluster Commissioners under Vice-Presidents of the Commission represents a big practical step in the right direction.

nominees. Once each Member State's proposed area of responsibility has been identified, Member States should be expected to put forward nominees for their respective portfolios for which they have demonstrable and relevant expertise. Arguably, the Council should share the right to appoint the President of the Commission.

- In order to achieve a better balance among the institutions, consideration should be given to sharing the European Parliament's power to sack the Commission with the Council, with the consent of both required.[65]

Two further measures would help to give pause to the Commission's legislative appetite. It should be obliged to withdraw a proposal if requested to do so, by QMV, by Member States. Secondly, the Commission's ability to keep a proposal on the table for years without its adoption should be curtailed, by requiring a proposal to be withdrawn if it has not been adopted after, say, three years.

More generally, the Commission should usually include sunset clauses in new legislation. Where the Commission deems it essential not to use such a clause, they should explain fully their reasons. These clauses would provide for the expiry of a measure after a specified period, which should be long enough to allow for a systematic review of its operation. Such a sunset clause could, if necessary, be overridden by a Qualified Majority in the Council.

---

[65] An argument also put in Grant et al, *How to build a modern European Union*, p. 21.

Budgetary reform is both necessary and feasible in the context of a rebalancing of the Commission. The EU budget has been capped and even reduced in recent years But there has been little progress in achieving a systematic review of the need for particular spending programmes. Vested interests abound. Regional subsidies account for a large proportion – more than a third – of the current budget.

The UK government should make the case for fundamental changes, by establishing two key principles which, if agreed, would gradually refocus subsidies where they are most needed. This would largely entail limiting the use of regional funds to two specific purposes: transitional support for new EU entrants, and monetary transfers designed to smooth out economic turbulence within the Eurozone. The latter programme should be financed by the Eurogroup countries. It has to be acknowledged that such an outcome will be hard to negotiate. The resulting redirection of EU expenditure would require gradual implementation – in some cases very gradual. Furthermore, the resulting reductions in the EU budget feed directly through to lower net contributions by Member States. For the United Kingdom this carries the risk of reopening the question of the rebate. Nonetheless, fundamental reform of the budget and its purposes should not indefinitely be postponed.

9. PROTECTING THE INTERESTS OF THE UK AS A NON-EURO MEMBER

The Eurogroup, representing the nineteen countries which use the Euro, comprises finance ministers from the Eurozone, together with the Commission's Vice President for Economic and Monetary Affairs and the President of the European Central Bank. Its main role is to oversee and manage the operation of the single currency area, principally by ensuring close alignment of economic policy within the Eurozone countries. The Group also undertakes preparations for Euro summit meetings and is responsible for following through their decisions. The Group normally meets once a month, immediately before the meeting of European Economic and Finance Ministers (ECOFIN).

The fact that 19 European countries are inside the Eurozone and nine are outside creates unavoidable tensions and imbalances in the governance of the EU. The Eurozone countries, which have signed up to the political, economic and regulatory costs of Euro membership in return for the perceived advantages of the single currency, are entitled to take decisions about the future of the Euro among themselves. But the non-Euro participants also need to be satisfied that their own interests are not adversely affected

by the actions of the Eurogroup. In particular, non-Euro countries seek reassurance on two key issues:

- That they have an input into discussions and decisions on matters which, whilst properly a matter for the Eurozone, have knock-on effects throughout the EU.

- That matters which intrinsically affect the whole of the EU (such as the Single Market) are not treated as if they related solely, or mainly, to the Eurozone.

