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**REPORT FROM THE COMMISSION**

**ANNUAL REPORT 2017**

**ON THE APPLICATION OF THE PRINCIPLES OF SUBSIDIARITY AND  
PROPORTIONALITY**

# ANNUAL REPORT 2017 ON THE APPLICATION OF THE PRINCIPLES OF SUBSIDIARITY AND PROPORTIONALITY

## 1. INTRODUCTION

This is the 25<sup>th</sup> annual report on the application of the principles of subsidiarity and proportionality in European Union law making. The report is submitted in accordance with Article 9 of Protocol No 2 to the Treaty on European Union and to the Treaty on the Functioning of the European Union (hereinafter ‘TFEU’).

The report looks at how the European Union’s institutions and bodies implemented these two principles in 2017 and how the practice has evolved in comparison with previous years. It also provides an analysis of the Commission proposals that were most notably the object of reasoned opinions from national Parliaments during the year. Given the close links between the subsidiarity control mechanism and the political dialogue between national Parliaments and the Commission, this report should be seen as complementary to the Commission’s annual report on relations with national Parliaments for the year 2017.<sup>1</sup>

## 2. APPLICATION OF THE PRINCIPLES BY THE INSTITUTIONS

### 2.1. The Commission

In 2017, the Juncker Commission continued putting into practice its reinforced Better Regulation agenda which ensures with strengthened guidance and new opportunities (including a Better Regulation online portal<sup>2</sup>) for citizens’ and stakeholders’ feedback that subsidiarity and proportionality are taken into account at all stages of policy-making. The Commission has also pursued its practice of evaluating existing policy frameworks, before coming forward with legislative revisions. These evaluations<sup>3</sup> include assessments of whether existing policy measures are still ‘fit for purpose’ and to what extent they comply with the principles of subsidiarity and proportionality.

The Commission website ‘Lighten the load – Have your say’<sup>4</sup> as well as the Regulatory Fitness and Performance (REFIT) Platform also provide ways for the public and stakeholders to communicate with the Commission on possible excessive burdens or inefficiencies of existing regulatory measures, which may include questions on subsidiarity or proportionality. In 2017, the Regulatory Fitness and Performance Platform produced 46 opinions, including recommendations to the Commission on how to simplify and reduce regulatory burdens of existing EU legislation. The Commission is responding to these notably through the implementation of its 2018 Work Programme.

In July 2017, the Commission adopted a revised set of better regulation guidelines and the accompanying toolbox. This was to ensure the guidelines and toolbox were updated in view of practical experience since the adoption of the Better Regulation package in May 2015. The Commission also expanded on its Better Regulation portal making it easier for citizens to navigate on-line.

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<sup>1</sup> COM(2018) 491 final.

<sup>2</sup> [https://ec.europa.eu/info/law/better-regulation/have-your-say\\_en](https://ec.europa.eu/info/law/better-regulation/have-your-say_en)

<sup>3</sup> Commission evaluations systematically assess 5 criteria: effectiveness, efficiency, coherence, relevance and EU added value.

<sup>4</sup> [http://ec.europa.eu/smart-regulation/refit/simplification/consultation/contributions\\_en.htm](http://ec.europa.eu/smart-regulation/refit/simplification/consultation/contributions_en.htm)

## **Task Force on Subsidiarity, Proportionality and ‘Doing Less More Efficiently’**

On 13 September 2017, President Juncker announced in his State of the Union address that he would set up a high level Task Force on Subsidiarity, Proportionality and ‘Doing Less More Efficiently’ Its objectives were described in the Commission’s Work Programme for 2018: *‘Building on the work that this Commission has already done, we should continue to be big on the big things. This means not regulating every aspect of citizen’s daily lives. We must reflect seriously on doing less more efficiently and giving back competences to Member States where it makes sense to do so. Building on the work of the Task Force headed by First Vice-President Timmermans, (...) the Commission will present its ideas on further enhancing subsidiarity, proportionality and better regulation to make sure we are only acting where the EU adds value.’* President Juncker established the Task Force on 14 November with effect from 1 January 2018<sup>5</sup>. The Task Force delivered its report to the President on 10 July 2018<sup>6</sup>. The Presidents of the European Parliament, of the Conference of Parliamentary Committees for Union Affairs of Parliaments of the European Union (COSAC) and of the Committee of the Regions were invited to nominate Members from their institutions for the Task Force who would then participate in a personal capacity. The National Parliaments (COSAC) and the Committee of the Regions subsequently put forward their members of the Task Force, while the European Parliament chose not to do so.

### **Subsidiarity and proportionality analysis**

The Better Regulation guidelines and the accompanying ‘toolbox’<sup>7</sup> require the Commission to carry out a subsidiarity analysis when considering a new initiative in areas where the Union does not have exclusive competence, and when evaluating the relevance and European added value of an existing intervention. The Commission addresses subsidiarity for both legislative and non-legislative initiatives. The objective of the analysis is twofold: first, to assess whether action at national, regional or local level is sufficient to achieve the objective pursued; second, to assess whether Union action would provide added value compared to action by the Member States.

Under the principle of proportionality, the content and form of Union action must not exceed what is necessary to meet the objectives of the Treaties.<sup>8</sup> Respect for the principle of proportionality is about ensuring that the approach and degree of regulatory intervention of a policy match its objective. Proportionality should be clearly referred to in impact assessments<sup>9</sup>, evaluations and fitness checks.<sup>10</sup>

### **Impact assessments**

In 2017, the Regulatory Scrutiny Board<sup>11</sup>, which assesses the quality of impact assessments<sup>12</sup>, examined 53 impact assessments. 12 of these cases were judged to need improvements in their

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<sup>5</sup> [https://ec.europa.eu/commission/priorities/democratic-change/better-regulation/task-force-subsidiarity-proportionality-and-doing-less-more-efficiently\\_en](https://ec.europa.eu/commission/priorities/democratic-change/better-regulation/task-force-subsidiarity-proportionality-and-doing-less-more-efficiently_en)

<sup>6</sup> [https://ec.europa.eu/commission/sites/beta-political/files/report-task-force-subsidiarity-proportionality-doing-less-more-efficiently\\_1.pdf](https://ec.europa.eu/commission/sites/beta-political/files/report-task-force-subsidiarity-proportionality-doing-less-more-efficiently_1.pdf)

<sup>7</sup> [http://ec.europa.eu/info/better-regulation-guidelines-and-toolbox\\_en](http://ec.europa.eu/info/better-regulation-guidelines-and-toolbox_en)

<sup>8</sup> Article 5(4) of the Treaty on European Union.

