



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 25.9.2009
COM(2009) 504 final

**REPORT FROM THE COMMISSION
ON SUBSIDIARITY AND PROPORTIONALITY**

(16th report on Better Lawmaking covering the year 2008)

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1. INTRODUCTION

This is the 16th report on the application of the principles of subsidiarity and proportionality which the Commission presents to the European Council and the European Parliament in line with the protocol annexed to the Treaty establishing the European Community¹. As was the case for the 2007 report, this report does not cover wider issues of better regulation which were addressed in the Third Strategic Review of Better Regulation².

2. THE LEGAL AND INSTITUTIONAL FRAMEWORK

2.1. The principles of subsidiarity and proportionality

Subsidiarity and proportionality are defined in paragraphs 2 and 3 of Article 5 of the Treaty establishing the European Community (TEC). Protocol 30 of the TEC provides further details on how the two principles should be applied.

Subsidiarity is a guiding principle for defining the boundary between Member State and EU responsibilities - that is, *who should act?* If the Community has exclusive competence in an area, there is no doubt about who should act, and subsidiarity does not apply. If the Community and the Member States share the competence, the principle clearly establishes a presumption in favour of the Member States taking action. The Community should only act if the objectives cannot be achieved sufficiently by the Member States (necessity test) and if the Community can achieve them better (value-added test or compared effectiveness).

Subsidiarity is a dynamic concept, and any assessment of it will evolve over time. It allows Community action within the limits of its powers to be expanded where circumstances so require, and conversely, it means that Community action should be restricted or discontinued where it no longer meets the subsidiarity test³.

Proportionality is a guiding principle when defining how the Union should exercise its competences, both exclusive and shared (*what should be the form and nature of EU action?*). Both Article 5 TEC and the Protocol provide that the action should not go beyond what is

¹ Protocol (No 30) on the application of the principles of subsidiarity and proportionality (1997)

² COM(2009) 15, 28.01.2009

³ Article 3 of the Protocol

necessary to achieve the objectives of the TEC. Any decision must favour the least restrictive option.

2.2. Modes of application, opportunity for comments, and ex-post control

All institutions of the Union have to comply with both principles. The Protocol and the Inter-Institutional Agreement of 1993 on subsidiarity⁴ set out specific obligations, the key elements of which are summarised here.

The Commission must: consult widely before proposing legislation; state in the explanatory memorandum for each legislative proposal the reasons for concluding that the proposal complies with subsidiarity and proportionality; and take into account the burden falling on the Community, national governments, local authorities, economic operators and citizens.

The European Parliament and Council must provide a justification regarding subsidiarity if an amendment they make affects the scope of Community action⁵. If the consultation or cooperation procedure applies, the Council has to inform Parliament of its position on subsidiarity and proportionality in a statement of reasons⁶.

The European Economic and Social Committee and the Committee of the Regions express their views either when they are consulted or in own-initiative opinions. The 'Conference of Community and European Affairs Committees of Parliaments of the European Union' (COSAC) can also express an opinion on the application of the principle of subsidiarity⁷.

Since September 2006, the Commission has transmitted new legislative proposals to the national parliaments inviting them to react. Although this exercise goes beyond issues related to subsidiarity and proportionality, many of the comments from national parliaments relate to these principles.

Finally, the Court of Justice and the Court of First Instance can review the legality of acts of the institutions for compliance with the principle of subsidiarity.

3. APPLICATION OF THE PRINCIPLES BY THE COMMISSION IN 2008

3.1. How the Commission deals with the principles

The Protocol requires the Commission to state the reasons why it considers that a legislative proposal complies with the principles of subsidiarity and proportionality. The Commission does this in a number of ways: subsidiarity and proportionality are examined as part of the impact assessments that the Commission produces for all its major initiatives, and they are dealt with in the explanatory memoranda and in the recitals of legislative proposals.

A key feature of the Commission's impact assessment system is the independent quality control provided by the Impact Assessment Board (IAB). In its opinions the IAB recommends improvements to core elements of the impact assessments, including the assessment of

⁴ Adopted 17.11.93, OJ C 329, 06.12.1993, p. 132

⁵ Section 2, point 3 of the Inter-Institutional Agreement on Subsidiarity of 1993

⁶ Article 12 of the Protocol

⁷ Point 6 of the Protocol on the role of national parliaments in the European Union, Treaty of Amsterdam

subsidiarity and proportionality. The IAB's opinions are part of the Commission's internal decision-making, and are also available to the other institutions and the general public, once the Commission has adopted the corresponding initiative.