The sensitivity of the position of the non-Euro countries was accurately summarised by the UK Minister for Europe[66] in a speech in June 2014:

> *'The Eurozone has started to put in place the governance and structures that it has always needed: creating a Banking Union, a European Stability Mechanism to bail out Eurozone countries, and a Single Resolution Mechanism to bail out Eurozone banks. In response to this integration, non-Euro members like the UK would need safeguards to protect their rights and interests and to establish the right articulation between members of the currency union and those countries outside the Eurozone.'*

And citing a proposal by the ECB relating to the domiciling of clearing houses trading in Euros, the Minister added :

> '*Under this policy, which the UK is challenging in the courts, Euro-denominated instruments could only be cleared by a clearing house that is physically located in a Eurozone Member State. In practice, what that means is the creation*

---

66 Rt Hon David Lidington MP.

of a fragmented, two-tier market within the EU, something that should have no place within a European single market governed by common rules applicable to all 28 Member States. There is a danger that, with their inbuilt qualified majority from 1st November 2014, Euro members could use their collective voting weight to write the rules for the whole EU. And that is a problem because, for example, it could leave us in a position where Euro members – including ones with little or no financial services industry or interests themselves – can caucus together to impose financial services legislation on the UK, the world's leading financial centre. We have already seen the Eurogroup discussing EU business privately before involving other Member States, particularly in the run-up to ECOFIN meetings.'

Some steps have already been taken to meet the concerns of the non-Euro countries. The Commission, for example, has tried to respond positively to such anxieties by taking them up with the Eurogroup. One result of this process was the introduction of the so-called 'double majority' procedure for decisions of the European Banking Authority, by which majorities are required among both the Eurogroup and non-Euro members. The fact that the Commission sees itself as the guarantor and protector of the integrity of the single market is encouraging. But it also underlines the need for the strengthening of the Commission along the lines described earlier in this paper.

More needs to be done, however, particularly as, under the impetus of increasingly close integration, the Eurogroup takes on more and more the role and appearance of an inner group, with institutional practices of its own.

The following additional measures are therefore highly desirable:

- There should be a legal right for the non-Euro countries to be represented through observer status at Eurogroup meetings.[67]

- There should be a legal duty on EU officials supporting meetings of the Eurogroup formally to draw the attention of the Chair to any attempt by members of the group to raise, discuss (other than tangentially), or to purport to take decisions on, the single market. Such a duty should also require the relevant officials to report to the Council any case in which the Eurogroup, despite advice to the contrary, acts in a manner which infringes the rights of non–Euro countries.

- The Council should – at the very least – make a formal declaration of support for the integrity of a 28 member single market and at the same time commit itself to any action necessary to preserve it. There would be merit in embodying such a declaration in a treaty text.

A potential threat to the interests of the non-Euro Member States also arises in the context of co-decision. This is because legislation having an adverse impact on those countries, including the UK, could be pushed through by the Eurogroup: by a simple majority in Parliament and by a Qualified Majority (which the Eurozone has) in the Council. One option for tackling this issue could be to establish a special procedure for proposed legislation which impeded essential national state functions or adversely affected vital national interests. Essential state functions might include the independent control of monetary

---

[67] As advocated in Grant et al, *How to build a modern European Union*, p. 39.

policy and financial stability or the maintenance of secure national borders. Vital national interests might relate to the protection of key economic sectors such as the financial services industry and the preservation of an open and competitive economy. The Chancellor has recently argued vigorously for 'guarantees' for the financial services sector against discrimination by the Eurozone.[68]

Legislation meeting these criteria could be subject to the 'double majority' provisions (of Euro-ins and -outs) applied to the European Banking Authority. Alternatively, an emergency brake could be applied to such legislation, requiring its referral to the European Council.[69] Such changes would probably require treaty revision in the long term, though there would probably be scope for establishing an interim position through a declaration of the Council.

The current arrangements also have drawbacks for the countries using the Euro, since MEPs from non-Euro countries can vote on matters affecting only the Eurozone – an EU version of the West Lothian Question. (This does not apply in the Council, since only Eurozone member states vote in Ecofin on Euro-related matters). To the degree that any attempts were made to tackle this anomaly – for example, by the creation of a Eurozone sub-committee of the Economic and Monetary Affairs Committee –

---

68 See *Financial Times*, 9 September 2015.

69 Under the Lisbon Treaty, an 'emergency brake' can be applied in certain policy areas. Under this provision, a Member State that is outvoted can ask for a matter it considers to threaten the fundamental principles of its social security or criminal justice systems to be referred to the European council. This does not necessarily stop the stop the measure but enables further reflection and negotiation.

there would be a case for creating parallel arrangements, protecting non-euro countries in areas of essential state functions and vital national interests, within the workings of the European Parliament.

