

Proportionality needed in the subsidiarity debate in the EU –

Appraisal of the British and Dutch initiatives

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The subsidiarity debate is not at all new in the EU, first appearing at treaty level as Protocol 19 to the Treaty of Maastricht signed in 1992. What is new is that it is no longer just a technical term of art for legislators working away in complex multi-tier government systems. Today the complaint that the EU is overly-intrusive has connected with populist eurosceptic polemics with the risk of major political consequences that could result from the forthcoming elections of the European Parliament. It is possible, even probable, according to current opinion polls, that the electoral outcome will see the likes of Nigel Farage, Marine Le Pen and Geert Wilders as the biggest winners. And for all of them, ‘less Europe’ is the battle cry, not at the refined level of revising or repealing this or that law, but in the most crude and brutal manner of attacking the system with sledge hammers.

Two governments, that of the UK and the Netherlands, have taken up the cause of cutting out excessive EU regulatory intrusion and burdens with explicit initiatives at the political and not just technical level, with the ongoing British Balance of Competences Review, and the Dutch list of 54 items of EU regulation that they would like to see repealed or reformed.

The major open questions at this stage are:

- 1) What is the core content of these initiatives, and how important are they for the EU’s global competitiveness?
- 2) How far might they connect with the interests of the other 26 member states and the EU institutions?
- 3) If there were at least some degree of widespread support for the EU to become less intrusive, how could this be organised operationally?
- 4) How far might this line of action go in countering the rising momentum of populist euroscepticism, and if the answer is not that far, what alternative approaches are needed?

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1. The British and Dutch initiatives

The British and Dutch initiatives both address issues of allegedly overly intrusive and burdensome (disproportionate) regulation, but with two major differences, one technical and the other political.

The technical difference is that the British Balance of Competences Review is a huge and comprehensive exercise in the collection of evidence from independent sources on how EU competences are being exercised. It is an ongoing project, taking two years until early 2015 to be completed, and will see the publication of no less than 34 volumes of reports, each around 50 to 100 pages in length.¹ Policy conclusions are not due to be drawn up by the government until the 34 reviews are completed. The Dutch project has been far quicker and simpler, with government departments and various professional bodies invited to submit their wishes for EU regulation that would better respect the principles of subsidiarity and proportionality. The Dutch list is thus a pragmatic collection of specific proposals, presented however with reasoned arguments in a 20-page published document.²

The political difference is that the British project is intended to inform the government on the possible content of fundamental reform of the EU, including the possible repatriation of competences, probably requiring treaty changes, renegotiation of the terms of British membership, and with the outcome to be subject to an 'in' or 'out' referendum in 2017. The Dutch initiative is by comparison entirely politically correct, recognising that there are cases for 'more Europe' as well as 'less Europe', excluding treaty changes, and of course not even discussing the hypothesis of secession.

The big story coming out of the British project so far was the surprise (for British eurosceptics) finding that the present balance of competences in the first six reviews completed was broadly right.³ There emerged no agenda for repatriation of competences, and criticisms mainly focused on points of detail or calls for the quality of prior impact assessments and management systems to be improved. This produced screams of complaint in the popular press and from various Conservative MPs that the operation had become a "Whitehall whitewash", which in our opinion is unjustified given the sound analytical standards and sources used.

Publication of the second set of reviews is imminent, which will include the controversial issue of migration policy. The British press has been reporting that the finalisation of this review has been held up because the findings did not sufficiently support the views of the Home Office minister on the case for curbing 'mass migration' from new member states.⁴ It

¹ See the British government's website at <https://www.gov.uk/review-of-the-balance-of-competences>.

² See "Testing European legislation for subsidiarity and proportionality - Dutch list of points for action" (www.government.nl/documents-and-publications/notes/2013/06/21/testing-european-legislation-for-subsidiarity-and-proportionality-dutch-list-of-points-for-action.htm).

³ For a summary assessment of the first six reviews see Michael Emerson and Steven Blockmans, "The British Balance of Competences Review, Part I, competences about right so far", CEPS, September 2013 (www.ceps.eu/book/british-balance-competence-reviews-part-i-%E2%80%98competences-about-right-so-far%E2%80%99).

