SENATE

PARLIAMENT OF THE CZECH REPUBLIC

How to better apply the principle of subsidiarity and the subsidiarity control mechanism

Recommendations to the Task Force on Subsidiarity, Proportionality and "Doing Less More Efficiently" based on Contributions of the COSAC

Paper from the COSAC delegation of the Senate of Parliament of the Czech Republic

Prague, 9 January 2018

We welcome the European Commission's endeavour to ensure better application of the principles of subsidiarity and proportionality manifested by the establishment of the Task Force on Subsidiarity, Proportionality and "Doing Less More Efficiently". It is only right that the Commission has decided to conduct a deeper review of the untapped potential in the application of these fundamental principles of EU law which are highly important also for the democratic functioning and accountability in the EU.

The subsidiarity control mechanism based in Protocol (No 2) on the application of the principles of subsidiarity and proportionality annexed to the Treaties was a result of the perceived lack of respect for the principle of subsidiarity in day-to-day EU politics and the insufficiency of self-control mechanisms of EU institutions. National parliaments were considered to be the natural guardians of this principle.

We are fully aware of the fact that the assessment of subsidiarity compliance is in the end a political one. At the same time, we are of the opinion that **practical improvements in the processes and attitudes are possible within the framework of the Treaties in order to give the fullest effect to the objectives of the principle of subsidiarity and its control mechanism**.

In this respect, **we would like to draw the attention of the Task Force to the contributions COSAC has made in the years since the Treaty of Lisbon came into force**. We would like to point out that these contributions have been adopted by consensus of the delegations that are regularly headed by chairpersons of EU affairs committees, i.e. by members of parliaments with considerable experience in EU affairs in general and subsidiarity control in particular. Drawing from these contributions, we would like to make a number of recommendations to the Task Force, while noting that this paper does not preclude any further contributions from the COSAC or from the national parliaments to the work of the Task Force.

The following paper presents and explains four recommendations based on COSAC Contributions adopted between 2010 and 2017:

1. The recess period from mid-December to early January and possibly other recess periods of EU institutions should be excluded from the counting of the deadline for the submission of reasoned opinions from the national parliaments in the same manner as the current arrangement regarding the month of August.
2. The Commission should set an internal deadline of 8 weeks for its replies to national parliaments' reasoned opinions. This deadline should start after the end of the deadline for submission of national parliaments' reasoned opinions. The month of August as well as any other periods not taken into account when determining the deadline for the submission of reasoned opinions should – by analogy – not be taken into account also when determining the deadline for the Commission's replies.
3. If the Commission proposes to replace, amend or supplement a legislative act or a draft that elicited the adoption of a significant number of reasoned opinions from the national parliaments, the Commission should demonstrate, in the explanatory memorandum of the new proposal, how the known subsidiarity concerns have been accommodated or how the facts or considerations relevant for the appraisal of compliance of the new proposal with the principle of subsidiarity have changed since the previous legislation.
4. Further elements of the impact assessments, in particular the qualitative and quantitative analysis relevant for the appraisal of the compliance of the draft legislative act with the principles of subsidiarity and proportionality, should be included in the explanatory memoranda of draft legislative acts in order to make them accessible in all official languages of the EU.

The last section of the paper calls for a more practical and open-minded approach to the dialogue on subsidiarity between the national parliaments and the Commission.

1. Exclusion of further recess periods from the counting of the 8-week period for the submission of reasoned opinions

Contribution of the LV COSAC (The Hague, 12 – 14 June 2016)

3.1. COSAC reiterates the contribution of the LIV COSAC in Luxembourg on the "yellow card" procedure (paragraph 4) and the need for improvement without Treaty change. COSAC also reiterates the invitation to the European Commission to consider excluding certain periods from the 8-week deadline. COSAC welcomes the current exclusion of the August period and encourages the European Commission to follow up on the aforementioned invitation in the same way.

Contribution of the LIV COSAC (Luxembourg, 29 November – 1 December 2015)

4.2. COSAC informs the European Commission that a vast majority of Parliaments whose views are presented in the 24th Bi-annual Report consider that the mid-December to New Year break should be excluded from the 8-week deadline provided by the treaties for a subsidiarity check and that a majority also stated that the recess periods in the EU institutions should be excluded as well. These periods should be announced annually by the European Commission.