A statement is also desirable setting out the scope and limits to the powers of the European Parliament over Euro-related matters. For example, in respect of bail-outs of banks and other financial institutions, action by the Parliament could cut across the process by which, as part of the European Banking Union, bail-outs are currently handled by intergovernmental agreement.

10. FINAL REFLECTIONS

The EU is in crisis, politically and economically. A revival of the politics of nationalism and extremes has been the result. The Eurozone crisis was partly caused and greatly exacerbated by the EU's failure, over decades, adequately to engage in structural and supply side reform, every bit as much as it has been inflamed by the lack of an adequate fiscal framework of rules. Those weaknesses themselves derive from the crisis of legitimacy at the heart of the EU's decision-making structure.

The Eurozone was created without adequate fiscal and institutional underpinning because domestic democratic consent – whether at the time of the Eurozone's inception, or now – cannot easily be assembled for it. The proposals outlined here, by restoring a more robust line of accountability through nation states for some of what the EU does, can make a contribution towards assuaging the crisis of legitimacy. In doing so, far from weakening the EU, these proposals can bolster it. The Commission and the Parliament are powerful and well-developed institutions; far from proposals to strengthen the Council being a threat to the EU as a whole, they are a recognition of the institutions' maturity. They also reflect the more sceptical view of

the capacity of government – at whatever level – to match ambition with delivery, and concern about the growth in the intrusiveness of the state, that has to varying different degrees swept through western countries in recent decades.

The UK has, in its 40 years of EU membership, tended to eschew institutional reform. Its governments have generally expressed little interest in the ideology that shaped the EU from its foundation, preferring to focus on practical, often incremental measures. But it is now increasingly clear that institutional reform will be needed to secure the UK's interests and those of the Member States in a Union of 28.

Reaching agreement on these reforms among the other Member States will not be easy. Where vested interests are involved resistance will be strong. National sensibilities will be aroused. The UK should emphasise that its proposals can enable the development of an organisation which, by concentrating its efforts and resources on its core responsibilities, produce benefits for all Member States, not least by putting national support for the EU on a surer and more sustainable footing.

Nevertheless there will, no doubt, be suspicions on the part of some Member States that the unspoken aim of the reforms is to undermine the founding principles of the EU. Such misgivings need to be addressed. The UK government should acknowledge – and be prepared to state formally if necessary – that the EU:

- Is a collaborative grouping of free, independent, democratic nation states which share common political, economic and cultural values.

- Has functions and objectives which go significantly beyond the promotion of free trade.

- Depends on the willingness of its Member States to work collectively in relation to a number of those agreed policy goals which, because of their cross-border implications or their importance to the development of a single market in goods and services, can benefit from legislative action at Union rather than national level.

- Recognises that democratic support for such a collaborative approach can only be maintained if the EU institutions accept the need to refrain from legislative or other intervention unless it can clearly be justified on the grounds of significant gains in efficiency and cost-effectiveness. The EU's legitimacy ultimately flows through national parliaments, not unelected supranational institutions.

Just as with the concerns of other Member States, so it is with those in the UK who are sceptical of the strength of the government's commitment to thoroughgoing renegotiations. Both sources of misgiving should be tackled head on. The treatment of the acquis in the renegotiations is crucial to this. The government should, if it has not already done so, conduct its own further review of the acquis. It should publish a list of at least some measures which should – in due course – be considered for repatriation, together with an explanation for each. The government will understandably be cautious about publishing such lists on the grounds that failure to obtain immediate repatriation or amendments might be held by some to constitute a 'failure' of the negotiations. This would be a mistake: it would not be a failure. The UK cannot expect, in any international negotiations, to secure all its demands on subsidiarity, or any other area for negotiation suggested in this paper. In any case, no 'full and final settlement' of Britain's, or any other Member

State's, relationship with an organic set of institutions such as the EU can or should be attempted. But institutional reform ensuring that, over time, measures in such a list will be considered on subsidiarity grounds for repatriation, or amendment certainly can.

