Hungary's contribution to the work of the European Commission's Task Force on Subsidiarity, Proportionality and 'Doing Less More Efficiently'

General observations

Hungary welcomes the establishment of the Commission's Task Force on Subsidiarity, Proportionality and "Doing Less More Efficiently". The basic purpose and principle of the Task Force are closely linked to and in line with the Hungarian position concerning the future of EU legislation. The principles of subsidiarity and proportionality should be fully respected in every policy area. In this spirit, we trust that the Task Force will be able to deliver tangible results despite its rapid establishment, limited size and short life span.

We especially support "doing less more efficiently" in the area of Justice and Home Affairs which was also declared in the Strategic guidelines for the area of freedom, security and justice in 2014: 'Building on the past programmes, the overall priority now is to consistently transpose, effectively implement and consolidate the legal instruments and policy measures in place.'

Regarding the specific tasks mentioned in the Working Methods of the Task Force, we propose considering the suggestions below.

Future legislation should fully respect the principles of subsidiarity and proportionality and it has to be based on actual needs and evaluation, and should give priority to quality, less legislation, more consolidation and better implementation.

Generally, it is of outmost importance that legislative proposals do not go beyond the division of powers as established by the Treaties. Action taken at EU level should in all cases be underpinned by a clear legal basis in the Treaties (requesting the opinion of the Council Legal Service whether the legal basis is suitable was necessary in several cases recently). It is essential that the Commission refrains from introducing proposals with an indirect or uncertain legal basis. This is particularly true for the Single Market Information Tool proposal, which extends the scope of Commission's existing information gathering powers. Hungary believes that the proposal is not in line with the principle of subsidiarity and proportionality and shares the opinion of the Council Legal Service that the present proposal cannot be validly based on any of the legal bases cited by the Commission.[1]

If the Treaties do not confer competence on the EU in a specific policy area and the Commission thus cannot propose legislation, it should in principle also refrain from issuing soft law measures, non-binding communications or recommendations or taking an activist approach to that policy area in some other way. In this respect a recent outstanding example is the idea of implementing the European Pillar of Social Rights through different proposals (including the European Semester) entailing legal and possible financial consequences (see below). As the Proclamation is an atypical act of a political nature which does not create legally binding rights and obligations and the Member States are encouraged to act in order to give effect, but are not legally bound to do so, while many of the 20 principles and rights fall primarily or exclusively under the competence of Member States, the implementation of the

[1] Hungary has already expressed its arguments in the joint non-paper which is addressed to the European Commission and signed by Hungary, Germany, Austria, France, Poland, Croatia, Romania, Slovakia, Spain, Cyprus, Latvia and Greece on 15 October 2017.

political goals defined in the Pillar requires special attention also from the point of view of the principles of subsidiarity and proportionality.

Protocol (No 2) on the application of the principles of subsidiarity and proportionality should be taken much more seriously and expeditiously. The justifications on legal basis, subsidiarity and proportionality in the Commission's proposals are often too general and too broad, which is clearly contrary to Article 5 of the Protocol (No 2) as it states clearly that an exhaustive, detailed and well-founded assessment should always be carried out.[2] All proposed legal instrument should respond to real, well founded needs. A detailed analysis based on objective and wide-range data on foreseeable benefits and implementation costs at EU and also at national level should in all cases accompany a proposal.

Prior to the elaboration and introduction of a new legislative proposal, it has to be assessed whether the issue intended to be regulated by the Commission is an EU-wide problem (e.g. if it affects at least half of the Member States). This assessment should also include whether the proposed solution will have practical benefits and added value compared to the existing EU or Council of Europe instruments or to the available practical solutions of Member States.

Member States should be more involved in the identification of these legislative needs because their courts and authorities meet the real cases which bring to the surface the necessity of future legal instruments at the Union level. It is also important to avoid the waste of resources and efforts allocated to works on instruments for which a real need is not justified because a very relevant side effect is that less resource can be devoted to other, more needed instruments. This would perfectly fit in the "doing less more efficiently" approach.

Civil law

The introduction of judicial cooperation in civil matters into the Union legal order (currently governed by Article 81 TFEU) and the evolving list of legal instruments adopted on this legal basis have greatly contributed to the improvement of legal certainty when people or undertakings face situations with cross-border element governed by civil law. Due to the nature of the cases covered it is generally accepted that common rules on jurisdiction, applicable law, recognition and enforcement of decisions, as well as on cooperation between courts and other authorities dealing with civil matters are more efficient than individual national laws. Therefore, subsidiarity and proportionality in this field is usually not questioned regarding the Commission's proposals. However, it does not mean that certain individual provisions of proposals do not raise doubts, especially when proposals intend to introduce unified rules relating to certain procedural issues.