4.3. COSAC invites the European Commission to consider excluding these periods from the 8-week deadline and invites the future Dutch Troika to present a follow-up on this matter to COSAC.

It is up to each national parliament to determine its procedures regarding the subsidiarity check, but the adoption of a reasoned opinion usually requires an analysis of the draft legislative act, communication with the government, debate in one or more committees and in some parliaments also a plenary debate. This is not an easy task to perform in 8 weeks considering the internal time schedules in the parliaments. On the other hand, it is clear that a general extension of the 8-week period, as proposed from time to time, would require amending the Treaties. However, this should not preclude practical arrangements regarding institutional recesses.

As early as 2009, the Commission was aware that in some cases, the 8-week period does not realistically allow the national parliaments to perform the subsidiarity scrutiny. Therefore the Commission declared that in order to take account of national parliaments' summer recesses, the whole month of August should not be taken into account when determining the deadline for the submission of reasoned opinions. (It should be added, however, that during the month of August, there is also an EU institutional recess.) This was done by a mere letter of the president and the vice-president of the Commission.[1] This practice has been maintained ever since and no doubts have been raised regarding its compatibility with the Treaties.

The national parliaments have repeatedly proposed that not only the month of August, but also the recess from mid-December to early January be excluded from the counting of the deadline. There are many practical reasons to do so: First, EU institutional recess means that no legislative negotiations take place. Second, in many parliaments, there is a winter recess that effectively shortens the time they really have for the subsidiarity check. Third, as a result of the working schedules of the Commission, there is a peak in the Commission's legislative activity before the end of the year. Many draft legislative acts are proposed by the Commission in late November and early December. This puts the national parliaments under increased time pressure. Excluding the usual two weeks of this EU recess period would facilitate the performance of subsidiarity control from the practical point of view. In line with the Contribution of the LIV COSAC quoted above, other recess periods of EU institutions announced annually by the European Commission could also be excluded.

There can be no strong argument against our proposal, if a similar arrangement is possible regarding the month of August without causing any problems whatsoever. In particular, no slowing down of the EU legislative procedure can occur, because even within the current 8-week period, draft legislative acts are regularly debated in the Council and its preparatory bodies. Furthermore, Article 4 of Protocol (No. 1) on the role of national parliaments in the European Union provides that

[1] http://ec.europa.eu/dgs/secretariat_general/relations/relations_other/npo/docs/letter_en.pdf

in cases of urgency and with due explanation, an agreement in the Council on a draft legislative act may be reached even before the 8-week period elapses.

The recess period from mid-December to early January and possibly other recess periods of the EU institutions should be excluded from the counting of the deadline for the submission of reasoned opinions from the national parliaments in the same manner as the current arrangement regarding the month of August.

2. Quality and timing of the Commission's responses to national parliaments' reasoned opinions and demonstrating the impact of reasoned opinions

Contribution of the LVI COSAC (Bratislava, 13 – 15 November 2016)

1.2 In the field of political dialogue between the European Commission and national Parliaments, COSAC sees potential for improvement of responses to national Parliaments' reasoned opinions and therefore suggests that the European Commission better addresses national Parliaments' specific concerns within a period of no more than eight weeks and analyse all possible points of views when preparing its responses, especially the responses when the so-called "yellow card" mechanism is triggered. COSAC also stresses the importance of discussions and exchanges of views in the subsidiarity check procedure between national Parliaments.

Contribution of the LV COSAC (The Hague, 12 – 14 June 2016)

3.2 COSAC supports the European Commission's endeavour to ensure better quality and more timely responses to reasoned opinions and contributions submitted by national Parliaments.

Contribution of the LIV COSAC (Luxembourg, 29 November – 1 December 2015)

4.4. COSAC furthermore reiterates its call upon the European Commission to strengthen efforts to ensure better quality and more timely responses to reasoned opinions.

Contribution of the L COSAC (Vilnius, 27 – 29 October 2013)

4.5. COSAC reaffirms its commitment to enhancing the democratic legitimacy in the EU and therefore suggests the following:

- COSAC calls on the EU institutions to demonstrate the impact of reasoned opinions and political dialogue contributions made by national Parliaments;
- COSAC calls on the European Commission, again, to ensure better quality and more timely responses to reasoned opinions and political dialogue contributions made by national Parliaments.