<sup>9</sup> In the context of impact assessments, proportionality is a key criterion to consider in the comparison of policy options.

<sup>10</sup> For more detailed information about the Better Regulation guidelines for the subsidiarity and proportionality analyses, see the Annual Report 2016 on Subsidiarity and Proportionality, point 2.1.

<sup>11</sup> The Regulatory Scrutiny Board consists of a Chair (Director-General level) and six full-time members, of which three are recruited from outside the Commission. All members of the board are independent and function in a personal capacity based on their individual expertise. The board reviews the quality of impact assessments, fitness checks and major evaluations. Subsidiarity and proportionality are part of this quality check.

analysis of subsidiarity and EU value added. 30 opinions contained comments on proportionality and the comparison of options. The following examples illustrate how the Board assessed subsidiarity and proportionality in 2017:

- In its negative opinion on the impact assessment<sup>13</sup> on the proposal on EU cooperation on Health Technology Assessment, the Regulatory Scrutiny Board stressed that one of the policy options - permanent cooperation at EU level on full health technology assessments - raised significant issues in terms of feasibility, subsidiarity and proportionality. The report was revised and took this comment into account by discarding upfront this option.
- In its positive opinion with reservations on the impact assessment<sup>14</sup> for an initiative amending a directive on combined transport, the Regulatory Scrutiny Board stated that the subsidiarity argument was not sufficiently developed, especially for the inclusion of strictly domestic transport. It asked for further evidence that national initiatives would not be sufficient to address the problem and that the scale of operations would require EU level intervention. The revised impact assessment report contained additional arguments to illustrate the cross-border dimension of the problem, including justification for extending support measures to domestic operations.
- In the negative opinion on the impact assessment<sup>15</sup> on the proposal for a framework for the free flow of non-personal data in the European Union, the Regulatory Scrutiny Board found that the report did not make the case for EU action and did not assess appropriately the proportionality of the options. The revised report received a second negative opinion from the Regulatory Scrutiny Board. The Board found that the report particularly failed to make the case for a new right for the portability of cloud services. The initiative was adopted by the College without the provisions establishing mandatory cloud services portability, but foreseeing self-regulatory measures instead.

As demonstrated by these examples, the Regulatory Scrutiny Board in 2017 helped to improve the analysis of how proposals comply with the principles of subsidiarity and proportionality and thus provided critical information for the Commission's political decision-making process.

## Evaluations and fitness checks

Subsidiarity and proportionality were also essential for the retrospective evaluations and fitness checks, which assess whether European actions are delivering the expected results in terms of efficiency, effectiveness, coherence, relevance and whether European value added continues to exist. In 2017, the Commission published 72 evaluations and fitness checks (evaluations of broader policy areas). Three fitness checks were published; one on the EU Eco-Management and Audit Scheme (EMAS) and the EU Ecolabel, one on Consumer policy and one on reporting obligations in the area of environment.<sup>16</sup>

The Regulatory Scrutiny Board examined 17 major evaluations and fitness checks in 2017. Out of these, the Board made recommendations for improvements within the category of 'relevance and EU value added' in seven cases, including on the LIFE programme<sup>17</sup> (EU action programme

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<sup>12</sup> Impact assessments are required whenever a policy initiative is expected to have significant economic, social or environmental impacts. They include an assessment of the problem, possible policy options, their likely impacts and how they comply with the principles of subsidiarity and proportionality.

<sup>13</sup> [https://ec.europa.eu/info/law/better-regulation/initiatives/com-2018-51\\_en](https://ec.europa.eu/info/law/better-regulation/initiatives/com-2018-51_en)

<sup>14</sup> [https://ec.europa.eu/info/law/better-regulation/initiatives/com-2017-648\\_en](https://ec.europa.eu/info/law/better-regulation/initiatives/com-2017-648_en)

<sup>15</sup> <https://ec.europa.eu/digital-single-market/en/news/proposal-regulation-european-parliament-and-council-framework-free-flow-non-personal-data>

<sup>16</sup> REFIT platform: [https://ec.europa.eu/info/law/law-making-process/evaluating-and-improving-existing-laws/refit-making-eu-law-simpler-and-less-costly/refit-platform\\_en](https://ec.europa.eu/info/law/law-making-process/evaluating-and-improving-existing-laws/refit-making-eu-law-simpler-and-less-costly/refit-platform_en)

<sup>17</sup> [https://ec.europa.eu/info/publications/mid-term-evaluation-life-programme\\_en](https://ec.europa.eu/info/publications/mid-term-evaluation-life-programme_en)

on environment and climate) and the General Food Law<sup>18</sup>. It thus helped to improve the analysis of how evaluations and fitness checks took account of the subsidiarity and proportionality principles.

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<sup>18</sup> [https://ec.europa.eu/food/safety/general\\_food\\_law/fitness\\_check\\_en](https://ec.europa.eu/food/safety/general_food_law/fitness_check_en)

## 2.2. Follow-up to reasoned opinions from national Parliaments

In 2017, the Commission received 52 **reasoned opinions**<sup>19</sup> from national Parliaments on the principle of subsidiarity<sup>20</sup>. This was 20% less than the 65 reasoned opinions received in 2016, corresponding to a lower overall number of opinions received in 2017<sup>21</sup>. The proportion of reasoned opinions compared to the overall number of opinions received in 2017 also decreased from 10,5% in 2016 to 9% in 2017.

