

Dr Reinhold LOPATKA

Member of the Austrian *Nationalrat*

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

Working Paper for the meeting on 15 March 2018

‘Application of subsidiarity and proportionality in the work of the institutions’

A. Preliminary remarks

This working paper refers to a large number of contributions received by me and to the opinions of the Austrian *Bundesländer*, the *Landtage* (regional parliaments), the Austrian Federation of Towns and Municipalities, the social partners and to the results of the COSAC (Conference of Parliamentary Committees for Union Affairs of Parliaments of the European Union). On the issue of identifying possible improvements concerning the role of subsidiarity and proportionality in the work of the institutions, this paper aims to propose a range of political tools but not an exhaustive list of measures.

B. Proposals

Treaty amendment proposals

1. Extend the 8-week deadline for subsidiarity checks to 12 weeks:

The deadline of 8 weeks laid down in Protocol No 2 for the submission of reasoned opinions does not allow enough scope for scrutiny and agreement, for example with regional parliaments or other national parliaments, and is regarded by the parliaments as being too short. As an alternative to amending the Protocol, the Commission could state its willingness to examine positions which it receives up to twelve weeks after the submission of the legislative proposal. An agreement could also be reached whereby the Commission extends the deadline once a certain minimum number of national positions has been submitted.¹

¹ See also the Statement by the Governors of the Austrian *Länder*: Future EU Scenario of the Austrian *Länder*, Decision of the Conference of the Governors of the Austrian *Länder*, 10 November 2017, point 6.

See also the Communication from the EU Committee of the *Bundesrat* of 21 November 2017 on the White Paper on the Future of Europe: Reflections and scenarios for the EU27 by 2025.

2. Reduce the threshold for the 'yellow card' and the 'orange card':

At present, Protocol No 2 provides that, where there are objections on grounds of subsidiarity from the national parliaments representing one third of the votes allocated to national parliaments (one vote per chamber in a bicameral parliamentary system and two votes for a single-chamber system) the draft legislation must be reviewed ('yellow card'). This threshold is lower for draft legislative acts relating to freedom, justice, and security (one quarter of the votes). Under the ordinary legislative procedure, if a simple majority of the votes allocated to national parliaments rejects the draft because it does not comply with the principle of subsidiarity, and the Commission maintains its proposal, the decision is presented to the legislator (European Parliament and Council). If the legislator considers that a draft legislative act does not comply with the subsidiarity principle, it may return it by a majority of 55 % of the members of the Council or a majority of the votes in the European Parliament ('orange card').

To date, the 'yellow card' procedure has been triggered only three times. It is therefore clear that the thresholds in the current legal framework are too high. This is also very relevant for the regional and local levels, which are very actively involved in monitoring subsidiarity through their national parliaments. The required threshold for the 'yellow card' could therefore be reduced from one third to one quarter, and the threshold for the 'orange card' could be reduced from a simple majority to one third.²

See also the 'Brussels Declaration' of the Presidents of the German and Austrian regional parliaments and the parliament of South Tyrol, with the involvement of Belgium's German-speaking Community, on the occasion of the Second European conference on the process launched by the White Paper on the Future of Europe, held in Brussels on 26 and 27 November 2017, point 2.

See also the decision of the Landtag of Lower Austria of 16 November 2017 on improvements in European legislation, LtG.-1919-1/S-12-2017, page 3.

See also the position of Upper Austria on the 'White Paper on the Future of Europe' (decided by the *Landtag* and the Regional Government), point II.3.

² See also the opinion of the *Landtag* of Lower Austria on the 'White Paper on the Future of Europe', 16 November 2017, p. 4.

See also the position of Upper Austria on the 'White Paper on the Future of Europe' (decided by the *Landtag* and the Regional Government), p. 4.

See also the 'Brussels Declaration' of the Presidents of the German and Austrian regional parliaments and the parliament of South Tyrol, with the involvement of Belgium's German-speaking Community, dated 27 November 2017, point 7.

3. Possibility of a second subsidiarity check before the adoption of a legal act by the European Parliament and the Council ('late card')

As things stand, reasoned opinions by national parliaments must be submitted within 8 weeks of the date of submission of the legislative proposal of the European Commission. Amendments made to the legislative proposal during the negotiations between the Council and the European Parliament and which are to be included in the final legal act, cannot currently be the subject of any new subsidiarity check by national parliaments. However, the final result may differ considerably from the original proposal.

Introducing a 'late card' would give national parliaments the right to submit draft legal acts to a second subsidiarity check at the end of the negotiations between the Commission, the European Parliament and the Council.