Contribution of the XLIX COSAC (Dublin, 23 – 25 June 2013)

26. COSAC acknowledges the work of the Commission in dealing with the large number of reasoned opinions sent to it by national Parliaments. However, COSAC urges the Commission to respond to reasoned opinions issued by national Parliaments with greater speed and with greater focus on the arguments contained within each reasoned opinion.

Given the strict 8-week period for the execution of the intricate subsidiarity check procedures in the national parliaments (including getting acquainted with the proposal in the first place), it would be welcome if also the Commission managed to reply to the reasoned opinions in a timely manner. This would facilitate further scrutiny of the draft legislative acts by the national parliaments, especially the dialogue with the government, which, in parallel, negotiates on the draft legislation in the Council.

The Commission's performance in this respect does not appear to be particularly satisfactory. For example, the Commission's replies to the last three reasoned opinions from the Czech Senate

arrived 71, 82 and 121 days after the deadline for submission of national parliaments' reasoned opinions, i.e. between 10 and 17 weeks after the Commission gathered all the reasoned opinions from the national parliaments.

We would consider it appropriate if the Commission made a commitment to reply to each reasoned opinion within 8 weeks from the end of the deadline for the submission of the reasoned opinions on the respective draft legislative act. Periods of EU institutional recess excluded from the counting of the deadline for submission of reasoned opinions should also be excluded from the counting of this deadline.

The Commission should set an internal deadline of 8 weeks for its replies to national parliaments' reasoned opinions. This deadline should start after the end of the deadline for submission of national parliaments' reasoned opinions. The month of August as well as any other periods not taken into account when determining the deadline for the submission of reasoned opinions should – by analogy – not be taken into account also when determining the deadline for the Commission's replies.

The COSAC has never been very concrete regarding what exactly should be improved on the Commission's reactions to reasoned opinions, apart from the fact that they should be more specific. The quality of the Commission's responses depends first and foremost on the concreteness and elaboration of arguments of the national parliaments' reasoned opinions. It is the duty of the national parliaments to state the reasons why they are of the opinion that a draft legislative act does not respect the principle of subsidiarity. If they fail to do so in a clear a concrete manner, the Commission cannot be expected to give a detailed answer to the national parliaments' concerns. However, where the reasoned opinions include a thorough argumentation, the Commission's responses should not be limited to a mere repetition of the explanatory memorandum of the proposal, because this has already been considered by the national parliaments during the subsidiarity scrutiny. An improvement on both sides is possible. Some ideas on how to approach the subsidiarity dialogue between the national parliaments and the Commission are outlined in Section 4 of this paper.

Regarding the demonstration of the impact of reasoned opinions (Contribution of the L COSAC quoted above), the annual Commission reports on the application of the principles of subsidiarity and proportionality provide good summaries. But the EU policy and legislation cycle usually extends past the one-year horizon of these reports. The Commission should be able to demonstrate that it continuously pays special attention to the principle of subsidiarity in policy areas where EU actions have in the past proven to be controversial among the national parliaments. This may be the case when the Commission proposes to replace, amend or supplement existing legislation (or an unsuccessful draft) that has met with a significant number of reasoned opinions from the national parliaments. In these cases, a thorough subsidiarity check of the new draft legislative acts may be expected. It would therefore be useful if the Commission could demonstrate how the new draft accommodates the known subsidiarity concerns or (possibly) how the facts or considerations relevant for the appraisal of compliance of the new proposal with the principle of subsidiarity have changed since the previous legislation. This practice could facilitate the subsidiarity scrutiny and help to bridge the differences of opinion in the early stage of the EU legislative procedure. At the same time, this practice would be narrowly focused on the most controversial EU legislation.

If the Commission proposes to replace, amend or supplement a legislative act or a draft that elicited the adoption of a significant number of reasoned opinions from the national parliaments, the Commission should demonstrate, in the explanatory memorandum of the new proposal, how the known subsidiarity concerns have been accommodated or how the facts or considerations relevant for the appraisal of compliance of the new proposal with the principle of subsidiarity have changed since the previous legislation.

This proposal is also related to the issue discussed in the following Section 3 of this paper.