Among the 52 reasoned opinions received in 2017, 24 opinions were concentrated on four Commission proposals. The proposal giving rise to most reasoned opinions was the proposal on the internal market for electricity<sup>22</sup>, which generated 11 reasoned opinions. Two legislative proposals in the so-called ‘services package’<sup>23</sup> received a total of 9 reasoned opinions and the proposal on work-life balance for parents and carers received 4 reasoned opinions<sup>24</sup>. Other proposals received between 1 and 3 reasoned opinions. The cases on which the Commission received the highest number of reasoned opinions are described in more detail in Chapter 3.

The decrease in the total number of reasoned opinions issued in 2017 coincided with a similar decrease in the number of reasoned opinions issued per chamber. 19 out of 41 chambers issued reasoned opinions in 2017 (compared with 26 in 2016). The reasoned opinions were issued by the Czech *Poslanecká sněmovna* (1), the Spanish *Cortes Generales* (2), the Irish *Dáil and Seanad Éireann* (3)<sup>25</sup>, the German *Bundestag* (6), the German *Bundesrat* (3), the French *Sénat* (7), the French *Assemblée nationale* (2), the Italian *Senato della Repubblica* (1), the Hungarian *Országgyűlés* (2), the Dutch *Eerste Kamer* (2), the Dutch *Tweede Kamer* (2), the Austrian *Bundesrat* (6), the Polish *Senat* (4), the Polish *Sejm* (2), the Romanian *Camera Deputaților* (1), the Romanian *Senatul* (2), the Swedish *Riksdag* (4) and the British House of Commons (2).

## 2.3. The European Parliament

In 2017, the European Parliament formally received 421 submissions by national Parliaments under Protocol No 2 on the application of the principles of subsidiarity and proportionality<sup>26</sup>. 49 of these were reasoned opinions, whilst the other 372 were contributions (submissions not raising issues related to the subsidiarity compliance). In comparison, 76 reasoned opinions and 333 contributions were officially transmitted to the European Parliament in 2016. The ratio of reasoned opinions to contributions remains small, indicating that national Parliaments see the mechanism of subsidiarity control mechanism as an additional constructive means of voicing their views and concerns. All submissions of national Parliaments are made available at CONNECT, the European Parliament’s database of national Parliament documents<sup>27</sup>.

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<sup>19</sup> This number refers to the total number of opinions received from parliamentary chambers under Protocol No 2 to the Treaties. Reasoned opinions jointly concerning more than one Commission document therefore only count as one reasoned opinion. See the Annex to this report for more details.

<sup>20</sup> See the Annex to this report.

<sup>21</sup> 576 opinions received by the Commission in 2017 compared to 613 opinions received in 2016.

<sup>22</sup> Proposal for a Regulation of the European Parliament and of the Council on the internal market for electricity (recast) {COM(2016) 861 final}.

<sup>23</sup> Proposal for a Directive of the European Parliament and of the Council on the enforcement of the Directive 2006/123/EC on services in the internal market, laying down a notification procedure for authorisation schemes and requirements related to services, and amending Directive 2006/123/EC and Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System {COM(2016)821} and proposal for a Directive of the European Parliament and of the Council on a proportionality test before adoption of new regulation of professions {COM(2016)822 final}.

<sup>24</sup> Proposal for a Directive of the European Parliament and of the Council on work-life balance for parents and carers and repealing Council Directive 2010/18/EU {COM(2017) 253 final}.

<sup>25</sup> The *Dáil and Seanad Éireann* submitted one joint reasoned opinion and each adopted one reasoned opinion.

<sup>26</sup> For the procedure how the European Parliament deals with national Parliaments' reasoned opinions, see the Annual report 2016 on Subsidiarity and Proportionality, point 2.3.

<sup>27</sup> <http://www.europarl.europa.eu/relnatparl/en/connect/welcome.html>

Pursuant to Annex V to the European Parliament's Rules of Procedure, the Committee on Legal Affairs has the horizontal responsibility for the respect for the principle of subsidiarity. Every six months, a Member of the committee is appointed as standing rapporteur for subsidiarity on the basis of rotation among the political groups. Ms Mady Delvaux (S&D group/Luxembourg) was the standing rapporteur during the first half of 2017, succeeded by Ms Laura Ferrara (EFDD group/Italy) for the second half of the year. The rapporteur follows the reasoned opinions received and has the opportunity to take up issues raised in reasoned opinions for debate in the committee and for possible recommendations to the committee responsible for the subject-matter of the proposal in question.

A report is also regularly drawn up by the Committee on Legal Affairs on the Commission's Annual Report on subsidiarity and proportionality. Ms Mady Delvaux was appointed rapporteur for the Parliament's own-initiative report on the Annual Reports 2015 and 2016 on Subsidiarity and Proportionality. The Parliament adopted the resolution on Parliament's own initiative report on the Annual reports 2015 and 2016 on Subsidiarity and Proportionality at its plenary session on 18 April 2018<sup>28</sup>. The committee also contributes to the bi-annual reports by the Conference of Parliamentary Committees for Union Affairs (COSAC) on questions related to subsidiarity.

The Committee on Legal Affairs is responsible for ensuring the respect of the principle of proportionality, which it takes into account in discharging its task of verifying the legal basis of proposals and in exercising its responsibility for better law-making.

In addition, the European Parliamentary Research Service continued to assist the European Parliament in taking account of the principles of subsidiarity and proportionality in its work:

- by systematically scrutinising the subsidiarity and proportionality aspects of Commission impact assessments and drawing attention to any concerns expressed in this respect, notably by national Parliaments and the Committee of the Regions;
- by ensuring that these principles are fully respected in the European Parliament's own work, for example when carrying out impact assessments of its own substantive amendments or analysing the added value of Parliament's proposals for new legislation, based on Article 225 TFEU, and the cost of the absence of action at EU level; and
- by scrutinising the subsidiarity and proportionality aspects when drafting impact assessments, focussing on the added value of EU rather than national spending or actions.