If the negotiations are entered in this spirit, the UK may find support in unexpected corners. Far from being the isolated demand of a recalcitrant member, the restoration of a leadership role for Member States in the Council – supported by the entrenchment of subsidiarity and proportionality in EU practice and capable of limiting action to areas with demonstrable benefit – is not just common sense. It is essential to the mobilisation of support for the EU among Member States' electorates.

The Government should not be nervous about explaining the radicalism of such proposals, and their long-term implications for the future of the EU. That radicalism is essential. The renegotiations – and the accompanying need to stabilise the Eurozone and ensure a strong working relationship between the Euro and non-Euro members – will alter the character of the EU. The EU has already been fundamentally recast twice in the past 30 years. Both the single market and enlargement owe something to British initiatives. Each confronted Europe's needs at the time; both – though initially controversial – are now widely held to have strengthened Europe. The EU, if it is to prosper, must recast itself again. These renegotiations, and the essential reforms to the Eurozone and its relationship with the EU, provide that opportunity.

BIBLIOGRAPHY

Andrew Adonis and Andrew Tyrie, *Subsidiarity: No Panacea*, European Policy Forum, 1992.

Anthony Browne and Mats Persson, *The Case for European Localism*, Open Europe, 2011.

Charles Grant et al, *How to Build a Modern European Union*, Centre for European Reform, 2013.

Luigi Guiso, Paola Sapienza and Luigi Zingales, *Monnet's Error?,* Brookings Panel on Economic Activity, September 2014.

Daniel Innerarity, *Does Europe need a demos to be truly democratic?*, LSE Europe in Question Discussion Paper series, 2014.

HM Government, *Review of the Balance of Competences Between the United Kingdom and the European Union: The Single Market: Financial Services and the Free Flow of Capital,* Summer 2014.

HM Government, *Review of the Balance of Competences Between the United Kingdom and the European Union: Subsidiarity and Proportionality*, December 2014.

House of Commons Library, *Reforming the EU: UK plans, proposals and prospects,* Vaughne Miller and Constance Woollen, Standard Note IA/7138, March 2015.

House of Lords, European Union Committee, *The Role of National Parliaments in the European Union,* 9th Report of Sessions 2013-14, HL Paper 151, March 2014.

Anthony Teasdale and Timothy Bainbridge, *The Penguin Companion to European Union*, Penguin: 4th edition, 2012.

John Tate and Greg Clark, *Reversing the Drivers of Regulation: the European Union,* Policy Unit, Conservative Research Department, 2004.

Timothy Taylor, *European Union: Functionalism and the Ratchet Effect,* Conversable Economist website, 2014.

Andrew Tyrie, *Sense on EMU*, European Policy Forum: Revised Edition, 2000.

ANNEX 1

STRENGTHENED SUBSIDIARITY: SOME OF EVIDENCE OF ALLIES IN EU

According to an *Open Europe* report in September 2011, more 'European localism', another expression for subsidiarity, would be supported by Scandinavian countries, the Netherlands, most of Eastern Europe and the German Länder.[70] There might even be some support from the Commission President, Jean-Claude Juncker.[71]

A House of Lords report in March 2014, on the role of national parliaments in the EU, noted similar views to those of the UK Government from the Finnish and Cypriot parliaments.[72] In Finland, the party manifesto of the winner of the parliamentary

---

70 Anthony Browne and Mats Persson, *The case for European localism*, September 2011.

71 Martin Selmayr, Head of Juncker's Cabinet, said on a visit to Berlin on 1 June: "Cameron wants Brussels to only deal with the big issues and respect the subsidiarity principle. We want that too".

72 www.publications.parliament.uk/pa/ld201314/ldselect/ldeucom/151/15102.htm

elections in April 2015, the Finnish Centre Party, emphasised the principle of subsidiarity.[73]

The Dutch Government appears to be a firm supporter of strengthened subsidiarity. In a review of subsidiarity and proportionality in June 2013, it called for 'a more sober but more effective EU, starting from the principle: at European level only when necessary, at national level whenever possible'.[74] The Dutch Government argued that power and responsibility should be at local, national, European, or global level, depending on the issue. It stated that the 'time of an ever-closer union in every possible policy area is behind us'. In a speech on 30 October 2013 the Dutch Prime Minister, Mark Rutte, echoed much of what the Fresh Start Group[75] and the UK Government had been saying about looking at which tasks are better performed by Member States, and which by Europe.