The IAB Report for 2008 shows that there was an increase in the number of IAB recommendations on subsidiarity and proportionality (29 cases in 2007, 48 in 2008). On the basis of the IAB's work, and drawing on the "evaluation grid" that the Committee of the Regions developed for its own work on subsidiarity⁸, the Commission has improved the guidance on how to analyse subsidiarity and proportionality in the revised impact assessment guidelines it adopted in January 2009. They now contain two explicit sets of questions⁹ which are based on Protocol 30, and which should help to improve the quality of the analyses in impact assessments. For instance, the questions focus attention on the presence of transnational aspects which could be an indication that Member States cannot satisfactorily achieve the objectives on their own.

3.2. Examples of how the Commission applied the principles through its impact assessments

*The Reconciliation Package*¹⁰. This package consisted of revisions of two Directives: one on the protection of pregnant workers (extending the right to maternity leave from 14 to 18 weeks, in principle with full salary) and one on assisting spouses and self employed women (giving assisting spouses, at their request, the same social security provisions as their self-employed partner). The initial results of the impact assessment showed, in particular for the latter proposal, that the implementation costs would be significant for several Member States. Therefore, to make certain measures proportionate to the objectives, the Commission proposed to make their application voluntary for Member States.

*Reduced VAT rates for local services*¹¹. The Commission's proposal to reduce VAT rates for local labour intensive services introduces greater flexibility for Member States in setting VAT rates for services where the internal market dimension is negligible. This is an example of how having a renewed look at the application of a piece of legislation can lead to a scaling down of the level of EU intervention.

*Directive on equal treatment outside employment*¹². The proposal to implement the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation contains a number of safeguards to make clear where Member States retain competence (e.g. substance of education, secular nature of the state or not, recognition of homosexual marriage or not). In response to concerns that the measures dealing with disability would bring disproportionate costs for business, the Commission ensured that the proposal builds on the concept of reasonable accommodation, which is familiar to businesses since it was established in the Directive on equal treatment in employment¹³. The Commission proposal specifies the factors to be taken into account when assessing what is 'reasonable', and the explanatory memorandum sets out how this complies with the principles of subsidiarity and proportionality.

⁸ <http://subsidiarity.cor.europa.eu/Help/tabid/283/Default.aspx>

⁹ SEC(2009) 92, 15.1.2009; see section 5.2 for subsidiarity and section 7.2 for proportionality

¹⁰ COM(2008) 636 and COM(2008) 637, 3.10.2008

¹¹ COM(2008) 428, 7.7.2008

¹² COM(2008) 426, 2.7.2008

¹³ 2000/78/EC, 27.11.2000

Council recommendation on drug related issues in prison. The Commission began work on an initiative recommending that Member States take actions related to the management of drug related issues in prisons. This would have complemented the general Recommendation on drug dependence which already exists. The impact assessment made clear that there was an issue of proportionality considering the limited scale of the problem, and concerns about proportionality were among the reasons why the Commission did not pursue the initiative.

In several other cases the IAB requested an improved analysis of subsidiarity, for example: the proposal for a Regulation on the rights of passengers in bus and coach transport¹⁴, proposal for a Directive on the energy performance of buildings¹⁵, proposal for a Directive facilitating cross-border enforcement in the field of road safety¹⁶, proposal for a Directive on the protection of animals used for scientific purposes¹⁷, proposal for a Regulation on food distribution to deprived persons¹⁸, proposal for a Regulation setting up a school fruit scheme¹⁹, proposal for a Directive on Stage II petrol vapour recovery during the refuelling of passenger cars²⁰. The Commission's impact assessment website has more detailed information on these cases²¹.

4. INVOLVEMENT OF NATIONAL PARLIAMENTS

4.1. Opinions sent to the Commission

Since 2006, the Commission has been transmitting all new proposals to national parliaments, and has put in place a procedure for replying to their opinions²². The number of opinions the Commission has received has roughly doubled each year, from 53 in 2006 to 115 in 2007, to 200 in 2008²³. This shows that national parliaments are progressively putting in place the arrangements necessary to respond to Commission initiatives. Although the scope of this exercise is wider than subsidiarity and proportionality, national parliaments have frequently raised these issues. For example:

*Proposal for patients' rights in cross-border healthcare*²⁴. The Commission received three opinions. The French Senate stressed that to respect subsidiarity and proportionality the proposal should acknowledge that the organisation of health services is a responsibility of Member States. Both chambers of the Dutch Parliament stated that it was unclear why there should be action at European level. They expressed doubts about the respect of national sovereignty on the organisation and financing of the health system, and about the choice of legal instrument (a Directive). The German Bundesrat stressed that social aid services should be excluded from the scope. It argued that the use of article 95 of the TEC for the legal basis should not be used to circumvent the limits to Community action in the field of health laid out

¹⁴ COM(2008) 817, 4.12.2008

¹⁵ COM(2008) 780, 13.11.2008

¹⁶ COM(2008) 151, 19.3.2008

¹⁷ COM(2008) 543, 5.11.2008

¹⁸ COM(2008) 563, 17.9.2008

¹⁹ COM(2008) 442, 8.7.2008

²⁰ COM(2008) 812, 4.12.2008

²¹ http://ec.europa.eu/governance/impact/index_en.htm

²² "A Citizens' Agenda - Delivering Results For Europe", COM(2006) 211, 10.05.2006

²³ Annex 1 provides an overview of the origin of the opinions received by the Commission

²⁴ COM(2008) 414, 2.7.2008

in article 152. The Bundesrat also stressed that article 5 of the proposal confirming the responsibility of Member States for the organisation of healthcare systems should be further strengthened. In addressing the opinions of national parliaments the Commission stated that, in line with Article 152(5) of the TEC, Member States would remain responsible for the organisation and delivery of health services and medical care and in particular for determining the entitlements of patients and how healthcare is to be provided. In reply to the opinion of the German Bundesrat the Commission also stated that the proposed directive applies to the standards of health services provided, but does not cover the reimbursement of social assistance and welfare of victims.

*Proposal for a European Private Company*²⁵. The German Bundesrat expressed doubts about the respect of subsidiarity and about whether the proposed harmonisation would achieve the set objectives. Both chambers of the Dutch Parliament asked for a clear justification of the legal base. They wished to avoid a situation where national rules prohibiting abuses could be bypassed by European rules. They also questioned the value added of the initiative and the Commission's forecast on the effective use of the European enterprise. In its answer to the German Bundesrat the Commission pointed out that including a cross-border requirement as a condition for setting up a European Private Company would be inconsistent with the objective of the proposal, notably to contribute to the completing and improving the functioning of the internal market and to make it more accessible for SMEs.

*Communication "Small Business Act for Europe"*²⁶. The German Bundesrat had certain concerns about subsidiarity, for example on the issue of programs for European schools to promote the spirit of entrepreneurship. On the other hand, the Italian Senate endorsed all principles of the Small Business Act. In its responses, the Commission invited both the German Bundesrat and the Italian Senate to participate actively in the follow-up process, especially to share best practice from national and regional SME policy and measures, for example on the issue of benchmarking.

If ratified, the Treaty of Lisbon would reinforce the role of national parliaments in EU lawmaking²⁷. Protocols 1 and 2 of the Treaty provide for an enhanced system for national parliaments to express their views on draft legislative proposals as regards their compliance with the principle of subsidiarity. They would be informed of all legislative proposals and, except in duly justified urgent cases, would have eight weeks in which to make their views known²⁸. They would have the right to send a reasoned opinion to the Commission if they consider that a legislative proposal does not comply with the subsidiarity principle²⁹. Depending on the number of parliaments which respond, the Treaty provides two mechanisms - the 'yellow card' and the 'orange card' - which lead to a review and possible amendment or withdrawal of the proposal. The Treaty also contains new provisions for *ex-post* judicial

²⁵ COM(2008) 396, 25.6.2008

²⁶ COM(2008) 394, 25.6.2008

²⁷ Protocols N°1 and 2

²⁸ Article 4 of the Protocol on the Role of national Parliaments in the European Union

²⁹ This concerns: proposals of the Commission; initiatives of a group of Member States (cf. penal cooperation); initiatives of the European Parliament; requests of the European Court of Justice; recommendations of the European Central Bank; and requests of the European Investment Bank for adoption of a European legislative act.

control: national parliaments³⁰ and the Committee of the Regions would be able to bring suspected violations of the principle of subsidiarity before the European Court of Justice³¹.

4.2. Subsidiarity exercises run by the COSAC

In 2008 the Conference of Community and European Affairs Committees of Parliaments of the European Union (COSAC) conducted two new subsidiarity exercises to simulate the procedures proposed under the Treaty of Lisbon. Under these exercises the Commission received 27 opinions.