In 2017, the European Parliament produced 42 Initial Appraisals of Commission Impact Assessments, two Impact Assessments of substantive parliamentary amendments, 11 ex-post European Impact Assessments and five Implementation in action papers related to this. In addition, three reports on the cost of non-Europe and two European Added Value Assessments were completed. The European Parliamentary Research Service also scrutinises the implementation and effectiveness of existing EU legislation whenever the Commission announces in its annual work programme that this legislation will be amended. In 2017, some 26 of such 'Implementation Appraisals' have been produced.

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<sup>28</sup> <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2018-0120+0+DOC+XML+V0//EN>

## 2.4. The Council of the European Union

Under Article 4 of Protocol No 2 to the Treaties, the Council has to forward to national Parliaments all draft legislative acts originating from a group of Member States, the Court of Justice, the European Central Bank and the European Investment Bank. As a corollary to the above obligation, under Article 6 of Protocol No 2, the Council must forward any national Parliament opinion on a legislative proposal originating from a group of Member States to the proposing Member States. Similarly, the Council forwards national Parliaments' opinions on legislative proposals from the Court of Justice, the European Central Bank and the European Investment Bank to the institution concerned.

On 27 July 2017, the Council forwarded to national Parliaments the European Central Bank's Recommendation for a Decision of the European Parliament and of the Council amending Article 22 of the Statute of the European System of Central Banks and of the European Central Bank<sup>29</sup>.

In addition to its Treaty requirements, the Council also keeps Member States informed of national Parliaments' opinions on Commission legislative proposals. In 2017, the Council Secretariat distributed to the delegations 38 reasoned opinions received within the framework of Protocol No 2 and 220 opinions issued within the framework of the political dialogue<sup>30</sup>.

## 2.5. The Committee of the Regions<sup>31</sup>

2017 was marked by a wide debate on the Future of Europe, in which the Committee of the Regions emphasised the importance of efficient application of the subsidiarity and proportionality principles. In the framework of its fifth Subsidiarity Work Programme, the Committee monitored three initiatives selected from the Commission Work Programme 2017 with particular attention. In addition, the Committee assessed compliance with the subsidiarity and proportionality principles of all legislative proposals on which it issued opinions.

In 2017, the Committee of the Regions issued 15 opinions on legislative proposals. For the majority of them, the Committee found that they complied with the principles of subsidiarity and proportionality. In two opinions, the Committee raised concerns which were relevant in terms of subsidiarity and proportionality monitoring.

The opinion on the 'services package' pointed out 'potential interference in national legislative procedures' and highlighted that 'the proposals for the services e-card, notification procedure and proportionality test will impose additional administrative burdens'. The Committee's opinion on the European Pillar of Social Rights and the Reflection paper on the social dimension of Europe highlighted that the local and regional dimension of social policies should be properly taken into account.

As part of the Subsidiarity Work Programme, the Subsidiarity Expert Group was consulted on three initiatives. Regarding the proposal for a Regulation on the Financial Rules Applicable to the General Budget of the European Union, the experts considered that the new proposals on financial instruments and conditions have a substantial impact on their beneficiaries and the content and procedure of policy implementation on the ground. Also, the managing authorities at

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<sup>29</sup> 2017/0810 COD - CM 3730/17

<sup>30</sup> There is a discrepancy in the number of reasoned opinions registered by the European Parliament, the Council and the Commission, as not all institutions have received all reasoned opinions or the institutions count the number of reasoned opinions received differently. Equally, the Council Secretariat does not systematically receive all opinions from the national Parliaments.

<sup>31</sup> A more detailed description of subsidiarity related activities is provided in the 2017 Subsidiarity Annual Report issued by the Committee of the Regions, available after adoption by the Committee of the Region's Bureau at <http://portal.cor.europa.eu/subsidiarity/Pages/default.aspx>.



national and regional level were substantially concerned by the proposals. The opinion pointed out that ‘no impact assessment was carried out and that a justification in terms of proportionality is not substantiated by the presented data’. Furthermore, in the opinion ‘the [Committee] questions the European Commission’s assessment that the legislative proposal falls under the exclusive competence of the Union, given that the proposals on the sectoral legislative acts go beyond aligning the text with the new financial rules applicable to the Union’.

The second consultation concerned the ‘Clean Energy for all Europeans’ package. With regard to the Governance of the Energy Union, the respondents highlighted that, particularly for the federal countries with many stakeholders involved in implementation, the proposed time frames are too narrow and are not compatible with the coordination process used in federal States. The Committee of the Regions’ opinion did not raise subsidiarity but proportionality concerns, ‘as the suggested governance system is considered too complex, too detailed and to impose too tight reporting intervals. The Committee of the Regions would have preferred to see the governance system introduced via a directive, instead of a regulation, which would allow the proper involvement of regional authorities in federal countries’.

With regard to the proposals on Energy efficiency and performance in buildings, the Committee, in its opinion, shared the points raised by the consultation respondents and points out that the given legal base, Article 194 TFEU, does not cover measures to combat energy poverty which ‘should come under TFEU Article 151’. The Committee was ‘opposed to the introduction of the smartness indicator by means of a delegated act’. The opinion attested both proposals’ compliance with the proportionality principle. The Committee’s opinion on Renewable Energy and the internal market in electricity attested compliance with the subsidiarity principle and pointed out the need for ‘a more thorough examination’ for the assessment of compliance with the proportionality principle.