According to a report by Rem Korteweg of the Centre for European Reform, the Dutch subsidiarity review has received support from Germany, Sweden, Finland and Austria, and from the EP President, Martin Schulz.[76] However, the author did not think the Dutch Government would support David Cameron in his quest for 'radical changes to the EU', and the 2013 *Tweede Kamer* report on national parliaments in the EU did not call for a red card system.

---

73 European Movement UK, *Eurosceptic paper Tigers at the Finnish Parliamentary elections*, 26 April 2015.

74 Testing European legislation for subsidiarity and proportionality – Dutch list of points for action, 21 June 2013.

75 A group of Conservative MPs committed to reform of the EU and an examination of the options for a 'new UK-EU relationship'.

76 Centre for European Reform bulletin 91, August-September 2013.

Germany's position is ambivalent. Before the 2013 German election Chancellor Merkel was reported as wanting more direct agreements between EU Member States – an intergovernmental rather than an EU approach – and during her election campaign, she was widely reported as saying she saw 'no need to give more authority to Brussels'. Professor Dr. Hans Hugo Klein, a former CDU MP and judge at the German Constitutional Court, argued that 'the principle of subsidiarity needs to be defined in more detail' followed by a 'thorough check of existing EU law', and that, in order not to alienate the people in Europe, 'a repatriation of EU competences and a thinning-out of European rules and regulations is required'.[77]

German Finance Minister Wolfgang Schäuble stated in 2014 that the new EU Commission 'must observe the principle that policy decisions must only be taken at a European level when national solutions are inadequate'.[78]

Reports on David Cameron's meeting with the Polish Prime Minister Ewa Kopacz in May 2015 signalled agreement on more subsidiarity and respect for the sovereignty of Member States.[79] In June 2014 the then Danish Prime Minister, Helle Thorning-Schmidt, said she wanted to strengthen subsidiarity.[80]

---

77 Open Europe reported on 31 May 2013 on a guest piece in the *Frankfurter Allgemeine Zeitung,* 31 May 2013.

78 Bloomberg business, 30 June 2014.

79 ITV News, 29 May 2015.

80 Konrad Adenauer Stiftung, *How populist EU opponents influence national politics,* Facts and Findings April 2015 No. 168.

ANNEX 2

REFORM PROPOSALS AND TREATY CHANGE

As noted in Box 1, there is no prospect of a new EU Treaty within the timescale of the British renegotiation. However, there may well be scope for various forms of interim solution regarding the more wide-ranging proposals set out in this paper, whether through a unanimous political declaration of the Council or an integovernmental treaty outside the EU framework pending incorporation into the next Treaty. This was the approach taken at Edinburgh in 1992. More recently, the Fiscal Compact was agreed outside the EU framework with a provision that signatories would endeavour to incorporate it into that framework by 1 January 2018.

The following tables, while not exhaustive, provide a preliminary assessment of which proposals are likely to require an interim agreement, pending long-term Treaty change, and which could be taken forward without this.

Proposals with significant Treaty implications

Summary of Proposal	Possible Treaty implication
Strengthening of the definition of subsidiarity	Article 5 TEU and the Subsidiarity and Proportionality Protocol provide for adherence to these concepts. In time, amendments would probably be required. The Council could seek to act on this basis by agreement in the interim
Enhanced ability to challenge by national parliaments; changes to thresholds for 'Yellow Card' challenges and establishment of 'Red Card'	This would require amendment of Article 7 of the Subsidiarity and Proportionality Protocol (Protocol 2 to TFEU). As above, the EU institutions could agree to exercise their powers in accordance with this approach prior to more formal change
Ability of the Council of Ministers to require, by Qualified Majority, the withdrawal of a proposal	The Commission's near monopoly on legislative initiative (under Article 17.2 TEU) means that there is no provision for it to be required to withdraw a proposal; a recent judgment by the European Court of Justice (Case C-409/13, *Council v. Commission*) also makes clear that its discretion to withdraw proposals, while upheld, is not absolute and must respect the institutional balance of the Treaties. However, the Commission could, pending Treaty change, agree to exercise its powers in this way. In practice, the current Commission has withdrawn a significant number of proposals
Creation of the ESC, advising the Council on legislative proposals	The creation of such a body might not require Treaty change, though over time it would be preferable for it to have any formal status. Article 5 TEU could provide some basis for the ESC's existence, though this would require additions to and amendment of the Article. The consequences of the ESC's advice in terms of possible Council decisions are addressed in other sections