*Council Framework Decision on combating terrorism*³². In total 12 opinions were received. Only the House of Commons of the United Kingdom gave a negative opinion on compliance with the subsidiarity principle. 5 chambers of national parliaments asked the Commission to clarify certain issues linked to subsidiarity; and 5 others asked for clarifications on the link to the Council of Europe Convention on the Prevention of Terrorism.

*Directive on equal treatment outside employment*³³. 15 opinions were received on the proposal, of which 14 were positive on subsidiarity. The only negative opinion came from the Czech Senate.

5. APPLICATION BY THE COUNCIL

*Framework Directive on the protection of soil*³⁴. The lively discussion on this directive was signalled in the 2007 report on subsidiarity and proportionality. Despite efforts of the Presidency, supported by the Commission, the Council failed to reach political agreement on this Directive in December 2007. The final compromise, which provided for a large degree of flexibility for Member States and reduced costs for implementing the Directive, was not acceptable for a blocking minority for reasons related to subsidiarity and proportionality. Discussions at technical level continued in 2008.

*Directive on publication and translation obligations of certain types of companies*³⁵. One provision of this proposal abolishes the obligation to publish company acts in paper form, providing for the information to be published on a central electronic platform instead, the aim being to reduce costs for companies. A number of Member States, which together form a blocking minority, want to continue to allow Member States to maintain requirements to publish in the national or local press at the expense of companies. Two Member States, arguing on the basis of the principle of subsidiarity, pointed out that publication in national or local newspapers has added value for local societies, in particular where internet coverage is low. They also referred to the need to maintain this source of financing for the national press.

³⁰ Via an action notified by the Member State in accordance with its national legal order on behalf of the national Parliament or a chamber thereof

³¹ Article 8 of the Protocol on the application of the principles of subsidiarity and proportionality

³² COM(2007) 650, 6.11.2007

³³ COM(2008) 426, 2.7.2008

³⁴ COM(2006) 232, 22.9.2006

³⁵ COM(2008) 194, 17.4.2008

*Directive on equal treatment outside employment*³⁶. Germany opposed this proposal on grounds of subsidiarity. Ireland expressed the same doubts and the Czech Senate adopted a resolution in the same direction. They consider that the proposal goes beyond what is allowed by its legal basis (Article 13 TEC) to be able to encourage, support or supplement the action of the Member States. Other Member States (in particular the Netherlands and Italy) also consider that the proposal is not in conformity with the principle of proportionality given the administrative and financial costs that it involves. The discussions in the Council on this proposal continue under the Swedish Presidency.

*Directive on the protection of pregnant workers*³⁷. For several Member States (in particular the Netherlands), the proposal does not conform with the principle of subsidiarity: these Member States would prefer to remain free to decide certain issues covered by the proposal according to their practices and national experiences.

*Reduced VAT rates*³⁸. One Member State raised subsidiarity in Council discussions. This Member State had no subsidiarity concerns about the 2008 Commission proposal; however, it objected on subsidiarity grounds to an element of the compromise proposed by the French Presidency (according to which each request for a Member State to apply a reduced rate would have had to be submitted to an evaluation of its impact, in particular budgetary). This element was not included in the political agreement reached at the Economic and Financial Affairs Council of 10 March 2009.

6. APPLICATION BY THE EUROPEAN PARLIAMENT

In the course of 2008, the European Parliament adopted two resolutions which deal in some depth with subsidiarity and proportionality. In October the Parliament adopted a resolution on the Commission's report on *"Better lawmaking 2006 on the application of the principles of subsidiarity and proportionality"*³⁹. It addressed the new role of national parliaments with regard to the scrutiny of subsidiarity. The initiative of the Commission to send its new proposals to national parliaments and seek their reactions was endorsed, but in order to make this dialogue more efficient the European Parliament believes there is a need to develop a common approach to the principles of subsidiarity and proportionality.

The second resolution which focuses on subsidiarity issues is the Parliament's response to the Commission's Green paper *"Towards a new culture of urban mobility"*⁴⁰. While Parliament considers that urban mobility is the responsibility of local authorities, it acknowledges a role for the EU in developing an integrated European approach to the issue. While the EU should not legislate in the field of urban mobility, the Parliament argues that the Union should take into account "particular needs of urban transport in the policy areas where it has legislative power (e.g. budget policy, environment policy, social and labour market policy, competition policy, industry policy, regional and cohesion policy, transport and road safety policy, energy policy)".