3. Better justification of draft legislative acts with regard to the principles of subsidiarity and proportionality

Contribution of the XLV COSAC (Budapest, 29 – 31 May 2011)

4.3 In order for national Parliaments to be able to carry out subsidiarity checks in accordance with the aim of the Treaty of Lisbon, it is a prerequisite that the European Commission's proposals are thoroughly explained. COSAC recognizes the ongoing efforts of the European Commission to meet this demand, but underlines the importance for the Commission to continue and extend this work further.

Contribution of the XLVI COSAC (Warsaw, 2 – 4 October 2011)

2.3 In accordance with Article 5 of Protocol 2, COSAC underlines that for national Parliaments to exercise the powers vested in them it is necessary to enable the financial effects of EU draft legislative acts to be evaluated, and, in the case of Directives, the implications for national legal systems also to be evaluated. Moreover, COSAC recalls that EU draft legislative acts should be justified on the basis of qualitative and quantitative indicators. COSAC notes that subsidiarity analyses in the Commission's explanatory memoranda have, to date, not met the requirements of Article 5.

2.4 COSAC notes the concerns of national Parliaments with the quality and independent nature of impact assessments of EU draft legislative acts which at times are considered to be schematic and not satisfactory in substance. COSAC draws attention to the suggestion by a number of national Parliaments to have the full text of impact assessments translated into all official languages of the EU.

It is the duty of the Commission to justify an action at EU level with respect to the principles of subsidiarity and proportionality and this justification should form a part of the draft legislative act.[2] Where such justification is missing or is manifestly insufficient (superficial), the national parliaments cannot be expected to "make up" the Commission's justification and could eventually even consider the proposal in question as violating the principle of subsidiarity in the formal sense by not including the required justification.

It must be emphasized that there has been a significant improvement in the Commission's practice in justification of draft legislative acts in the years since the observations made at the XLVI and XLVII COSAC quoted above. The Commission's endeavours to that effect are recognized and supported. However, further improvement is possible and necessary.

The most complete publicly available source of information allowing the appraisal of compliance of a draft legislative act with the principles of subsidiarity and proportionality is the Commission's impact assessment. However, the impact assessments are not translated to all official EU languages. Therefore they are not easily accessible to EU citizens all over EU and to the members of national parliaments. The parliamentary administration cannot be expected to translate the impact assessments or their relevant parts within the 8-week period. While it is laudable that the Commission publishes impact assessment summaries in all official EU languages, these documents tend to be very brief and do not provide much information beyond what is included in the explanatory memorandum of the draft legislative act they accompany.

[2] Article 5 of Protocol (No. 2) on the application of the principles of subsidiarity and proportionality reads: "*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.*"

Therefore it is recommendable that more information from the impact assessment, especially the qualitative and quantitative analysis relevant for the appraisal of the compliance of the draft legislative act with the principles of subsidiarity and proportionality, is included (reproduced) in the explanatory memorandum of a draft legislative act. This would not only facilitate the subsidiarity scrutiny, but also increase the transparency of the EU legislative procedure vis-à-vis EU citizens. This would obviously increase the need for translation services, but we must bear in mind that the language diversity is a cultural heritage of Europe and the EU institutions must be able to communicate with all the citizens (i.e. in all the official languages of the EU), especially where potentially sensitive issues such as the necessity of new EU legislation are concerned.

Further elements of the impact assessments, in particular the qualitative and quantitative analysis relevant for the appraisal of the compliance of the draft legislative act with the principles of subsidiarity and proportionality, should be included in the explanatory memoranda of draft legislative acts in order to make them accessible in all official languages of the EU.

4. Interpretation of the scope of the principle of subsidiarity

Conclusions of the XLVIII COSAC (Nicosia, 14 – 16 October 2012)

2.1 COSAC notes that almost all national Parliaments take the principle of proportionality into consideration when examining draft legislative acts, even though in many cases it is not considered as a principle of an equal status to the subsidiarity principle under the Lisbon Treaty. Even though national parliaments are divided over the issue whether proportionality is an inextricable component of the subsidiarity principle, the majority of national Parliaments are of the opinion that a subsidiarity control is not effective enough if a proportionality check of the proposal at hand is not conducted.