Finally, the Subsidiarity Expert Group was consulted on the proposal on work-life balance for parents and carers. Also some positions were received on the REGPEX-platform – the sub-network of the Subsidiarity Monitoring Network open to Parliaments and governments of regions with legislative powers – pointing out that the proposed measures are not necessary and that existing national measures and arrangements in place are sufficient. The opinion on this proposal attested to compliance with subsidiarity and proportionality principles. However, the opinion underlined that ‘Union action should leave as much scope for individual and national decisions as possible since it is established practice for this area to be regulated by the social partners at both EU and national level’

The use of REGPEX – an early warning system for regional authorities with legislative powers, and a source of information and exchange between regional parliaments and governments in the preparation of their subsidiarity analyses - increased in 2017. A total of 66 contributions submitted by REGPEX partners were uploaded to the platform. The Austrian Federal Council, the Lower Austrian State Government, the Emilia Romagna Regional Legislative Assembly and Thuringia State Parliament were among the most active partners.

Pursuant to Protocol No 2 to the Treaties, regional Parliaments contribute to the subsidiarity scrutiny carried out by national Parliaments. Before issuing a reasoned opinion on a draft legislative act, it is for each national Parliament to consult, where appropriate, regional Parliaments with legislative powers.<sup>32</sup>

A major event in the area of subsidiarity was the 8<sup>th</sup> Interinstitutional Subsidiarity Conference, co-organised by the Committee of the Regions and the Austrian Federal Council that took place in Vienna on 4 December 2017, with over 200 participants from different national and EU

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<sup>32</sup> More information on the role of regional Parliaments in subsidiarity control and their input to Union law-making is presented in the Annual Report on relations with national Parliaments, section 3.

institutions and representing all levels of governance<sup>33</sup>. As part of the main conclusions it was pointed out that the meaning of the subsidiarity principle is not always clearly communicated to citizens and that broader acceptance of policies cannot be achieved without the correct application of the principles of subsidiarity and proportionality.

## 2.6. The Court of Justice of the European Union

The Court of Justice in 2017 delivered significant judgments on the principles of subsidiarity and proportionality in which the General Court and the Court of Justice considered that those principles had been respected by the Union legislature.

In the case *Germany v Commission* of 3 April 2017<sup>34</sup> on the legality of the Commission Decision (EU) 2015/2098 excluding from European Union financing certain expenditure incurred by the Member States under the European Agricultural Guarantee Fund and under the European Agricultural Fund for Rural Development<sup>35</sup>, the General Court considered that it has not been demonstrated that the Commission encroached on its field of competence resulting from the application of the principle of subsidiarity. The General Court underlined ‘*the division of roles between the Commission and the German authorities results in the latter being entrusted with drawing up the relevant national rules governing the eligibility of expenditure [...] the Commission is required to verify whether the German authorities actually fulfil their obligations in this area, without this however conferring on the Commission any power to impose particular rules on national legislation relative to the land consolidation and village renewal procedure*’<sup>36</sup>.

The case *Sotiropoulou and Others v Council* of 3 May 2017<sup>37</sup> concerned an application for compensation under Article 268 TFEU in respect of the loss and harm which the applicants have sustained as a result of the drastic reduction of their main pensions in Greece. The contested decisions<sup>38</sup> concern inter alia the laying down of detailed measures, policies and interventions in the social security and pension system. The General Court considered that the decisions addressed to a Member State with a view to remedying an excessive deficit situation do not infringe the principle of subsidiarity laid down in Article 5 of the Treaty on European Union, neither the principle of conferral. These decisions were adopted to strengthen budgetary surveillance and alerted the Member States to take ‘*steps to make the necessary deficit reduction judged to remedy the situation of excessive deficit*’<sup>39</sup>.

The case *Landeskreditbank Baden-Württemberg — Förderbank v European Central Bank* of 16 May 2017<sup>40</sup> concerned an action for annulment, under Article 263 TFEU, brought by a German investment and development bank, against a decision of the European Central Bank which classified the German bank as a ‘significant entity’. As a consequence, the applicant was subject to the direct supervision of the European Central Bank in the framework of the single

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<sup>33</sup> For further information about the outcome of the Conference: <http://cor.europa.eu/en/news/Pages/Subsidiarity-conference-in-Vienna-EU-decisions-must-be-taken-closer-to-citizens.aspx>.

<sup>34</sup> Judgment of 3 April 2017, T-28/16, *Germany v Commission*, EU:T:2017:242.

<sup>35</sup> Decision (EU) 2015/2098 of 13 November 2015, excluding from European Union financing certain expenditure incurred by the Member States under the European Agricultural Guarantee Fund (EAGF) and under the European Agricultural Fund for Rural Development (EAFRD).

<sup>36</sup> *Ibid.*, paragraph 110.

<sup>37</sup> Judgment of 3 May 2017, T-531/14 *Leimonía Sotiropoulou and Others v Council of the European Union*, EU:T:2017:297.

<sup>38</sup> Decisions 2010/320/EU of 8 June 2010, 2010/486/EU of 7 September 2010, 2011/57/EU of 20 December 2010, 2011/257/EU of 7 March 2011, 2011/734/EU of 12 July 2011, 2011/791/EU of 8 November 2011, 2012/211/EU of 13 March 2012 and 2013/6/EU of 4 December 2012.

<sup>39</sup> Judgment of 3 May 2017, T-531/14 *Leimonía Sotiropoulou and Others v Council of the European Union*, EU:T:2017:297, paragraph 73.

<sup>40</sup> Judgment of the General Court of 16 May 2017, T-122/15 *Landeskreditbank Baden-Württemberg - Förderbank v European Central Bank*, EU:T:2017:337.

supervisory mechanism. The applicant argued that, given its low risk profile, it could have been properly supervised by the competent national authorities.

The General Court recalled that the principle of subsidiarity applies only in areas which do not fall within exclusive EU competence<sup>41</sup>. In that respect, the General Court found that, under Regulation (EU) No 1024/2013 (the Basic Regulation), the European Central Bank had exclusive competence<sup>42</sup>, which led to the conclusion that the principle of subsidiarity was irrelevant<sup>43</sup>.