4. Green Card:

A 'green card' to expand the political dialogue (without Treaty changes and therefore only on the basis of a political agreement) should be introduced. The idea is that one parliament would be able to make a (legally non-binding) proposal that new EU legislation should be initiated or existing legislation revised. Although this is already possible, at the moment national parliaments enter only individually into contact with EU institutions. In future, national parliaments would have the opportunity of declaring their support for the proposal of one parliament within 6 months. Each parliament would have 2 votes, and from one quarter of all votes, the initiative would count as a green card and a joint letter from all supporting parliaments would be sent to the European Commission.

5. Preference for directives over regulations:

With the objective of creating the best possible bases for compliance with the requirement for subsidiarity and proportionality, and in order to avoid over-regulation, a fundamental preference for the adoption of directives over regulations could be established.

The Protocol on the application of the principles of subsidiarity and proportionality to the Amsterdam Treaty still included the obligation to choose the least intrusive form of a measure in relation to national legislation ('simplest form'). With the Treaty of Lisbon, this was dropped from the current Protocol No 2, since the Treaty of Lisbon lays down relatively precisely in the various policy areas what form (directive or regulation), a legal act may have. In those policy areas that leave the choice of form

to the EU legislator, however, preference for a directive over a regulation would be effective in terms of proportionality and subsidiarity.

6. Stricter definition of shared competences:

The list of shared competences laid down in Article 4(2) TFEU is extremely vague, since it outlines only general areas such as 'transport' instead of defining more specific areas such as 'cross-border transport'. A clearer distinction could be used to establish more effectively whether action at EU level is justified.³

Amendment to the Interinstitutional Agreement on Better Law-making (IIA)

7. Inclusion of a definition of subsidiarity in the IIA:

An alternative to amending the Protocol could be the inclusion of a clear definition of subsidiarity and proportionality (using the text of the 'old' Subsidiarity Protocol from 1997) in the IIA on Better Law-Making (the IIA was last revised in 2016, after a two-year consultation process, but there was not enough support at the time for the inclusion of a definition).⁴

8. Adoption of a 'Subsidiarity Pact':

An extra provision should be included in the IIA on a 'subsidiarity pact' between the three legislative institutions. This would ensure that the European Commission limits its proposals to those initiatives that have already been agreed in the Commission's work programme. Moreover, in future the Commission should refrain from publishing non-binding recommendations and communications on the matter at issue where there is no appropriate legal basis.⁵

³ See also the opinion of the Austrian Federation of Cities and Towns (*Österreichischer Städtebund*), 7 February 2018, p. 1.

⁴ See also the Statement by the Governors of the Austrian *Länder*: Future EU Scenario of the Austrian *Länder*, decision of the Conference of Governors of 10 November 2017, point 6; opinion of the Austrian Federation of Cities and Towns, 7 February 2018, page 1 of the Annex.

⁵ See also the position of Upper Austria on the 'White Paper on the Future of Europe' (decided by the *Landtag* and the Regional Government), point III.2.

Proposals for specific implementation in the current legal framework

9. Action-oriented subsidiarity monitoring:

The subsidiarity debate should not solely address regulation, but also action, which is completely in line with the idea of subsidiarity. This means that the EU institutions, in particular the Commission and the ECJ, may not take any action in citizens' key areas of protection.

The creation of new agencies or special authorities is particularly questionable in this respect. Thus, for example, the added value of a European Labour Authority, which is at the planning stage, is hard to decipher.

10. More restrictive use of delegated acts:

The growing number of delegated acts is an example of the erosion of powers at the expense of the Member States and regions. Delegated acts are based on underlying legislation of the Council and Parliament and grant the Commission *de facto* legislative rights. The Member States hardly have the ability to shape legislation any longer. The growing number of EU legal acts which provide that rules are to be developed in the framework of delegated legal acts – or implementing acts – delegates a considerable number of powers to the Commission. More restrictive use is urgently needed.⁶

Such implementing acts give the European Commission extensive rights. Thus, the Commission intervenes extensively in national labour markets by means of implementing acts, for example on the basis of the EURES Regulation (Regulation (EU) 2016/589 of 13 April 2016). Furthermore, almost excessive reporting requirements are imposed on Member States ('Performance Measurement System'), which do not necessarily bring visible added value in return. As a result, the Commission is also attempting to extend its competence in the field of data protection vis-à-vis Member States, although objectively this is not easy to understand.

⁶ See also the communication from the EU Committee of the *Bundesrat* of 21 November 2017 on the White Paper on the Future of Europe: Reflections and scenarios for the EU27 by 2025.

See also communication from the EU Committee of the *Bundesrat* of 4 February 2015 on Friends of the Presidency Group: Improving of the functioning of the EU system.

