EU regulatory fitness and subsidiarity and proportionality - 19th report on Better lawmaking covering the year 2011

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PURPOSE: to present the 19th report on the application of the principles of subsidiarity and proportionality.

BACKGROUND: this is the nineteenth annual report on the application of the principles of subsidiarity and proportionality in EU lawmaking.

As in previous years, it looks at how the principles are implemented by the different EU institutions and bodies, the Commission, the European Parliament, the Council and the Committee of the Regions and presents in more detail some Commission initiatives and legislative proposals which have raised subsidiarity issues during 2011. It also examines how the subsidiarity control mechanism, which under Article 12 of the TEU and the Protocol gives **national Parliaments a particular role in scrutiny of the principle of subsidiarity**, has developed since the entry into force of the Lisbon Treaty.

CONTENT: the majority of Commission proposals were adopted by the colegislators without significant discussions on subsidiarity and proportionality. In 2011, the thresholds for the so-called "yellow card" and "orange card" were not reached and only **a small percentage** (**about 10%**) of national Parliaments' opinions sent to the Commission in the context of the political dialogue were reasoned opinions within the meaning of the Protocol, i.e. stating **a breach of subsidiarity**. At the same time, in cases where compliance with the principles of subsidiarity and proportionality was questioned, the views of the institutions and other players involved sometimes differed widely.

The concepts of subsidiarity and proportionality are fundamental elements in the policy development process of the EU Institutions, and the Commission's impact assessments remain the main vehicle for addressing subsidiarity and proportionality issues during the pre-legislative phase, the IA Board playing a key role in this respect. However, institutional practice shows that the way these principles are interpreted and applied during the legislative phase often depends on the political context, highlighting thus their political dimension.

The way in which most of the national Parliaments implement the Protocol and use the subsidiarity control mechanism has highlighted the primarily political character of this new tool.

The **subsidiarity control mechanism has served to make the process more transparent** and has clearly helped to bring EU policies into the public debate in Member States and thus to raise public awareness on these issues.

How the institutions apply these principles: the report reviews how the institutions apply these two fundamental principles:

1. the Commission: it recalls that a subsidiarity statement is presented for each legislative proposal, as foreseen by Article 5 of the Protocol to the Treaty. Impact assessments (IAs), which accompany proposals with significant impacts, provide the most detailed analysis of subsidiarity and proportionality. The quality of this analysis is systematically scrutinised by the IA Board. In 2011, the Board continued to assess EU added value when scrutinising the quality of IAs. Though the Board's recommendations on

subsidiarity and proportionality were down slightly compared to 2010, they still featured in a significant number of opinions (43 %). The Board frequently asked for stronger justification of the need for action at EU level, in particular the need for more evidence of problems that require action at EU level and, on some occasions, it concluded that the evidence base to demonstrate the need for and proportionality of an EU legislative initiative remained weak.

2. the national parliaments: the subsidiarity control mechanism gives national Parliaments the right to express their views on whether draft legislative acts, which do not fall within the EU's exclusive competences comply with the principle of subsidiarity. Depending on the number of reasoned opinions concluding that a proposal is in breach of the subsidiarity principle, the so-called '**yellow card**' and ' **orange card**' can be triggered. These entail a review of the draft legislation and may lead to the relevant legislative proposal being amended or withdrawn. In 2011, the Commission received **64 reasoned opinions from national Parliaments**, an increase of almost 75% in comparison with 2010, the first year of functioning of the subsidiarity control mechanism. These 64 reasoned opinions received in 2011 related to 28 different Commission proposals. Most of the reasoned opinions focused on legislative proposals in the fields of taxation, agriculture, internal market and justice. The proposals which elicited the highest number of reasoned opinions concerned the **Common Consolidated Corporate Tax Base** (nine opinions), the **temporary reintroduction of border controls at internal borders in exceptional circumstances** (six), the **Common European Sales Law** (five) and the **Single CMO Regulation** (five).

In none of the 2011 cases were the thresholds for triggering the yellow or orange cards met.

In accordance with its political commitment to national Parliaments, the Commission replied or is in the process of preparing a reply to each reasoned opinion in the context of the political dialogue and put forward into account in the ensuing interinstitutional discussions and negotiations.

3. the European Parliament and the Council: in Council, the Committee of Permanent Representatives (Coreper) ensures that the principles are complied with. In the European Parliament, the internal Rules of Procedure contain **a specific Rule on the** "**Examination of respect for the principle of subsidiarity**", which states that compliance is verified by the committees in charge of specific legislative dossiers, together with the Committee on Legal Affairs, and that the committee responsible may not take its final vote before expiry of the eight-week deadline.

It should also be noted that, in 2011, the Commission received a small number of **parliamentary questions** (**32** out of more than 12 000) which concerned issues in relation to respect for the principles of subsidiarity and proportionality. They mainly covered requests to substantiate the compliance of certain Commission proposals with these principles, partially echoing concerns raised by other institutions and players.

4. the Committee of the Regions: the Committee of the Regions expresses its views either when it is consulted or in the form of own-initiative opinions. In accordance with Article 8 of the Protocol, it also has the right to challenge under Article 263 TFEU the validity of legislation as regards compliance with the principle of subsidiarity, but only if it has been consulted by virtue of an obligation under the TFEU. 2011 saw preparations for the launch of the REGPEX website, which is designed to help regions with legislative powers play their part in the subsidiarity control mechanism and to provide a source of information and exchange between regional parliaments and governments as they prepare their subsidiarity analyses. The website was launched in March 2012.

5. the Court of Justice: the Court of Justice of the European Union is, in accordance with Article 263 TFEU, competent to review the legality of legislative acts as regards compliance with the principle of subsidiarity. The Protocol states that the Committee of the Regions or Member States, themselves or on behalf of their national Parliaments, can bring a case before the Court.

Lastly, the report cites a number of key cases where subsidiarity and proportionality concerns were raised. These cases are described both from the point of view of the interinstitutional debates that took place in their regard and the arguments put forward by national parliaments to counter the proposals in question.