



Task Force on Subsidiarity, Proportionality and "Doing Less More Efficiently"

***Minutes of the 3rd meeting of the Task Force:
Brussels, 15 March 2018, 14.30-15.30.***

Participants:

Members of the Task Force

Mr. Frans TIMMERMANS, Chairman and First Vice-President of the European Commission;
Mr. Karl-Heinz LAMBERTZ, President of the European Committee of the Regions;
Dr. Michael SCHNEIDER, Member of the European Committee of the Regions;
Mr. François DECOSTER, Member of the European Committee of the Regions;
Mr. Toomas VITSUT, Member of the (Estonian) Riigikogu;
Dr. Reinhold LOPATKA, Member of the Austrian National Council;
Mr Kristian VIGENIN, Member of the National Assembly of the Republic of Bulgaria.

Invited guests

President Koen LENAERTS, Court of Justice of the European Union;
Professor Michael DOUGAN, University of Liverpool, the United Kingdom.

Assistants and secretariat

Mr. Thomas Wobben, European Committee of the Regions;
Mr. Michael Collins, European Committee of the Regions;
Mr. Christian Gsodam, European Committee of the Regions;
Ms. Tuuli Reissaar, Deputy Representative of the Riigikogu to the European Parliament – (accompanying Mr. Toomas Vitsut);
Ms. Lidiya Simova, Representative of the National Assembly of the Republic of Bulgaria at the European Parliament (assistant of Mr Kristian Vigenin, Member of the Task Force);
Mr. David Liebich (accompanying Dr. Lopatka);
Mr. Michael Shotter, Cabinet of President Juncker;
Mr. Maarten Smit, Cabinet of the First Vice President;
Mr. Jorrit Rijpma, Cabinet of the First Vice President;
Mr. John Watson, European Commission, Secretariat;
Mr. Duncan Johnstone, European Commission, Secretariat;
Mr. Detlev Clemens, European Commission Secretariat;
Mr. Luis Romero Requena, European Commission (Head of the Legal Service);
Mr. Pieter Van Nuffel, European Commission (Legal Service);
Mr. Bernhard Schima, European Commission (Legal Service).

Opening of the Meeting by the First Vice-President Frans Timmermans

The Chairman of the Task Force welcomed the members and Professor Dougan and explained that the meeting would focus on the application of subsidiarity and proportionality in the work of the institutions. The Chair thanked the members for their considerable efforts in having prepared and circulated the two additional papers before the meeting. These would provide an excellent basis for the discussion along with the paper prepared from the Secretariat.

The Chairman also drew attention to the feedback and increasing volume of inputs which had been received by the Secretariat or via the Task Force's website which was providing a rich source of material for the Task Force's work.

The Chairman confirmed that the position of the European Parliament about its participation had not changed since the first meeting and so the Task Force would continue in its current format.

Approval of minutes of the 1st meeting on 23 February 2018

The minutes were approved with a minor addition to refer to "elected" EU liaison officers and "elected" local officials. The amended minutes would be uploaded to the web site of the Task Force.

The Chairman agreed to circulate the draft minutes of today's meeting by the 23 March so that they could be used in connection with upcoming working group meetings in COSAC on 26 March.

Summary of the discussion at the previous Task Force meeting on the participation of local and regional authorities in the preparation and follow-up of Union policies.

The Chairman referred to the paper prepared by the Secretariat summarising the discussion of the previous meeting together with illustrative actions for the various institutions and bodies.

There was agreement that the Task Force should begin to set out in greater detail the issues on which possible recommendations/actions in the final report could focus, distinguishing the areas where there was consensus amongst all members and areas where there was as yet no full agreement. This would help focus the future discussions of the Task Force. Discussions at technical level would follow to make progress on this. There was also a desire to see already an outline of the final report in terms of its structure and contents.

Exchange of views on the application of subsidiarity and proportionality by the institutions in their work.

The Chairman introduced the paper¹ prepared by the Secretariat which provided background information and a series of questions to guide the discussion. He also invited President Lambertz and Dr Lopatka to introduce the papers they had circulated prior to the meeting^{2,3}.