The ESC should carry out a rolling review of the *acquis communautaire* on the basis of subsidiarity and proportionality. Where a measure is found not to be justified, ESC can propose that the Council vote by QMV to impose a 12 month sunset clause	The Commission is currently bringing forward proposals for repeal of legislation under the REFIT programme; the ESC could make similar proposals, but on the basis of subsidiarity and proportionality. However, under current EU law, any proposals for sunset clauses would have to be brought forward by the Commission, raising the question of its near-monopoly on legislation
New legislative proposals from the Commission, unless accompanied by a full explanation of the need for their permanence, should carry automatic sunset clauses. Those proposals not enacted within three years, or by the end of a Commission's term, should lapse	Currently individual measures are adopted with sunset clauses in them. Commission Vice President Frans Timmermans is examining long-standing legislative proposals with a view to withdrawing those not resolved. Applying this on a systematic basis would require Treaty change, though it may be possible to secure an interim agreement that this approach would be applied in practice

Proposals with few or no Treaty implications

Summary of Proposal	Possible Treaty implication
Explanatory Memorandums to address in full compliance with the new and strengthened subsidiarity test, Impact Assessments to describe and quantify compliance costs	This would probably not require Treaty change, but changes in procedure. The establishment of the new Regulatory Scrutiny Board is a step in the direction of strengthening Impact Assessments
The European Court of Auditors to take on a regular programme of performance audits, and to have a streamlined leadership with a European Auditor General and six deputy EAGs	The programme of audits will be governed by the ECA's Rules of Procedure. Establishing a board of deputy EAGs would not require Treaty change, though renaming the most senior post might
OLAF should be transferred to the ECA and its powers and resources enhanced	OLAF was established under Article 235 TFEU, a Commission Decision of 28 April 1999 and other legislation. Article 235.4 TFEU provides for strengthening of anti-fraud measures, and changes to legislation rather than the Treaty are likely to be required. Under the Commission's current proposals, much of OLAF's functions would be subsumed within the EPPO
The European Commission should be streamlined through the creation of an inner group of some eight Commissioners occupying the most senior posts	Creation of an inner group would formalise the arrangement begun by the current Juncker Commission. Any move to change or reduce the size of the Commission could be taken by unanimous decision of the European Council under Article 17.5 TEU without the need for treaty change

Nominations to the Commission by national governments to give greater weight to portfolio expertise	A greater focus on portfolio expertise would probably not require treaty change unless formally mandated
Gradual reform of EU regional funding to concentrate on transitional support for new EU entrants and smoothing out economic turbulence within the Eurozone	This would require amendment of various EU regulations, including EU Regulation 13/2013 setting out provisions on the regional and structural funds, rather than treaty change
Protection of the interests of non-Euro Member States	The proposed extension of the 'double majority' voting principle, applied to decisions in the European Banking Authority, would not require treaty change

TEU: Treaty on European Union, the Maastricht Treaty as altered by subsequent amending treaties

TFEU = Treaty on the Functioning of the European Union, the Treaty of Rome as altered by subsequent amending treaties

Both Treaties have numerous Protocols and Declarations attached to them

ANNEX 3

VARIABLE GEOMETRY: OPTIONS AVAILABLE TO MEMBER STATES

Many distinct forms of application of EU law to Member States (commonly known as 'variable geometry') are available to negotiators. These include:

a) blanket opt outs from EU Treaty provisions and legislation (for example, the euro opt-out);

b) transitional provisions, providing the UK (and other Member States) with a temporary derogation106 (for example, the transitional free movement provisions following the accession of a new Member State) or with an opt-out (for example, the JHA107 block opt-out of approximately 130 pre-Lisbon police and criminal justice measures);

---

106 Derogations are provisions in an EU legislative measure which allows for all or part of the legal measure to be applied differently, or not at all. Although these exceptions can give Member States flexibility as to how EU law is applied domestically, they are usually narrowly defined, subject to limitations and conditions (such as satisfying the proportionality principle) and are strictly interpreted by the Court of Justice.