[2] Article 5 of Protocol (No 2): Draft legislative acts shall be justified with regard to the principles of subsidiarity and proportionality. Any draft legislative act should contain a detailed statement making it possible to appraise compliance with the principles of subsidiarity and proportionality. This statement should contain some assessment of the proposal's financial impact and, in the case of a directive, of its implications for the rules to be put in place by Member States, including, where necessary, the regional legislation. The reasons for concluding that a Union objective can be better achieved at Union level shall be substantiated by qualitative and, wherever possible, quantitative indicators. Draft legislative acts shall take account of the need for any burden, whether financial or administrative, falling upon the Union, national governments, regional or local authorities, economic operators and citizens, to be minimised and commensurate with the objective to be achieved.

Looking at the field of civil law from a wider view, not only limited to matters governed by Article 81 TFEU, the situation is less positive. The proposal on the Common European Sales Law (CESL) was a prime example for that.

Efficiency could also be improved by the better preparation of legislative proposals. In the field of judicial cooperation in civil matters, EU legal instruments, which are mostly regulations, must function in the framework of the very different legal systems of Member States. Another example is the proposal on the Succession Regulation (No 650/2012) where the Commission's proposal did not take into account the national system of several Member States where notaries act in certain cases. Consequently, all the work to adjust the Regulation to those systems had to be done during the legislative procedure. These differences must be taken into account from the beginning regarding all proposals, which, again highlights the importance of involving the Member States from the very early stages of the preparation of proposals.

Regarding the return of competences to Member States, we believe that in the field of judicial cooperation in civil matters Member States should be given more possibility to negotiate and conclude international agreements with third states. In a great part of this field the Union has exclusive external competence which prevents Member States from negotiating and concluding agreements with thirds states. However, while there might not be an interest at the EU level to deal with certain third states, geographical, historical, cultural or other ties between a Member State and a third state may create a legitimate need for that Member State to have an agreement with the third state in question. This idea has been acknowledged by Regulations No 662/2009 and 664/2009 by providing a mechanism for allowing Member States to deal with third states even in certain fields that belong to the exclusive external competence of the EU. We would suggest considering the extension of this possibility to other areas of judicial cooperation in civil matters as well. Individual Member States having agreements with thirds states is beneficial for citizens and undertakings of that Member State, facilitates civil procedures connected to the third state concerned and generally improves legal certainty. The protection of the interests of the EU and the acquis would on the other hand be ensured by the mechanism which has been introduced by the Regulations cited above.

Criminal law

In connection with the field of criminal law, a consolidation period should begin from now on; no further legislation is required in this area in the near future except the ones in progress. We have to endeavour to thoroughly examine both the existing and adopted regulations and the regulations to be adopted in the near future. We have to assess the operating mechanism of the framework decisions and directives in practice and whether they come up to our previous expectations or not, thus we particularly support the elaboration of an effective assessment mechanism. We would like to give priority to efforts to be taken in order to improve the daily application of the EU instruments. We believe that in order to achieve the above, EU legislation concerning criminal procedural law and substantive criminal law should exclusively be considered in the future when practical experiences shows its necessity in the interest of efficient cooperation.

Two legal acts were submitted recently in the form of Regulation (in relation to the issues of confiscation and e-evidence) in the field of criminal procedural law. However, the ruling of these issues in a Directive could have been applicable and proportional, since Directives give certain flexibility to Member States to adjust their national legislation to EU rules. Legislation

in the form of a Regulation is more restrictive due to its direct effect. We do not agree to this procedure, it has to be avoided to create a precedent and we believe that the choice of legal form for future instruments should be carefully assessed on a case-by-case basis taking into account the effectiveness of the instrument and the principles of proportionality and subsidiarity amongst others.

The European Pillar of Social Rights

Ever since the publication of the proposal for the establishment of the European Pillar of Social Rights, especially in light of its signature and proclamation last November, the Commission has launched several legislative and non-legislative proposals in order to implement its principles. Yet, the negotiations of the specific proposals referred to below so far made it clear that not only Hungary but most Member States have well-established and serious concerns, typically by referring to the breach of the principles of subsidiarity and proportionality, emphasizing the importance of respecting the competences of Member States as laid down in the Treaties. In this regard we would also like to remind the opinion of the Council Legal Service underlining that an atypical document, such as the Proclamation, shall not prejudice the position of EU Institutions and Member States regarding specific initiatives and proposals linked to it[3].