⁴ On 1 January 2014 the British press corps gathered at an airport to count the beginnings of the mass immigration anticipated by Conservative party ministers with the first plane load of the New Year arriving from Romania, following the lifting of restrictions on the free movement of persons. This first planeload revealed only one such individual, all the rest being people already legally resident as workers.

remains to be seen whether or how far the intended high standard of objectivity of evidence presented is undermined by populist politicisation.⁵

At the present stage the overall profile of these exercises is not that clear, the British one because it is far from complete, and the Dutch is an assembly of a heterogeneous wish-list.⁶ However at the December 2013 European Council meeting, Prime Minister Cameron set out on a campaign to 'cut EU red tape', and so enhance the global competitiveness of the European economy.⁷ This contained 30 proposals, which can be compared with the 54 Dutch proposals, and so at the technical level the British and Dutch exercises may be converging. The conclusions of the European Council "welcome(d) the steps taken by the member states and the EU aimed at better identification of excessively burdensome regulation".

However, it is essential to try and frame this mass of material, concerning potentially hundreds and thousands of EU laws, in some digestible manner, to make it possible to see the wood for the trees. The box presented below is an attempt to do this with eight cases or categories, which may between them represent a fair coverage of much of the landscape.

If this sample is reasonably workable, several significant points emerge.

- i) There are not so many items that can easily be understood by the general public, and these include some very minor but ridiculed cases of unnecessary regulation (specimen 1), some more important cases where the absence of cross-border externalities can be clearly presented (specimen 2), and some eternally controversial labour market regulations (specimen 3). As a result these cases receive big media coverage and the ridiculed ones cause disproportionate reputational damage to the EU.
- ii) However there are by contrast a large number of cases in the single market area (specimens 4,5,6 and 7) that are both extremely complex technically and show a strong case for EU level, as opposed to national competences. The issues here are whether the EU regulations have got it more or less right, or have poorly designed rules, or have been bent by heavy interest-based lobbying, or continue with rules that have become technically obsolete. This is a huge agenda, which the Commission's REFIT process seeks to address. The general findings seem so much not that the subsidiarity principle has been neglected, but that there has to be a permanent process of policy refinement (lightening of regulatory burdens, getting the incentives right). This is much along the lines of the conclusions coming from the British project, and fits also with many items on the Dutch wish-list.
- iii) Two major items fall in the macroeconomic policy domain (specimens 8 and 9), concerning economic policy rules, especially for the eurozone, and taxation. Here the EU institutions and eurozone member states have been trying hard to mend a complex set of euro-system defects, but the process is revealing continuing contradictions in relation to

⁵ See *Financial Times*, 15 January 2014, "UK pulls report on migration cuts". This article quotes "... officials close to the process say that Ms May (Home Secretary) was inundated with evidence from academics and business supporting the single market for labour".

⁶ For a short review, see Michael Emerson, "The Dutch Wish-List for a Lighter Regulatory Touch by the EU", CEPS, July 2013 (www.ceps.eu/book/dutch-wish-list-lighter-regulatory-touch-eu).

⁷ "Cut Red Tape - Report from the Business Task Force", this document is presented on the Prime Minister's website with translations into French, German, Spanish and Italian (https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/249969/TaskForce-report-15-October.pdf). This report makes 30 proposals, organised under the headings of 'Barriers to ... A/ Overall competitiveness, B/ Starting a company and employing people, C/ Expanding a business, D/ Trading across borders, and E/ Innovation.

the subsidiarity principle. Criticisms are that the EU is trying to meddle too much in the details of the member states' policies, while failing to introduce new EU level fiscal capacities where they are needed. The attempts to mend the weakness of the Stability and Growth Pact have seen a cascade of initiatives, now requiring the Commission under the 'Two Pack' initiative to tell member states that fail to respect the Maastricht criteria (and its more complicated derivatives) how to improve all kinds of structural policies.⁸ Serious 'subsidiarity objections' to this are heard not only in the southern member states, but also for example in Belgium and France. This links to the controversy over the lack of democratic legitimacy of eurozone governance, with the Troika (IMF-ECB-Commission) having emerged as a large power that is exercised without commensurate democratic accountability. The 54 Dutch points omit discussion of these difficult but hugely important subsidiarity aspects of eurozone governance and explicitly exclude greater fiscal capacity and shock absorption mechanisms (point 11).