President Lambertz highlighted the need to check subsidiarity and proportionality at the end of the legislative procedure (as well as at the beginning) because of the substantial changes

¹ https://ec.europa.eu/commission/sites/beta-political/files/5-3-2018-2018-tf-discussion-paper-no3-institutional-work_en.pdf

² https://ec.europa.eu/commission/publications/contribution-european-committee-regions-members-task-force-subsidiarity-and-proportionality-principles_en

³ https://ec.europa.eu/commission/sites/beta-political/files/paperdrlopatkats15-3-18_final_en_0.pdf

introduced by the co-legislators. He also pointed to the need for a common understanding of subsidiarity and proportionality to guide the work of the institutions and the national Parliaments. An early consultation and involvement of local and regional authorities may lessen recourse to the formal subsidiarity control mechanism. In addition, better feedback should be given to the local and regional authorities when they engage in policymaking and implementation processes.

Dr Lopatka summarised some of the 23 tangible proposals set out in his paper. These included: the parameters of the subsidiarity control mechanism, the involvement of national Parliaments during legislative procedure, the use of non-legislative instruments, the interinstitutional agreement on better law making, impact assessment, "one-in-one-out targets for regulatory burden reduction, fewer delegated acts, and the use of directives instead of regulations.

The Chairman welcomed the President of the Court of Justice, Koen Lenaerts, to the meeting and invited him and Professor Dougan to make presentations to kick-start the discussion.

President Lenaerts described the four constitutional principles which are relevant to the work of the Task Force: the principle of conferral (*Articles 4(1) and 5(2) TEU; Article 2 TFEU*), the principle of subsidiarity (*Article 5(3) TEU*), the principle of proportionality (*Article 5(4) TEU*), and the principle of sincere cooperation (*Article 4(3) TEU*). Those principles – together with Title II TEU (concerning the Treaty provisions on democratic principles) and Protocols No. 1 and No. 2 (respectively, on the role of National Parliaments and on the application of the principles of subsidiary and proportionality) – provide the framework within which the EU institutions must operate. Subsidiarity could also be considered as a meta-constitutional principle that was taken into account by the authors of the Treaties when deciding the competences that were to be transferred from the Member States to the EU. From this overview, the following salient points emerged:

- The principle of subsidiarity does not apply to areas where the EU enjoys exclusive competences. By contrast, it applies to areas where the EU and the Member States share competences. Those areas are listed in Article 4(2) TFEU and include virtually everything the Union does in the “area without internal frontiers” established by the Single European Act and the shift to the internal market from the common market.
- European added value is the key factor that determines whether the Union should act. Such added value ought to be obvious, the result of common sense and capable of being explained easily to the man or woman in the street.
- Article 4(2) TEU requires respect for national identity (including local and regional self-government) and equality between Member States before the Treaties. Moreover, the EU is, first and foremost, a ‘union of values’ where all the Member States share the same degree of commitment to respecting those values. That same degree of commitment gives rise to mutual trust.
- However, where the Member States do not trust each other, the EU has no choice but to promote a heightened level of detail and prescription in Union legislation (directives). The lack of trust between Member States also weakens the effectiveness of “mutual recognition” as a means to lessen the “density” of legislation. Member States need to be more consistent – if they demand greater freedom/ flexibility for themselves, then they must accept that the same applies to others.

- The balance between detail/prescription and national discretion is the shared responsibility of the European Parliament, the Council and the Commission.
- The Task Force should have as a key aim the identification of specific EU policies in respect of which a European added value can no longer be found. The EU measures that implement those policies should, therefore, be repealed or, where appropriate, the legislative density of those measures should be reduced so as to allow room for the exercise of policy choices by local and regional governments.
- Subsidiarity is, however, a two-way street and the same test of European added value would in many cases point to the necessity for Union-level action.