107 JHA refers to the Justice and Home Affairs field. Strictly speaking, in the terminology of the Lisbon Treaty, this should now be referred to as the Area of Freedom, Security and Justice (AFSJ).

c) rights to choose whether to participate in particular EU legislation on a case-by-case basis in the JHA and Schengen fields (known as the Schengen Protocol 19 and Protocol 21 on JHA);108

d) other means by which the UK (and other Member States) can choose whether to participate in legislation (known as Enhanced Co-operation);109

e) "emergency break" procedures enabling Member States to object to (but not necessarily prevent) legislation in restricted policy areas;

f) derogations available to all Member States under the treaties (for example, derogations from the four EU freedoms: Goods, Persons, Services and Capital on law and order or defence grounds); and

g) Derogations from individual EU legislation negotiated within individual measures (see for example, the Working Time Directive, VAT derogations and the Prisoner Transfer arrangements), including longer periods for the implementation of directives.

Source: House of Commons European Scrutiny Committee

---

108 Protocol 19 applies to legislation building on the Schengen *acquis;* under Protocol 21, the UK (and Ireland) do not automatically participate in measures concerning AFSJ, but can opt in either at the negotiating stage or once the measure has been adopted.

109 Enhanced Co-operation takes place when at least 9 Member States ask the Commission to make a proposal after attempts to adopt legislation under the normal Trinity rules have failed. It is required to be consistent with EU law and to respect the rights of non-participating Member States.

ANNEX 4

REASONED OPINIONS (OBJECTIONS) ON SUBSIDIARITY GROUNDS ISSUED BY THE HOUSE OF COMMONS EUROPEAN SCRUTINY COMMITTEE BETWEEN 2010 AND 2014

EP legislative file	Proposal
(2010) 371	Investor Compensation Schemes (Directive)
(2011) 121	Common Consolidated Corporate Tax Base (CCTB) (Directive)
(2011) 452	Prudential Requirements for Credit Institutions (known as CRD4) (Regulation)
(2011) 635	Common European Sales Law (Regulation)
(2011) 896	Public Procurement (Directive)
(2012) 130	Right to take collective action (Monti II) (Regulation)
(2012) 617	Fund for European aid to the most deprived (Regulation)

(2012) 614 Gender balance on corporate boards (Directive)

(2013) 147 Reducing the cost of deploying high-speed electronic communications networks (Regulation)

(2013) 534 European Public Prosecutor's Office (EPPO) (Regulation)

(2013) 619 New psychoactive substances (Regulation)

(2013) 641 Indices used as benchmarks in financial instruments and financial contracts (Regulation)

(2013) 821 Presumption of innocence (Directive)

(2013) 893 Animal cloning (Directive)

Source: House of Commons European Scrutiny Committee

BECOME AN ASSOCIATE OF THE CENTRE FOR POLICY STUDIES

The Centre for Policy Studies is one of Britain's best-known and most respected think tanks. Independent from all political parties and pressure groups, it consistently advocates a distinctive case for smaller, less intrusive government, with greater freedom and responsibility for individuals, families, business and the voluntary sector.

Through our Associate Membership scheme, we welcome supporters who take an interest in our work. Associate Membership is available for £100 a year. Becoming an Associate will entitle you to:

- all major CPS reports produced in a 12-month period
- invitations to lectures and conferences
- advance notice by e-mail of our publications, briefing papers and invitations to special events

For more details, please write or telephone to:

Jenny Nicholson, Deputy Director of Fundraising
Centre for Policy Studies
57 Tufton Street, London SW1P 3QL
Tel: 020 7222 4488
jenny@cps.org.uk
Website: www.cps.org.uk