Some specimens and types of EU regulations from the standpoint of subsidiarity

1. ***Absurd micro-regulation.*** There have been two such cases cited in the recent British and Dutch documents. One was the olive oil packaging affair in mid-2013, in which the Commission proposed that all olive oil on the tables of restaurants should be in the original producer's packaging, not in some anonymous carafe which might be offering sub-standard olive oil. There was such a public outcry that the Commission withdrew the proposal. A second one was the proposal for a regulation for the health and safety of hairdressers, which had been requested by the relevant European trade association. This led to much amusement in the popular press along the lines "Brussels bans high heels for hairdressers". The Commission decided not to propose this regulation. Good fun for the media. Economically trivial, but politically damaging. Subsidiarity says no need for the EU to act in these cases.
2. ***Serious and clear subsidiarity cases.*** The 54 Dutch points contain several examples in the environmental, land use and transport areas where they see no cross-border externalities (airport noise, coastal land use), and these can be argued on classic subsidiarity grounds.
3. ***Politically contested field - labour market regulations.*** Classic battlefield between social model regulators (stop 'social dumping') and market liberals advocating subsidiarity. No chance of consensus for repatriation. Constraints of EU law exaggerated, note the German Hartz reforms were not impeded, nor was the UK prevented from having a much more flexible labour market than, for example, Belgium or France.
4. ***Heavily regulated industrial products - chemicals.*** A commonly criticised case is the REACH regulation for chemical products, which is a matter of major industrial significance. The criticisms heard is that the obligations on producers are impossibly burdensome for small- and medium-sized enterprises in this sector within the EU itself, and for the EU's external trading partners, they amount to a formidable non-tariff barrier. Very complex technically. No subsidiarity case for repatriation, products must be regulated by EU. Good impact assessment and revision/reform are clearly indicated in this case.
5. ***Heavily regulated agri-food products - the horse meat scandal.*** This 2013 scandal revealed defective implementation by some member states of justified EU regulation. This offered a typical example of when there is a food safety problem, EU regulation is found inadequate, not superfluous. No subsidiarity case for repatriation.

⁸ This topic deserves a much more detailed exposition than is appropriate here. See for example Michael Emerson and Alessandro Giovanni, "Fiscal and Monetary Policies in the EU - a chicken and egg dilemma", IAI, Rome, December 2013 (www.ceps.eu/book/european-fiscal-and-monetary-policy-chicken-and-egg-dilemma).

6. ***Heavily regulated service sector networks – telecommunications.*** Criticisms are made that the EU model of regulation lags behind the demands of technology and global competition. Very complex technically. No subsidiarity case for repatriation. Again this example illustrates the need for good impact assessment and revision/reform.
7. ***Heavily regulated financial services.*** The financial crises of recent years showed the need for profound reforms of great technical complexity, to address the manifest inadequacy of national supervisory/regulatory regimes. No subsidiarity case can be made for national competence. There is much room for contesting and negotiating details, continuing revisions/reforms.
8. ***Rules for constraining national budget policies, especially in the eurozone.*** There has been a proliferation of ever-more binding constraints on national budgets and detailed structural policies (European Semester, Six Pack, Two Pack etc.), given the failure of the Stability and Growth Pact. These have provoked serious ‘subsidiarity tensions’ in many member states, not only in the south. Serious doubts have been expressed over the democratic legitimacy of the system as has been emerging with the euro crisis. Many independent economists see the need for enhanced fiscal capacity and automatic shock absorbers, i.e. more quasi-federal fiscal mechanisms, and less Troika-Brussels-Berlin *diktats*. This a very complex and controversial set of systemic issues, with subsidiarity arguments going both ways.
9. ***No-go areas for further EU legislation – taxation.*** Both the British and Dutch want to ban or to keep the unanimity hold on new legislation in the field of taxation, to ensure that it remains the exclusive competence of member states. But at least for this Eurozone, this contradicts the case for enhanced EU fiscal capacity. Dutch objections to the case for a Common Consolidated Corporate Tax Base are also not convincing; it could make for more transparency and cut business costs, without constraining tax rates.

2. The interests of other member states

At a meeting of European think tanks at CEPS in October 2013, there was an attempt to test the interest of other member states in the British and Dutch initiatives, after presentations by senior officials from both countries.

At the level of strategic thinking, there was a quite dispersed set of narratives emerging at the CEPS meeting. Some traditional ‘allies’ of the British felt that the Cameron government’s political stance on European affairs was so toxic that they would not want to be close to it. Some traditionally federalist member states want to go in the opposite direction of stronger, not reduced EU powers. Some new member states with still-weak governance count crucially on a strong European system. Some warned that various noises coming out of Berlin about curbing Brussels’ competences had little depth. Cameron’s ‘Cut Brussels red tape’ campaign was met by a low-key French non-paper arguing that ‘simplification’ in Brussels regulations was desirable, which the Commission should mainly do by itself.

The ‘Cut Brussels red tape’ proposition undoubtedly has some validity, but if it is presented in a populist and disproportionate manner it may fail to win a groundswell of support across the EU. There can be a problem of fair balance and proportionality in the argument over where the red tape problems are the most serious, as between the competences of the EU and the member states. For example, in the British case, it is generally considered that inadequate transport infrastructure is seriously damaging the competitiveness of the British economy, due to years and even decades of regulatory blockages over crucial projects (such as expanding the London airport, or building a core high-speed train network); but Brussels has absolutely no responsibility for this.