³⁶ COM(2008) 426, 2.7.2008

³⁷ COM(2008) 637, 3.10.2008

³⁸ COM(2008) 428, 7.7.2008

³⁹ 2008/2045(INI), 21.10.2008

⁴⁰ 2008/2041(INI), 9.7.2008

7. APPLICATION BY THE COMMITTEE OF THE REGIONS

The Committee of the Regions' Subsidiarity Monitoring Network entered its second year of operation in 2008. The network operates through an interactive website⁴¹ and is primarily aimed at government and parliamentary institutions representing Europe's regions and cities. National parliaments are also invited to participate. Other EU and national institutions can follow the network's activities as observers. When the Committee of the Regions is issuing an opinion on a new policy or legislative proposal, registered participants in the network can use a standardised electronic form to comment on compliance with the subsidiarity principle. In addition, rapporteurs in the Committee can initiate broader consultations of the network when they require more input on subsidiarity and proportionality for their work. Three consultations were held in 2008⁴².

The Committee of the Regions intends to use its consultative networks and platforms, including the Subsidiarity Monitoring Network, to provide data to the European Commission on the possible impacts of its initiatives on the local and regional level. This will allow local and regional authorities to participate at an early stage in the (pre)legislative process, and to contribute to a better assessment of the territorial impacts of EU legislative and policy proposals.

8. APPLICATION BY THE COURT OF JUSTICE

Although there was no new case law of note to record, there is an on going request for a preliminary ruling which could result in the Court pronouncing on subsidiarity. On 13 February 2008 the High Court of Justice (England & Wales) made a reference to the European Court of Justice for a preliminary ruling on the "roaming Regulation"⁴³. In addition to a question on the legal base, the High Court has asked the European Court of Justice whether the regulation is invalid *"on the grounds that the imposition of a price ceiling in respect of retail roaming charges infringes the principle of proportionality and/or subsidiarity."* A judgement is expected before 2010.

9. CONCLUSIONS

The above analysis suggests three broad conclusions. First, while the application of the principles of subsidiarity and proportionality often exposes a divergence of views in Council, this is less the case in the European Parliament where a broader consensus seems to exist on the need for and value added of EU action. Second, the number of opinions that the Commission receives from national parliaments on its proposals is increasing rapidly, roughly doubling every year. This trend can be expected to continue if the Treaty of Lisbon is ratified and the 'yellow and orange cards' become operational. This should further enrich the debate on subsidiarity and proportionality. Third, impact assessments have become the main vehicle

⁴¹ <http://subsidiarity.cor.europa.eu>

⁴² (i) on Immigration & Employment COM (2007) 248, COM (2007) 249, COM (2007) 637 and COM (2007) 638; (ii) on patients' rights in cross border healthcare COM (2008) 414; (iii) on the Green Paper on Territorial Cohesion COM (2008) 616.

⁴³ Case C-58/8 *Vodafone Ltd, Telefónica O2 Europe plc, T-Mobile International AG, Orange Personal Communications Services Ltd v. Secretary of State for Business, Enterprise and Regulatory Reform* about EC Regulation No. 717/2007

to address subsidiarity and proportionality issues within the Commission when policy initiatives are being prepared. The Impact Assessment Board is playing a key role in this respect, and the revised impact assessment guidelines should lead to further progress in this area.

Annex 1: Number of opinions received from national parliaments

| | Chambers of national parliaments | Opinions received |
|----|---|-------------------|
| 1 | PT - Assembleia da República | 65 |
| 2 | DE - Bundesrat | 18 |
| 3 | SE - Riksdag | 16 |
| 4 | FR - Sénat | 13 |
| 5 | UK - House of Lords | 12 |
| 6 | DK - Folketing | 11 |
| 7 | CZ - Senát | 11 |
| 8 | IT - Senato della Repubblica | 8 |
| 9 | IE - Dáil Éireann and Seanad Éireann | 7 |
| 10 | IT - Camera dei deputati | 6 |
| 11 | NL - Staten Generaal | 5 |
| 12 | PL - Sejm | 5 |
| 13 | AT - Bundesrat | 4 |
| 14 | EL - Vouli ton Ellinon | 3 |
| 15 | DE - Bundestag | 2 |
| 16 | EE - Riigikogu | 2 |
| 17 | LU - Chambre des Députés | 2 |
| 18 | BE – Sénat/Senaat | 2 |
| 19 | CY - Vouli ton Antiprosopon | 2 |
| 20 | LV - Saeima | 2 |
| 21 | UK - House of Commons | 1 |
| 22 | CZ - Poslanecká sněmovna | 1 |
| 23 | BE - Chambre des Représentants/ Kamer van volksvertegenwoordigers | 1 |
| 24 | BG - Narodno sabranie | 1 |
| | Total: | 200 |