In the same judgment, the General Court also found that the principle of proportionality was not breached since the acts adopted by the European Central Bank were appropriate for attaining the legitimate objectives pursued by the legislation. The European Central Bank decided to exercise its direct supervision in accordance with the rules set out in Regulation (EU) No 1024/2013, which does not require the case-by-case demonstration that its objectives may be just as well attained through direct supervision by the national authorities.

The case *Slovak Republic and Hungary v Council of the European Union* of 6 September 2017<sup>44</sup> concerns the proportionality of the Council decision establishing a relocation mechanism regarding third country nationals who entered Greece and Italy irregularly in July and August 2015.

The Court of Justice pointed out that the contested measures, adopted in the area of the European Union's common policy on asylum, entail essentially political choices and complex assessments that must, in addition, be made within a short time in order to provide a swift and tangible response to an 'emergency situation' within the meaning of that provision. In that light, it confirmed that the contested decision was appropriate and necessary for attaining the objective which it pursued. '*The Council was fully entitled to take the view, in the exercise of the broad discretion which it must be allowed in this regard, that the distribution of the persons to be relocated had to be mandatory, given the particular urgency of the situation in which the contested decision was to be adopted*'<sup>45</sup>. Moreover, the existence of various adjustment mechanisms provided for in the contested decision showed that the relocation mechanism for which the contested decision provides generally allows Member States to take account, in a proportionate manner, of the particular situation of each Member State.

### **3. KEY CASES WHERE SUBSIDIARITY AND PROPORTIONALITY CONCERNS WERE RAISED**

#### **3.1. Proposals receiving the highest number of reasoned opinions in 2017**

This chapter presents the four individual legislative proposals which received more than four reasoned opinions in 2017. Insofar as they form part of larger packages, these are more comprehensively described in the annual report on relations with national Parliaments.

- *Proposal on the internal market for electricity*

On 30 November 2016 the Commission presented a 'Clean Energy for all Europeans package', aimed at making the electricity market fit for flexibility, decarbonisation and innovation by providing for undistorted market signals, and consisting of eight legislative proposals, four of which relate to electricity supply. In relation to the proposal for a Regulation on the internal

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<sup>41</sup> *Ibid*, paragraph 65.

<sup>42</sup> Judgment of 16 May 2017, T-122/15 *Landeskreditbank Baden-Württemberg - Förderbank v European Central Bank*, EU:T:2017:337, paragraph 54.

<sup>43</sup> *Ibid* paragraph 65.

<sup>44</sup> Judgment of 6 September 2017, C-643/15 and C-647/15, *Slovak Republic and Hungary v Council of the European Union*, EU:C:2017:631.

<sup>45</sup> Paragraph 246.

market for electricity<sup>46</sup>, the Commission received 11 reasoned opinions<sup>47</sup> with a variety of arguments.<sup>48</sup> Some parliamentary chambers argued that the proposal would negatively affect Member States' possibility to ensure a security of electricity supply. Others were concerned as regards the additional powers transferred to the Agency for the Cooperation of Energy Regulators, while again others were concerned that the proposal would affect Member States right to decide their own energy mix. Finally some Parliaments were critical towards the proposal's provisions on the configuration of bidding zones, the proposed establishment of regional operational centres set up to act in the interest of regions, or the proposal's empowerment of the Commission to adopt delegated acts.

In its replies to the subsidiarity concerns of national Parliaments, the Commission stressed that the proposals in the energy package fully respect Member States' rights and prerogatives under the Treaties to decide their own energy mix. It argued that the proposed amendments were necessary to achieve the purpose of an integrated European electricity market which, legally and practically, could not be achieved at a national level alone in an equally efficient manner. It also stated that evidence had shown that isolated national approaches had led to delays in the implementation of the internal energy market, leading to sub-optimal and incompatible regulatory measures, unnecessary duplication of interventions and delays in correcting market inefficiencies. As regards the configurations of bidding zones, the Commission stressed that the current EU legislation provides for substantive requirements on bidding zones. As regards the regional operational centres, the Commission stressed the need to set up regional entities to act independently in the interest of a whole region in order to avoid inefficient solutions due to lack of agreement between transmission system operators.

- *Two proposals from the Services Package*

As part of its so-called 'Services Package' containing a Communication and four legislative proposals, presented on 10 January 2017, which was aimed at unleashing the full potential of the Single Market, the Commission adopted (i) a proposal for a Directive laying down a notification procedure for authorisation schemes and requirements related to services<sup>49</sup>, and (ii) a proposal for a Directive on improved notification of draft national laws on services<sup>50</sup>, which triggered a total of nine reasoned opinions<sup>51</sup>. The proposal on a notification procedure intends to allow both European authorities and Member States to raise potential concerns about legal incompatibilities between EU and national law at an early stage of national law making. The proposal on proportionality assessment of national rules on professional services aims to ensure that Member States undertake a comprehensive and transparent proportionality test prior to setting national rules on professional services.

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<sup>46</sup> Proposal for a Regulation of the European Parliament and of the Council on the internal market for electricity (recast) {COM(2016)861 final}.

<sup>47</sup> From the Austrian *Bundesrat*, the Czech *Poslanecká sněmovna*, the German *Bundesrat*, the German *Bundestag*, the Spanish *Congreso de los Diputados*, the French *Sénat*, the Hungarian *Országgyűlés*, the Polish *Sejm*, the Polish *Senat*, the Romanian *Camera Deputaţilor* and the Romanian *Senat*.

<sup>48</sup> The Commission also received three opinions in the context of the political dialogue, namely from the Czech *Senat*, the Danish *Folketing* and the Portuguese *Assembleia da República*.

<sup>49</sup> Proposal for a Directive of the European Parliament and of the Council on the enforcement of the Directive 2006/123/EC on services in the internal market, laying down a notification procedure for authorisation schemes and requirements related to services, and amending Directive 2006/123/EC and Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System {COM (2016)821 final}.