More generally, the major competences determining macroeconomic performance remain with the member states, notably for taxation and social security policies, education and economic infrastructure. How otherwise can one explain the huge divergences in economic performance between the member states? EU red tape has not prevented the German and Nordic economies from being among the best performers in the world. Nor did it prevent the UK from having a much more flexible labour market than its closest neighbours, Belgium and France, nor Germany from liberalising its labour market with the much-acclaimed 'Hartz' reforms.

3. How to organise better regulation

The Dutch government is looking for an initiative from the EU Council to take all this forward. How can this be done, beyond debating desirable principles?

Given the 54 Dutch proposals and the similarly scaled 30 British proposals, one approach for the EU as a whole could be for the Council to invite all member states to produce their own lists according to some structured framework. It would then be for the Commission to analyse them, identify proposals that seemed to offer chances of widespread support and to proceed accordingly with formal proposals for amending or repealing laws. If the member states agreed to participate in this exercise, they would all prepare their own 30-50 preferred reformist measures, which could have a certain impact at the level of public opinion, and possibly help turn the tide against populist euroscepticism. By comparison the December European Council meeting's conclusions quoted above fell well short of deciding any new initiative of importance. (A systematic recording of the views of member states at the CEPS/Clingendael meeting of 23 January would therefore be of considerable value in testing the readiness of the member states as a whole for more incisive action.)

Such a project would connect with work already underway in the Commission, which produces an annual report on 'subsidiarity and proportionality', and runs a standing programme of impact assessments under the name of Regulatory Fitness (REFIT), which the British government considers to be 'a step in the right direction'. These programmes could thus be given renewed momentum.

This work requires sustained attention to an immense amount of detail, and can only produce a gradual incremental impact. However an agenda along these lines would at least avoid any strategically mistaken and politically impossible approach, such as aiming at a large-scale and categorical repatriation of competences from EU to national levels. From the British reviews underway there is no evidence so far in favour of removing competences from the EU, as they are listed in the treaties, i.e. at the level of large sectoral blocks of policy, although there are several more controversial policies still to be reviewed. Many policies are in any case 'shared competences' or 'supporting competences', so in these cases the frontiers between the EU and national competences in practice can be quite fluid. Moreover any proposals for repatriation of large sectoral competences would be hopeless propositions from the standpoint of getting the required general agreement of member states. The British government has already maximised its own unilateral opt-outs (eurozone, Schengen, and much of the justice and home affairs field), but that is a quite different matter from repatriation at the EU level.

4. How to counter populist euroscepticism

The ominous problem of populist euroscepticism calls for sound diagnosis. What is it essentially about? Is it about excessive intrusiveness of EU powers? If that is the case, is this being driven disproportionately by occasional instances in which EU micro-regulation has become the object of ridicule in the media? Or is it due more to disappointing macroeconomic performance and the seven years of non-stop eurozone crisis, and the grave economic and social costs for much of the south? Is it today being driven by the combination of economic recession and the increasingly intrusive macroeconomic policies that have come to be associated with it. Or is it also due to a sense that the foreign and security policy achievements of the EU do not meet the expectations of EU citizens? Or, most politically of all, is it due to the absence of sufficiently strong leadership at the European level?

How much would a robust recovery now across the EU economy do to limit euroscepticism, or turn around public opinion towards the EU? Probably quite a lot. By comparison, how much difference would a 'cut Brussels red tape' programme make? Probably not so much. The reasoning is quite simple. A robust macroeconomic recovery affects the lives and feelings of the people directly. A 'cut Brussels red tape' programme, even when more correctly described as a campaign to improve the quality and selectivity of EU regulatory policies, will only have a very gradual and relatively imperceptible impact.

5. Conclusions

One can approve of a campaign for better EU regulation and for cutting out unnecessary micro-regulation, but it would require impressive commitment by all member states and the EU institutions to follow the best features of the British and Dutch leads for this to have a real effect in the fight against populist euroscepticism. That battle will have to be won primarily with bigger weapons, namely some combination of better macroeconomic results, bigger foreign policy achievements and the emergence of a European level political leadership factor to which the people can relate. There has to be due proportionality in the diagnosis of the responsibility of inadequate subsidiarity for the EU's ills.

This issue of proportionality, however, has a double twist to it, if the quest for better subsidiarity and regulation can become a crucial political key to avoiding the secession of a large member state and the wider reputational damage that the EU as a whole would suffer as a result. This quest is the most accessible route currently available for building the argument that the EU is shifting onto a reformist track, and therefore is of huge tactical political importance.



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