18th report on better legislation - Application of the principles of subsidiarity and proportionality (2010)

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PURPOSE: presentation of the 18th annual report on the application of the principles of subsidiarity and proportionality in EU lawmaking.

CONTENT: the report looks at how the principles are implemented by different institutions – the Commission, the European Parliament, the Council and the Committee of the Regions, and presents in more detail some initiatives which have raised subsidiarity issues. It also examines how the subsidiarity control mechanism of national Parliaments, which was one of the innovations introduced by the Lisbon Treaty, has been implemented.

The fact that the **majority of Commission proposals have not raised any subsidiarity concerns** among national Parliaments, and were adopted by the legislators without major subsidiarity discussions, indicates that **subsidiarity checks** at an early stage of the policy development process are **generally effective**.

Application of the principles: the report highlights that it is imperative to make the arguments on subsidiarity and proportionality **transparent**, because this enables the different players to deliberate constructively over the validity of their positions. Therefore, irrespective of where the initiative originates, the draft legislative act should contain a detailed '**statement'** making it possible for the other actors to appraise compliance with the principle.

Subsidiarity **cannot be easily validated** by operational criteria. A **fair political judgement** at the **pre-legislative phase is important** to ensure that proposals get the subsidiarity issues right from the beginning.

European Commission: in 2010, the Board commented on subsidiarity and proportionality issues in more than half of the cases it examined, and identified three main areas for improvement:

(1) Need for **more robust evidence of EU value added**. For example, for the initiative on the European Dimension in Sport, the Board was concerned about the limited evidence base for a planned financing programme. Similarly, the Board questioned the added value of EU-level measures for the idea of a mountain product label (initially included in the Package of Agricultural Product Quality). In both cases the relevant services have decided to conduct further analysis before proposing EU action.

(2) Need for **thorough subsidiarity analysis for initiatives extending the scope of EU intervention** . This was the case for several initiatives adopted in the aftermath of the financial crisis – amendments to the Directives on Deposit Guarantee Schemes and Investor Compensation Schemes , an initiative on Short Selling and Credit Default Swaps, and the White Paper on Insurance Guarantee Schemes.

(3) The Board **questioned the preferred level of harmonisation on several occasions**, given the differences in national situations. This was the case for amendments to the Regulation on Judgments in Civil and Commercial Matters and a proposed Regulation on Property Consequences of Registered Partnerships.

National Parliaments: the subsidiarity control mechanism introduced by the Lisbon Treaty enhances the role of national Parliaments, which can express their views on whether draft legislative proposals comply with the principle of subsidiarity. The Treaty provides for two mechanisms – the so-called '**yellow card**' and '**orange card**'. Both mechanisms entail a review of the draft legislation and may lead to amendment or withdrawal of the proposal.

Since 2006 the Commission has, within the framework of the political dialogue, transmitted all new proposals to national Parliaments, and replied to their opinions. By the end of 2010, the Commission had sent out 82 draft legislative proposals falling within the scope of the Protocol and received **211 opinions**. While most of the opinions concentrated on the content of the proposal, a total of **34 opinions raised subsidiarity concerns**. For five legislative proposals the Commission received more than one reasoned opinion,18 but in all of these cases the threshold for a 'yellow card' was far from being reached.

The Commission initiatives on which the national Parliaments delivered reasoned opinions as regards respect of the subsidiarity principle are as follows:

- Seasonal Workers Directive,
- Deposit Guarantee Schemes Directive,
- Food Distribution to the Most Deprived Persons in the Union,
- Support for Rural Development by the EAFRD Regulation,
- Direct Support Scheme for Farmers,
- Investor Compensation Scheme,
- European Heritage Label,
- Frontex Regulation,
- Translation and Interpretation in Criminal Proceedings,
- Imports of Fishery Products from Greenland to the EU,
- Radio Spectrum Policy Programme,
- Single European Railway Area.

Some replies from the national Parliaments have also highlighted insufficient or missing subsidiarity justification in a number of the Commission's proposals. This appeared to be in particular the case for **proposals on minor amendments to existing legislation**. The Commission will take measures to ensure proper subsidiarity justification in explanatory memoranda of all legislative proposals, including, for instance, by recalling and reconfirming the subsidiarity analysis made in the past.

The European Parliament and the Council: the legislators – the European Parliament and the Council – act at the final stage of the prelegislative phase. They must validate the proposal's conformity with the principles of subsidiarity and proportionality, and provide a relevant justification if an amendment they make affects the scope of Union action.

The Council and the European Parliament have both set up their own procedures to implement the subsidiarity control mechanism. The Parliament's Rules of Procedure were amended to ensure that the reasoned opinions of national Parliaments are taken into consideration in parliamentary discussions. The Council has ensured that the national Parliaments were consulted on the initiatives originating from a group of Member States.

In a limited number of cases, there has been an extensive debate between the European Parliament and the Council on how subsidiarity should be interpreted. Thorough political discussions have helped to find an appropriate balance between EU and Member State responsibilities.