The Pillar itself confirms that it does not affect the right of the Member States to define the fundamental principles of their social security systems and manage their public finances, and different socio-economic environments as well as the diversity of national systems in accordance with the principle of subsidiarity and proportionality should be taken due account during the implementation[4]. Despite all these, the Commission's proposals mentioned below seem not to meet these requirements.

While the general objectives of the **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**[5] are welcomed by Hungary, we are concerned that the directive would have an excessive impact on the already existing and well-functioning national models. EU harmonisation in this particular area cannot be justified from the point of view of the principle of subsidiarity since the targeted regulatory area has no cross-border element. Any proposal at Union level shall respect the differences of the individual national systems. We are convinced that only the basic directions could be designated for Member States at the EU level, providing greater flexibility to set the tools and instruments, schedules and priorities needed to achieve the desired goal at national level.

The **proposal for a directive of the European Parliament and of the Council on transparent and predictable working conditions in the European Union**[6] aims at improving working conditions by laying down minimum rights that apply to every worker in

[3] The legal nature of the Social Pillar was also analysed by the Council Legal Service (Opinion of 19 September 2017, doc. 12077/17, the version partially accessible to the public is available at: http://data.consilium.europa.eu/doc/document/ST-12077-2017-INIT/en/pdf). CLS confirmed that the Proclamation is an atypical act with a political nature which does not create legally binding rights and obligations with respect to the persons falling within its personal scope and its addressees (point 14). The CLS recommended recalling in the proclamation that as an atypical document, it cannot prejudice the positions that the Council takes in specific future dossiers, legislative or otherwise (point 20).
[4] Preambles (17) and (18) of the proclamation
[5] COM(2017) 253 final
[6] COM(2017) 797 final

the Union, in order to promote more secure and predictable employment while ensuring labour market adaptability. The question of subsidiarity and proportionality is at the centre of the debate in this case as well. The majority of Member States considers the proposal to be overreaching, and argues that it seriously violates the competences of Member States, the principles of subsidiarity and proportionality. One of the main issues is defining the notion of 'worker' and 'employer' within an EU legal act which has led to the opposition of almost all Member States, including Hungary. Even some national Parliaments formulated strong criticism against the Commission's proposal in which they referred to the proposed rules as a 'clear risk' that could lead to disruption in efficiently functioning national systems by violating of the principles of subsidiarity and proportionality.

Concerns of subsidiarity also arose in relation to the **proposal for a Regulation of the European Parliament and of the Council establishing a European Labour Authority**[7]**.** The competences of the proposed new decentralised EU agency are not clearly pointed out in the proposal; therefore, there is a serious concern about the possible overlap of competences of this Authority and other EU or national bodies. For just one example, the area of labour inspectorates, which falls within the competence of Member States; but others, like the field of social security could also be mentioned, where the new Authority cannot be considered to provide added value compared with that already carried out by the Administrative Commission for the Coordination of Social Security Systems or the Audit Board. We also have serious concerns that the proposal contains reference to the 2 million workers in the road transport sector. The need for the new Authority, its tangible benefits and added value to the existing institutions and forums are unclear for us. It is clear, that the free movement of workers and the freedom to provide services within the Union depend on clear, fair and effectively enforced rules on cross-border labour mobility and social security coordination, and it is also clear there are difficulties in this field, however this proposal does not provide enough evidence that these problems will be addressed by the suggested measures. Furthermore, it might be disproportionate to create such an overarching institution with such a substantial budget. Instead, synergies should be found within the existing bodies and their operation should be streamlined.

The Commission published its proposal for a **Council recommendation on access to social protection for workers and the self-employed** this March. In Article 2 the proposal declares that 'the Recommendation aims to establish minimum standards in the field of social protection of workers and the self-employed' and it would provide guidance for Member States regarding the coverage and adequacy of several social benefits being under its scope. Besides, however the impact assessment focuses on non-standard workers and self-employed, the Recommendation extends the personal scope having reference to *all* workers. According to our assessment all these rules together could influence the whole national social protection system and its fundamental principles which is not in line with Article 153 paragraph (4) TFEU. The Commission also proposed to prepare national action plans for the implementation and it would be monitored through the European Semester. While Article 288 TFEU confirms that recommendations shall have no binding force, through the Semester and its link to EU funds[8] this recommendation seems to be binding in an indirect way. Therefore, in our opinion this proposal does not respect the principle of subsidiarity and proportionality.