Professor Dougan concentrated on the practical operation of the subsidiarity principle and the subsidiarity control mechanism as well as potential reforms to it. He highlighted the following points:

- There is a *perception* that the existing subsidiarity control mechanism is not effective due to the limited number of “yellow card” procedures triggered so far. However, this is not necessarily evidence of current subsidiarity controls not working. Relevant factors might be the lack of a common understanding about subsidiarity and the different practices and degrees to which national Parliaments engage in the control mechanism (some preferring to concentrate resources on controlling their national representatives in the Council).
- It was a practical reality that national Parliaments often raised issues in their reasoned opinions which went beyond “pure subsidiarity”. This was because there was no shared understanding about whether subsidiarity should mean economic/regulatory added value; or promoting decentralization; or simply a procedural principle to permit meaningful expression. In the latter cases, national parliamentary concerns are not always addressed comprehensively by the Commission's more focused approach. The Commission might consider addressing these concerns in a more substantial manner to take greater account of national Parliaments in the policymaking process.
- The assessment of subsidiarity in the area of the internal market (and the area of freedom, security and justice) is often regarded as insufficient because the presence of a cross-border issue effectively meant that no further or deeper subsidiarity analysis was done. Issues to consider could be minimum harmonisation, mutual recognition, national implementing authorities (rather than EU bodies) and avoid legislating in wholly internal situations. There was also uncertainty about what EU added value should mean in non-cross-border situations.
- The European Council conclusions of February 2016 had already agreed an extension of the period given to national Parliaments to submit reasoned opinions from 8 weeks to 12 weeks (for the purposes of the Council’s deliberations on the relevant legislative proposal).
- A more consistent approach by national Parliaments was desirable for the subsidiarity control mechanism. The introduction of a red card (veto) for national Parliaments would not bring clear added value in the absence of any shared understanding on the meaning and scope of subsidiarity by the national Parliaments. As the Task Force discussion paper showed, the thresholds for “yellow cards” would have to be reduced substantially below one quarter of all votes to have any meaningful effect.

- Subsidiarity needs not only to be done but must also be seen to be done. The engagement and visibility of national Parliaments should be reinforced therefore.

There was a fruitful exchange of views drawing on the content of the papers circulated before the meeting and the presentations from President Lenaerts and Professor Dougan. The following salient points emerged from the discussion:

- The Court of Justice's role was to check the procedural aspects of the conformity with the principle of subsidiarity. The Court cannot step into the shoes of the EU Legislator. The check on the substance of subsidiarity is essentially a political question that falls within the purview of the EU political institutions and the national Parliaments. In that regard, the authors of the Treaties have envisaged a strong involvement of national Parliaments in the *ex-ante* monitoring of that constitutional principle (see Article 12 TEU, Protocols No. 1 and No. 2).
- European added value was the key determining factor but how could one promote a greater operational clarity and common understanding about it? Perhaps using something like the assessment grid used by the Committee of the Regions or the criteria that once appeared in the Treaty of Maastricht? A common presentation/checklist that draws on the relevant case law of the Court could also be useful.
- The added value of an EU policy needs to be monitored continuously. The Union can repeal an EU measure in respect of which the European added value is no longer present. That absence can also require the legislative density to be reduced.
- There is little difference between the content/form of directives and that of regulations following the current practices of the Union's institutions (however, in terms of redress for individuals, there is a difference, since directives that are not properly implemented may not produce horizontal direct effect). In that regard, is there a way to monitor whether the EU institutions have chosen a legal instrument that is in keeping with the principle of subsidiarity?

The Chair concluded the discussion and indicated that the Secretariat would draw-up a summary of key potential recommendations which would be discussed at a future "stock-taking" meeting.

Next Meeting (s): Topics for discussion.

The Chairman agreed that the Secretariat and the assistants of the members should meet to discuss the practical arrangements of the planned hearing on 28 May which would be held in close proximity with the Task Force meeting on that date.

The Chair also agreed to look at finding an appropriate date to reschedule the meeting envisaged for 28 June until after the plenary session of the Committee of the Regions on 4/5 July. Members would be contacted about their availability in due course by the Secretariat.

The next meeting will be on 28 April and would look at how to identify policy areas and files where the Union might cease to act or act more efficiently.