See also the opinion of the *Landtag* of Upper Austria on the 'White Paper on the Future of Europe', 9 November 2017, point III.3.

See also the Statement by the Governors of the Austrian *Länder*, 10 November 2017, point 10.

11. Increased focus on proportionality:

This concerns in particular the obligation to show consideration, but also a discussion on the need for regulatory density. It is not necessary to regulate everything down to the last detail and at the same time incorporate at European level a reference to local authorities. EU directives should revert to setting out only the framework within which the national legislator must act. Some room for manoeuvre must be preserved. Proposals aimed at completing the single market should not be necessarily have to be implemented in the smallest municipality, since the action of small local authorities is relevant to the single market only in a tiny minority of cases.⁷

12. Improve how contributions on the subject of subsidiarity are dealt with:

In order to raise the profile of all contributions from local and regional authorities, the European Commission should, after the expiry of the eight-week period referred to in Article 6 of Protocol No 2, give an overview of the officially received opinions of public authorities and communicate the issues raised therein to both the European Parliament and the Council. This overview should also be forwarded to the Member States. This step would make it easier for the Members of the European Parliament, as well as Member States' representatives in the Council working groups, to identify any sensitive points in Commission proposals at an early stage and to form an opinion thereon.⁸

The annual reports of the European Commission on the application of subsidiarity and proportionality should also examine reasoned opinions on subsidiarity in detail and, following the example of the Austrian *Bundesrat*, cite in the reports those regions that put 'reasoned opinions' or 'communications' from the national parliaments to the European Commission. The existing multilevel system between the European institutions, the Member States and the regions requires, in the interests of clarity in practice, clearer communication and identification of the relevant stakeholders.⁹

⁷ See also the opinion of the Austrian Federation of Municipalities on the Task Force on Subsidiarity.

⁸ See also the letter from the President of the *Landtag* of Upper Austria at the second meeting of the Task Force, February 2018.

⁹ See also the opinion of the *Landtag* of Lower Austria on the 'White Paper on the Future of Europe', 16 November 2017, p. 4.

13. Adhere to responsibilities for legislation:

The Commission should propose EU rules only where there is a clear EU competence and under that legal basis and only where there is clear European added value.¹⁰ Moreover, in future the Commission should refrain from publishing non-binding recommendations and communications on the matter at issue where there is no appropriate legal basis. To ensure only the necessary legislation is passed, the EU must be guided by the principles of better legislation and reduced red tape.¹¹

14. Better use of directives and realistic scrutiny of the implementation of EU legal acts:

In future, directives should be understood as a contribution to respect for regional and national competences as well as an opportunity for deregulation, to the extent that they merely set out the objectives to be achieved and leave the choice of the means to achieve them increasingly to the Member States and regions.¹²

Even though the Treaties specify that directives are binding only with respect to the objective to be achieved, and that the choice of form and means is left to the national authorities, as a rule directives are highly detailed legislative acts, which means that their substance can often no longer be transposed by the Member States. Instead, they have to be taken over almost verbatim, with no consideration given to the Member States' legislation. A return to using the legal form of a directive in accordance with its actual purpose — limited to setting the objectives to be achieved — would allow the regions greater ability to shape their legal environment.

The level of detail in EU rules is often compounded by a formalistic assessment criterion applied by the EU when monitoring national implementation, which in some cases merely comes down to questions about drafting. This results in it becoming increasingly rare to be able to integrate EU legislative acts into national legal systems

¹⁰ See also the recommendations of the Austrian Chamber of Commerce (*Wirtschaftskammer Österreich*) for the Task Force on Subsidiarity, Proportionality and 'Doing less more efficiently', January 2018, p. 2.

¹¹ See also the Statement by the Governors of the Austrian *Länder*, 10 November 2017, point 10.

¹² See also the opinion of the *Landtag* of Lower Austria on the 'White Paper on the Future of Europe', 16 November 2017, p. 3.

harmoniously, which reduces the legislative quality of the rules and hampers national efforts to improve legislation.¹³

¹³ See also the Statement by the Governors of the Austrian *Länder*, 10 November 2017, points 31-33.

Strengthen the processes of the EU institutions and national parliaments

15. Stronger oversight role of the Council:

The Committee of the Regions (CoR) prepares Outlook Opinions on future European legislative proposals, political measures and impact assessments that are often critically lacking from a subsidiarity perspective (for example, because the regional and local levels are not involved enough and little account is taken of the consequences for these levels).

