

Chapter 5

Limits to EU legislative powers

Context for this chapter

Subsidiarity assessment: seasonal changes of time

The European Commission has proposed a Directive to end seasonal clock changes in the EU in 2019. Member States would be required to choose to apply 'permanent summer-time' or 'permanent winter-time'. Should the UK and EU reach an agreement according to the terms of the draft Withdrawal Agreement, the UK would be required to implement the proposed Directive during the transition period.

The Sub-Committee's report raises subsidiarity concerns in relation to:

- The proposal's limited subsidiarity statement, which cites increased questioning of the current summertime arrangements as a reason for action.
- Inadequate consideration of how the role of summertime arrangements varies between Member States due to the interplay between longitude, latitude, and time zone in determining daylight hours. The geographical position of the UK, for instance, means that the benefits and drawbacks of 'permanent summer-time' or 'permanent winter-time' differ significantly between its northern and southern regions. The potential implications for the UK are exacerbated by the devolution settlement with Northern Ireland, under which time is a devolved matter.
- Inadequate evaluation of alternative options, such as the possibility of allowing Member States to choose whether or not to observe seasonal clock changes but requiring coordinated arrangements for those that do.

House of Lords EU Internal Market Select Committee, 'Reasoned opinion on discontinuing seasonal changes of time recommended by Committee' (22 October 2018), available at <https://www.parliament.uk/business/committees/committees-a-z/lords-select/eu-internal-market-subcommittee/news-parliament-2017/seasonal-change-of-time-report-published/>

Discussing the scenario

Consider the EU legislative process as a whole. What could the UK have done to stop the adoption of the Commission's proposal to end seasonal time changes? And if the proposal to end seasonal time changes was adopted by the EU legislature, would the UK be able to overturn this via CJEU review?

Approaching the scenario

This scenario may not immediately look like it, but it is set up to be a problem question: it presents a situation in which there is effectively a legal 'problem' and you are expected to give 'advice' (in this case to the UK government) on how to resolve that problem.

To start with, we can assume from the phrasing of the instructions that the UK does not *want* seasonal time changes to end. You have to approach your ‘advice’ from that perspective. The basic starting point of the question is to answer two separate but related questions:

- 1) What could the UK have done to stop the Commission’s proposal from being adopted?
- 2) If the proposal was adopted, could the UK have had this overturned via CJEU review?

Note that the scenario is asking about actions the UK could have taken *when it was a Member State*. There is no need to consider what its options are during the transition period, let alone thereafter.

Question 1

The first of the two questions asks you to set out what the UK, as a Member State, could do in order to stop a Commission legislative proposal from being adopted. The general instruction to the question is to ‘consider the EU legislative process as a whole’.

What this means, then, is that the expected answer considers *all* the places in the legislative process where the Commission must justify its actions, and where the UK might have protested them. The ‘**Discussing the scenario**’ boxes throughout the chapter will have made you reflect on many of these already:

- The Commission has to defend its choice of legislative basis: can it rely on Article 114 TFEU to adopt this directive, and is the content of the directive covered by existing shared competences?;
- The Commission impact assessment needs to demonstrate that its legislative proposal ending seasonal time changes satisfies the principle of subsidiarity (by reference to the *Working Time Directive* and *Vodafone* cases);
- The UK can vote against adoption of the proposal in the Council of Ministers—though it obviously can be outvoted, as this proposal will be adopted through qualified majority voting;
- And the UK Parliament can send (one or two) reasoned opinions to the Commission, arguing that the proposal is contrary to the principle of subsidiarity.

In light of what Chapters 4 and 5 addressed in detail, it makes sense to consider the matters of competence and subsidiarity in the most detail. Issues that should be addressed here include what the principle of subsidiarity is; how the Early Warning Mechanism was added in the Lisbon Treaty; what the effects of reasoned opinions are (i.e. nothing, or a yellow or orange card); and to what extent using the Early Warning Mechanism has in general been successful. All of this will then permit you to develop a view on how you rate the UK’s chances of success in blocking adoption of this Commission proposal.

Question 2

The second of the two questions asks you to consider what the UK can do to protest the adoption of EU-level legislation once it has been adopted. Presumably, here, it has

already been outvoted in the Council of Ministers—so what options remain for challenging adopted legislation?

The option that Chapters 4 and 5 identify is for the UK, as a Member State, to challenge the adopted legislation before the CJEU on grounds of subsidiarity and proportionality. Here, a good answer addresses both what these principles *state*, and how the CJEU has *applied* them in earlier case law.

The final '**Discussing the scenario**' box in the chapter serves as an example of how to reflect on case law on a principle like proportionality for the purposes of a scenario question such as this. If you have engaged with it, you should already have considered if the Commission's proposal on seasonal time change will satisfy the CJEU's case law on proportionality. If so, you can now apply a similar evaluation to the CJEU case law on subsidiarity discussed in the chapter. Having set out these legal evaluations, you can then address in general what you think are the UK's chances of success in terms of overturning the adopted legislation on seasonal time changes.

(Students with particularly sharp memories, or who are doing EU law for the second time, *may* also raise the possibility of the UK commencing an 'action for annulment' (discussed in Chapter 2). But that is in no way the expectation on a question that so clearly points at subsidiarity/proportionality concerns!)