<sup>50</sup> Proposal for a Directive of the European Parliament and of the Council on a proportionality test before adoption of new regulation of professions {COM (2016)822 final}.

<sup>51</sup> Out of a total of 14 reasoned opinions that all proposals of the package together triggered. Four opinions were received on COM (2016)821 from the French *Assemblée nationale*, the French *Sénat*, the German *Bundestag* and the German *Bundesrat*, and five opinions were received on COM (2016)822 from the French *Assemblée nationale*, the French *Sénat*, the German *Bundestag*, the German *Bundesrat* and the Austrian *Bundesrat*.

As for the proposal establishing a notification procedure, national Parliaments expressed concern that it would give the Commission and other Member States the right to interfere in national legislative procedures, with standstill periods potentially causing significant delays, and therefore constituted a substantial encroachment of national sovereignty. As for the proposal establishing a proportionality test, Parliaments argued that the initiative constituted an additional and unnecessary obstacle to national legislation, that EU action on public health and tourism should only be complementary to action at national level and that the proposal would lead to a level of harmonisation that is contrary to the Treaty provisions on health, transport and tourism.

In its replies to the national Parliaments, the Commission defended its proposal establishing a notification procedure as balanced and proportionate, on the one hand taking into account the specificity of the services sector and the necessity to put in place an effective tool for ensuring compliance with EU rules and, on the other hand, the requirement to respect the decision making process at national level. The Commission pointed to the important shortcomings of the existing procedure, as highlighted in its Impact Assessment, and to the fact that in a public consultation, 80% of respondents, including almost three quarters of all public authorities participating in the consultation, considered the current notification procedure not satisfactory. As regards the proposal establishing a proportionality test, the Commission recalled that it merely coordinates how Member States should assess whether requirements that are to be adopted are in line with the principle of proportionality and does not in any way prejudge the outcome of the national legislative process. Furthermore, the proposal leaves ample discretion for the Member States to integrate the proportionality test in their existing structures.

- *Proposal on work-life balance for parents and carers*

This proposal, adopted on 26 April 2017<sup>52</sup>, forms part of a broader package of measures designed to ensure the implementation of the principle of gender equality with regard to labour market opportunities and treatment at work. The proposal lays down new or higher minimum standards to create more convergence between Member States, by preserving and extending existing rights. The main elements of the proposal include the enhancement of the existing parental leave scheme by facilitating uptake by first-earners through modifications as regards payment, flexibility and non-transferability. In addition, the proposal aims at introducing carers' leave and paternity leave and the right to request flexible working arrangements to all working parents of children up to 12 and carers with dependent relatives.

The Commission received four reasoned opinions<sup>53</sup> in response to the proposal, with a variety of arguments.<sup>54</sup> Some of the concerns related to proposal's alleged interference into matters of national competence and that the proposal was imposing numerous detailed rules, without taking into account the existence of national systemic solutions aimed at achieving the same purpose; thus, some Parliaments argued that the EU added value was not clearly demonstrated.

In its replies to the national Parliaments, the Commission explained that current European legislation already includes provisions concerning work-life balance in the area of gender equality on the labour market, which illustrates a common agreement that European Union level action in this area is necessary and in line with the principle of subsidiarity. The Commission also replied that the proposed Directive respects already established national arrangements in the area of family-related leaves and flexible working arrangements, as it only sets minimum standards, thus allowing Member States to maintain or introduce more favourable provisions. In

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<sup>52</sup> COM(2017) 253 final

<sup>53</sup> From the Dutch *Eerste Kamer*, the Dutch *Tweede Kamer*, the Polish *Sejm* and the Polish *Senat*.

<sup>54</sup> The Commission also received six opinions in the context of the political dialogue, namely from the Czech *Senat*, the Danish *Folketing*, The Italian *Senato della Repubblica*, the Portuguese *Assembleia da República*, the Romanian *Camera Deputaţilor* and the Spanish *Cortes Generales*.

the Commission's view, action at European Union level was is therefore necessary to ensure that sufficient progress in all Member States can be achieved.

### **3.2. 'Yellow card'- procedures and policy outcome – the case of the European Public Prosecutor's Office**

In 2017, the Union legislator adopted for the first time a legislative proposal on which a so-called 'yellow card' procedure had been triggered pursuant to Article 7(2) of Protocol No 2 to the Treaties.

This was the proposal for a Council Regulation establishing the European Public Prosecutor's Office (EPPO)<sup>55</sup> which had been adopted by the Commission on 17 July 2013. The aim of the proposal was to set up a European Public Prosecutor's Office and empower it to investigate and prosecute perpetrators of offences affecting the EU's financial interests. The European Public Prosecutor's Office would be an EU body consisting of a central office and a decentralised structure. In 2013, the Commission received 13 reasoned opinions<sup>56</sup> from national Parliaments on the proposal, representing 18 out of 56 possible votes, i.e. a quarter of the votes allocated to national Parliaments<sup>57</sup>. Among the concerns expressed in the reasoned opinions, the chambers argued that the Commission had not sufficiently explained how the proposal complied with the principle of subsidiarity, that existing mechanisms in place in Member States were sufficient and that no added value of the measures could be demonstrated. Parliaments also raised concerns relating to the structure and scope of the Office's competences.

After confirming that the 'yellow card' procedure laid down in Protocol No 2 had been triggered, the Commission carried out a review of the proposal, following which it issued a Communication on 27 November 2013<sup>58</sup> carefully analysing the reasoned opinions received from the perspective of the principle of subsidiarity. In particular, the Commission considered that the explanatory memorandum and the impact assessment sufficiently explained why action at national level would not achieve the policy objective and why, by contrast, Union level action could achieve this. On that basis, the Commission decided to maintain the proposal.