As they are submitted at an early stage and usually involve feedback from many stakeholders, the Council (in its various configurations) should discuss them in greater detail and take them into account in its policy-making. This could possibly become a separate regularly reserved segment during Council meetings and specific provision could be made for them in Council conclusions. The same applies to the work of the Conference of Parliamentary Committees for Union Affairs of Parliaments of the European Union (COSAC), with its bi-annual conferences and regular contributions and opinions to the EU institutions, which, because of its involvement in the subsidiarity monitoring procedure and in relation to exchange of information, experience and best practice, has rich expertise and experience, just like the Committee of the Regions.¹⁴

16. Early discussion of Commission proposals in the Council:

In the pre-legislative phase, specific Commission proposals should be dealt with in the Council as early as possible and proactively. This could draw the attention of national and European politicians to potential concerns and requirements at an early stage.

17. Systematic examination of the principles of subsidiarity and proportionality in the relevant Council working group

At the beginning of the legislative procedure, the relevant Council working group would systematically assess whether the Commission's proposal complies with the principle of subsidiarity. A detailed examination of compatibility with the principle of proportionality is also of great importance in order to prevent excessive rules.¹⁵

¹⁴ See also the letter from the President of the *Landtag* of Upper Austria at the second meeting of the Task Force, February 2018.

¹⁵ See also the recommendations of the Austrian Chamber of Commerce for the Task Force on Subsidiarity, Proportionality and 'Doing less more efficiently', January 2018, p. 11.

18. Improved response by the European Commission to reasoned opinions

The European Commission should step up its efforts to respond to the reasoned opinions issued by national parliaments more quickly and in more detail.¹⁶ Furthermore, there are no legal deadlines for the Commission's replies, so the Commission should commit itself to responding to a reasoned opinion within 8 weeks. Moreover, the dialogue between the European Commission and the parliaments of the Member States should be intensified. The Commission often takes several months to respond to communications and comments under the subsidiarity process. The responses are formally correct, but what is lacking above all is a lively political exchange on certain submissions.¹⁷

19. Consistent enforcement of the 'one in, one out' principle:

In future, consideration should be given to the following principle: a new proposal from the European Commission only if, at the same time, the Commission makes a proposal to repeal an EU provision ('one in, one out').¹⁸ In applying this principle there should be a cost and effort guideline for those affected.

20. Mandatory scrutiny of subsidiarity and proportionality by the Legal Services of the European Commission and the Council:

The introduction of mandatory legal scrutiny by the Legal Services of the European Commission and the Council as regards subsidiarity and proportionality before a Commission proposal is presented; prior involvement by the national parliaments.

21. Impact assessments must demonstrate clear European added value

New legal acts should be proposed only if the impact assessment demonstrates a clear European added value.¹⁹ An impact assessment should also be considered for delegated/implementing acts.

¹⁶ See also the Statement by the Governors of the Austrian *Länder*: Future EU Scenario of the Austrian *Länder*, decision of the Conference of Governors of 10 November 2017, point 6; Opinion of the *Landtag* of Upper Austria on the Task Force for Subsidiarity.

¹⁷ See also the communication from the EU Committee of the *Bundesrat* of 21 November 2017 on the White Paper on the Future of Europe: Reflections and scenarios for the EU27 by 2025.

¹⁸ See also the opinion of the Austrian Federal Ministry for Digital and Economic Affairs of 18 December 2017.

¹⁹ See also the recommendations of the Austrian Chamber of Commerce for the Task Force on Subsidiarity, Proportionality and 'Doing less more efficiently', January 2018, p. 11.

22. Systematic scrutiny of the principles of subsidiarity and proportionality in the responsible committee of the European Parliament

Right at the start of the legislative process, each responsible committee in the European Parliament should systematically assess whether the Commission's proposal complies with the principle of subsidiarity. A detailed examination of compatibility with the principle of proportionality is also of great importance in order to prevent excessive provisions.²⁰

23. Early involvement of national parliaments

National parliaments should be involved as early as possible in the legislative process, preferably immediately after publication of the roadmap and during the consultation phase. For example, the European Commission could be required to present important projects to national parliaments. Greater consideration should also be given to subsidiarity before a new legal act is tabled.²¹ In particular, the consultation phase should be used by parliaments in order to proactively gather views and register concerns. This could possibly avoid the use of the 'yellow card' and prevent problems during the negotiation phase. Moreover, early consideration of the project would compensate for the relatively short 8-week deadline following receipt of the legislative proposal.

In addition to early involvement in specific projects, there could be an annual discussion in national parliaments on the issue of subsidiarity or the Commission's work programme.

²⁰ See also the recommendations of the Austrian Chamber of Commerce for the Task Force on Subsidiarity, Proportionality and 'Doing less more efficiently', January 2018, p. 11.

²¹ See also the communication from the EU Committee of the *Bundesrat* of 21 November 2017 on the White Paper on the Future of Europe: Reflections and scenarios for the EU27 by 2025.