The Commission proposed to strengthen **the monitoring of implementation of the Pillar in the European Semester.** In its communication the Commission stated that it decided 'to put

[7] COM(2018) 131 final
[8] Article 23 of Regulation (EU) No 1303/2013 of the European Parliament and of the Council

greater focus on social priorities and put them on a par with economic objectives at the core of the annual cycle of economic governance, with this year's cycle also reflecting for the first time the priorities of the European Pillar of Social Rights'[9]. Hungary stresses that no overall decision has been taken to incorporate the Pillar into the European Semester. Linking the Pillar to other acts, in particular acts relating to the European Semester needs consultation, and case-by case decisions from the Member States. It was also confirmed in the opinion 12077/17 of the Council Legal Service[10]. These acts entail legal consequences and the signature of the Proclamation by the three institutions does not entail an acceptance of any of these initiatives. To seek to produce legal effects through a legally non-binding act would be tantamount to circumventing the rules laid down by the Treaty, in particular the requirement of a proposal from the Commission and, where appropriate, a codecision procedure with the European Parliament, and an atypical act of this kind would be liable to be annulled by the Court of Justice of the European Union.

The only tool has already been decided is to use the 12 (out of 14) indicators of the social scoreboard in the Joint Employment Report. While based on Article 148 TFEU the annual amendment of the Employment Guidelines which could legally create the link between the Social Pillar and the Semester, is under way and it is to be adopted by the EPSCO Council this June. However, it should be underlined that the heads of states or governments have touched upon this issue at the December 2017 and March 2018 summits but has not taken any decision to create any link between the Pillar and the European Semester. Using the European Semester for the implementation of the European Pillar of Social Rights without the consent of Member States would clearly circumvent the principles of conferral of powers and subsidiarity in all those policy areas which fall under the competence of Member States.

Considerations for the potential improvement of the current 'yellow card' system

Hungary believes that enhancing the role of national Parliaments in the EU's decision-making process contributes to the strengthening of democratic control as well as overcoming democratic deficit. Originally, the subsidiarity control mechanism has been developed to meet that objective. However, the negative experiences regarding its practical functioning show that the mechanism failed to deliver the expected results and so national Parliaments were unable to exert an impact on the Union's decision-making process; there were altogether only three successful 'yellow card' procedures launched by national Parliaments, and the Commission revoked only one of its challenged proposals (Monti II), whereas in the other two cases (the European Public Prosecutor's Office and the Posting of Workers Directive) it simply ignored the opposition of national Parliaments. In the latter case, it was particularly alarming that the European Commission disregarded the opinion of national Parliaments from eleven Member States representing more than 100 million Union citizens.

We therefore deem it necessary to strengthen the role of national legislations and empower them with the right to effectively block any legislation that their majority opposes. The introduction of one form of the 'red card' procedure may be based on the Council's unanimous agreement to discontinue the consideration of the draft legislative act in case the

[9] COM(2018) 130 final

[10] „*36. First, statements by the Commission in the documents accompanying the draft Proclamation indicate that it may, in the future, be linked to other acts, in particular acts relating to the European Semester and to Union Funds. Those acts may entail legal consequences. The appropriateness of referring to the Proclamation in any such acts will have to be assessed in the event that such proposals are made."*

mechanism is triggered, until the draft is amended to accommodate the concerns expressed in the reasoned opinions.

Since the eight-week deadline for reasoned opinions mostly proved too short for national Parliaments, we propose extending the time period during which the Council takes into account reasoned opinions for 12 weeks. Furthermore, we believe that objections in this 'red card procedure' should cover not only the principle of subsidiarity, but any concern of content.

Similar to the political consensus reached at the European Council of 18-19 February 2016[11] such an agreement would be without prejudice to Protocol (No 2) on the application of the principles of subsidiarity and proportionality and would be feasible in full respect of the procedural requirements of the Treaties.

Such a mechanism, which would in practice empower national Parliaments to halt unwanted legislation, would also foster the Commission's preliminary consultations on its legislative plans and would lead to more precisely elaborated proposals as well as a more thorough legislative programming. The system would further entail strengthening the cooperation mechanisms among national Parliaments and thereby the reinforcement of democratic control.

[11] Council Conclusions (EUCO 1/16) , Annex I, Section C from 18 and 19 February 2016