The Council adopted a Regulation establishing the European Public Prosecutor's Office on 12 October 2017.<sup>59</sup> The Regulation was adopted under the enhanced cooperation procedure<sup>60</sup> by 16<sup>61</sup> out of the 28 Member States. By the date of entry into force of the Regulation, another six Member States joined the enhanced cooperation. Four of the 11 Member States whose parliamentary chambers had submitted reasoned opinions have so far not decided to participate in the enhanced cooperation (Hungary, Ireland, Sweden and the United Kingdom). Seven

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<sup>55</sup> COM(2013) 534 final.

<sup>56</sup> From the Cypriot *Vouli ton Antiprosopon* (2 votes), Czech *Senát* (1 vote), French *Sénat* (1 vote), Hungarian *Országgyűlés* (2 votes), Irish Houses of the *Oireachtas* (both chambers — 2 votes), Maltese *Kamra tad-Deputati* (2 votes), Romanian *Camera Deputaţilor* (1 vote), Slovenian *Državni zbor* (1 vote), Swedish *Riksdag* (2 votes), Dutch *Eerste Kamer* (1 vote), Dutch *Tweede Kamer* (1 vote), British House of Commons (1 vote) and British House of Lords (1 vote).

<sup>57</sup> Each national Parliament has two votes; where a national Parliament is bicameral, one vote is allocated to each chamber. Each chamber is entitled to issue reasoned opinions independently. Under Article 7(2) of Protocol No 2, only 14 votes were needed to trigger a 'yellow card'- procedure as the proposal in question was adopted in the area of freedom security and justice.

<sup>58</sup> COM(2013) 851 final.

<sup>59</sup> Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO'), OJ L 283, 31.10.2017, p. 1. The European Parliament had consented to the enhanced cooperation on 5.10.2017, cf. <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fTEXT%2bTA%2bP8-TA-2017-0384%2b0%2bDOC%2bXML%2bV0%2f%2fEN&language=EN>.

<sup>60</sup> See Article 20 in the Treaty on European Union and Articles 326 to 334 in the Treaty on the Functioning of the European Union.

<sup>61</sup> Belgium, Bulgaria, Czech Republic, Cyprus, Germany, Spain, Estonia, Finland, France, Greece, Croatia, Italy, Latvia, Lithuania, Luxembourg, Austria, Portugal, Romania, Slovakia and Slovenia.

Member States, whose parliamentary chambers had submitted reasoned opinions (Cyprus, Czech Republic, France, Malta, the Netherlands, Romania and Slovenia) have joined the enhanced cooperation. The Regulation as adopted by the Council differs from the Commission's initial proposal on a number of substantial points, seeking to reflect, in part, the main concerns expressed by national Parliaments, therefore taking them into account in the legislative process: the Regulation now provides, in addition to the European Chief Prosecutor, that one European Prosecutor from each participating Member State will be present at the central level, forming the College of the European Public Prosecutor's Office. Similarly, the Office no longer has an exclusive but a shared competence for the criminal offences defined in the Directive on the fight against fraud to the Union's financial interests by means of criminal law<sup>62</sup>. The Commission will keep the development of the newly established European Public Prosecutor's Office under close review, notably to assess whether it will be fully efficient in the protection of the financial interests of the Union against fraud.

#### 4. CONCLUSION

As in previous years, the principles of subsidiarity and proportionality remained at the core of the legislative discussions in 2017. All institutions involved in European decision-making were active in ensuring the application and monitoring of these principles. National Parliaments continued to intensively use the subsidiarity control mechanism, submitting a high number of Reasoned Opinions, and also regional Parliaments with legislative powers continued to engage in the subsidiarity control mechanism on issues relevant to them. For the Commission, the continued implementation of its reinforced Better Regulation agenda was in focus, as well as its practice of evaluating existing policy frameworks before presenting legislative revisions. Subsidiarity control and monitoring issues also figured prominently on the respective agenda of the European Parliament and the Committee of the Regions.

2017 was also the year in which the Union legislator adopted for the first time a legislative proposal on which a so-called 'yellow card'- procedure had been triggered, namely on the proposal for a Council Regulation establishing the European Public Prosecutor's Office. After years of negotiations, the Regulation was finally adopted in an enhanced cooperation procedure, differing on several aspects from the Commission's initial proposals but nevertheless establishing the new office.

Institutions at all levels were also involved in reflections on how to ensure and improve the application of the subsidiarity and proportionality principles. The European Parliament debated subsidiarity and proportionality issues in the framework of its regular own-initiative reports. The Commission initiated an interinstitutional reflection through the establishment of the Task Force on Subsidiarity, Proportionality and 'Doing Less More Efficiently' under the chairmanship of First Vice-President, which delivered its report to President Juncker on 10 July 2018. In the final report<sup>63</sup> that was submitted to President Juncker on 10 July 2018, the Task Force made proposals for improvements within the existing set-up for involving national and regional Parliaments and regional and local authorities in the preparation and implementation of Union legislation, and pointed to improvements that would require a change of the Treaties. In a Communication adopted in conjunction with the present report<sup>64</sup>, the Commission sets out how from its side it intends to follow-up on the recommendations of the Task Force in the context of the Commission's own Better Regulation agenda and its continuing commitment to initiate action at

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<sup>62</sup> Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law, OJ L 198, 28.7.2017, p. 29.

<sup>63</sup> [https://ec.europa.eu/commission/sites/beta-political/files/report-task-force-subsidiarity-proportionality-doing-less-more-efficiently\\_1.pdf](https://ec.europa.eu/commission/sites/beta-political/files/report-task-force-subsidiarity-proportionality-doing-less-more-efficiently_1.pdf)

<sup>64</sup> COM(2018) 703.

European level only if its added value over and above measures taken at national, regional or local levels is evident.

The results of the work of the Task Force will contribute to efforts to embed subsidiarity and proportionality even more firmly in the working procedures of the main stakeholders.