There has never been a consensus among the national parliaments on how exactly should the scope of the principle of subsidiarity be interpreted. The quote above from the Conclusions of the XLVIII COSAC confirms this. We fully recognize that it is up to each national parliament/chamber to take its own approach. Still, we would like to make a few points that should not be overlooked in the work of the Task Force.

Article 5(3) of the Treaty on European Union prescribes the following: "*Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level. The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol.*" However, this not the sole provision on subsidiarity in the Treaties. The purpose of the principle of subsidiarity is also apparent from the Preamble of the Treaty on European Union, where the Member States express their resolution "*to continue the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen in accordance with the principle of subsidiarity*". This establishes a clear link between subsidiarity and democracy. Then there are other provisions in the Treaties that make more concrete references to how the EU competence shall be exercised.[3]

[3] For example Articles 153(4) and (5) of the Treaty on the Functioning of the European Union: "*4. The provisions adopted pursuant to this Article:*
- shall not affect the right of Member States to define the fundamental principles of their social security systems and must not significantly affect the financial equilibrium thereof,
- shall not prevent any Member State from maintaining or introducing more stringent protective measures compatible with the Treaties.

Why is this relevant for the interpretation of the principle of subsidiarity? The control of compliance with the principle of subsidiarity is entrusted to national parliaments, i.e. to political bodies, not judicial or audit bodies. Consequently, this control must be understood to be a political control. Compliance with the principle of subsidiarity can really only be appraised in relation to the content of a draft legislative act and its possible effects, not merely in relation to its generally outlined objectives (which sometimes seem to be the main points of subsidiarity justifications of draft legislative acts). In other words, the subsidiarity scrutiny cannot be understood merely as a technical exercise limited to questions of administrative and economic efficiency and effectiveness. It must also consider various social and political repercussions connected with the proposed action. The benefits gained by acting at EU level (i.e. the added value of the EU action and the reduction of the "cost of non-Europe") have to be significant and compare favourably with the interference in the democratic decision-making and responsibilities in the Member States and with the fact that EU-wide solutions are often unable to cater for the preferences of all Member States. This is not a matter of proportionality, but a matter of subsidiarity, because it relates to how the two levels of governance interact. We must be aware of the fact that EU-wide actions that are not convincingly explained and do not produce significant benefits may negatively impact on the public perception of EU policies and this in turn projects into the EU citizens' will expressed in national and European elections and other forms of democratic decision-making.

One of the tasks of the Task Force is defined by the President of the Commission as follows: "*The identification of any policy areas where, over time, decision making and/or implementation could be redelegated in whole or in part or definitively returned to the Member States.*"[4] We believe that we can hardly find complete policy areas where decision making could be re-delegated in whole or in part or definitively returned to the Member States. It rather seems that in any policy area, there are issues that all Member States want to deal with collectively at the EU level and other issues where there is no such accord or where the Member States prefer only a limited action at EU level or no action at all. It could be more beneficial to pay attention to detail than to use the principle of subsidiarity as a measure for assessing complete policy areas. Similarly, in practice it is often the case that reasoned opinions relate to a certain part of a draft legislative act and may be easily accommodated by amending the draft rather than by withdrawing it as a whole.

This Section does not end with any concrete recommendation but should be taken note of by the Task Force during its debates on how to improve the application of the principle of subsidiarity.

The Treaty of Lisbon did not grant the national parliaments the right to collectively veto EU legislation. Rather it created a format for maintaining a dialogue with the Commission. Of course the national parliaments also need to continuously monitor how their subsidiarity concerns are voiced by their governments in the Council, but a more practical and open-minded approach to the dialogue on subsidiarity between the national parliaments and the Commission would, in our opinion, contribute to the good functioning of the Union.

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5. The provisions of this Article shall not apply to pay, the right of association, the right to strike or the right to impose lock-outs."

These provisions were relevant in the first "yellow card" case, the "Monti II" regulation. See http://www.ipex.eu/IPEXL-WEB/dossier/document/COM20120130.do

[4] Article 3 of the Decision of the President of the European Commission on the establishment of a Task Force on Subsidiarity, Proportionality and "Doing Less More Efficiently" from 14.11.2017, C(2017) 7810 https://ec.europa.eu/info/sites/info/files/2017-c-7810-president-decision_en_1.pdf