

Information Note in relation to the COSAC Working Group

30 October 2015, Luxembourg

"Yellow card" procedure

A.) Context:

In the Contribution of the LIII COSAC adopted in Riga, COSAC stated it would welcome better cooperation and coordination between national Parliaments in the conduct of subsidiarity checks. COSAC discussed the possibility of elaborating informal guidelines on the conduct of subsidiarity assessment and the reasoned opinion procedure in order to render it more efficient and effective. The majority of Parliaments who had expressed their views in the 23rd Bi-Annual Report supported the idea of elaborating **a voluntary, non-binding set of best practices and guidelines** on the subsidiarity check within the framework of COSAC.

However, in the same Contribution, COSAC emphasised that there was a clear preference of Parliaments "**to not standardise the format** in which reasoned opinions and political dialogue contributions were drafted and submitted to the European Commission", and "underlined that these formal matters should be left within the competence of respective Parliaments and their established internal procedural practices."

Following these conclusions, COSAC invited the Luxembourg Presidency to set up a working group on the reasoned opinion procedure ("yellow card").

B.) Findings based on the answers given by the Parliaments to the questionnaire preparing the 24th Bi-annual Report of COSAC¹

The questionnaire to the 24th Bi-Annual report addressed the issue on what those voluntary guidelines could include and which were the best practices to highlight. ²

i.) Improvements

The analysis of the replies showed that **a majority** of the responding Parliaments/Chambers considered that the "yellow card procedure" needed improvement without Treaty change.

Improvement without Treaty change	No. of responses
Yes	25 out of 30
No	5 out of 30

The following improvements were suggested in general terms by the Parliaments/Chambers:

¹ The following numbers reflect the answers given by Parliaments/Chambers by 15 October 2015. Complete replies were received by that date from 37 out of 41 Parliaments/Chambers of 28 Member States and the European Parliament.

² The 24th Bi-Annual Report is currently under preparation.

Proposals by national Parliaments (NP)	No. of responses
Improvement of the answers of the European Commission should give to Reasoned Opinions (RO)	10 out of 27
Extension or adjustment of the current 8-week deadline	9 out of 27
Better communication and / or coordination among NP	7 out of 27
Better justification by the European Commission with regard to the observance of subsidiarity principle	4 out of 27

Other remarks made among others:

- The "yellow card" procedure was not vital for parliamentary influence; parliamentary influence could be made real only through parliamentary control of national Governments' activities in the Council.
- The "yellow card" mechanism needed to be revised because the non-federal legislative assemblies should participate in the "yellow card" process.
- Each legislative act published in the Official Journal should contain a note detailing those national Parliaments which had responded and those which had raised subsidiarity concerns.
- Guidelines could be prepared outlining criteria for ROs on subsidiarity issues and proposed mobilising national Parliaments to undertake comparative evaluations of *ex ante* assessments which they had conducted and *ex post* assessments drawn up by the European Commission.

ii) Criteria for violation of principle of subsidiarity

9 out of 35 respondents replied that they had established criteria for deciding whether the principle of subsidiarity had been breached.

In the cases where criteria were used, the following elements were mentioned:

Elements to decide on violation of the subsidiarity principle	No. of responses
Relevant definitions and criteria in Article 5 TEU and/or Protocol 2	4 out of 12
Appropriateness of the choice of the legal basis of the proposal	2 out of 12
Necessity of the envisaged action: whether the objectives of the proposal cannot be sufficiently achieved by Member States	2 out of 12
Added value of the envisaged action: whether the said objectives can be better achieved at EU level by reason of the scale or effects of the proposed action	2 out of 12
Analysis of the principle of subsidiarity, proportionality and legal base	1 out of 12
The justification provided by the European Commission in its proposal as regards the observance of the principle of subsidiarity	1 out of 12
"Necessity test" and the "EU added value test" ³	1 out of 12
Lack of impact assessment	1 out of 12
Relevant criteria contained in the Treaty of Amsterdam	1 out of 12

³ As described in the European Commission 19th Report on subsidiarity and proportionality,

iii) Fixed form

19 out of 33 Parliaments/Chambers replied they drafted ROs according to an internal set form. The analysis of the results showed that, when Parliaments/Chambers used some kind of form/format, there was room for flexibility on how this was used.

iv) Criteria to separate the principles of subsidiarity and proportionality

6 Parliaments/Chambers out of 33 stated that they had defined criteria for separating the principle of subsidiarity from the principle of proportionality. 5 Parliaments/Chambers referred to the relevant definitions and criteria in Article 5 of TEU and/or Protocol 2. Some Parliaments/Chambers mentioned that the two principles were interwoven and were the principles of subsidiarity and proportionality were analysed together.

v) Guidelines and best practices

The respondents highlighted the following best practices in their replies.

Best practices	No of responses
Clear indication it is a RO	6 out of 23
Clear motivation of the violation	4 out of 23
Inclusion of the principle of proportionality	4 out of 23
Input from other actors	4 out of 23
Analysis of the question of competence and legal basis	2 out of 23
Input from Executive, cooperation with government	1 out of 23
Appointing a member of Parliament in standing committees to follow-up EU matters regarding their respective committees	1 out of 23
Introducing a specific procedure in case a RO needed to be issued when there is no Plenary session	1 out of 23
Mandatory translation into English of a full text of every RO issued and publication of the translated RO on IPEX as soon as possible	1 out of 23
In case there of no impact assessment or lack of motivation of the proposal by the European Commission, this should be mentioned in the RO	1 out of 23
Explanation setting out the breach in subsidiarity - 'subsidiarity test'	1 out of 23

Parliaments/Chambers mentioned the following elements that should be part of a "yellow card".

Guidelines	No of responses
Mentioning of the legislative proposal the reasoned opinion refers to	30 out of 31
Clear indication that the text is a reasoned opinion	29 out of 31
Translation in English of the reasoned opinion or a summary in English should be provided	22 out of 31
Summary of argumentation	21 out of 31
Legal basis	20 out of 31
Motivation	20 out of 31
Information on the procedure applied	9 out of 31
Other	12 out of 31

vi) 8-week period

Proposal	No of responses
Exclusion of the period mid-december to New Year break	23 out of 31
Exclusion of recess periods in the EU institutions	18 out of 31
Other	11 out of 31

Other suggested periods for exclusion:

- from mid-July to mid-September
- the recess periods of the national Parliaments
- extension of the deadline to 12 weeks as many Parliaments had varying recess periods
- no further exceptions in addition to the month of August should be added because this could be confusing and potentially lead to legal uncertainty

20 out of 28 Parliaments/Chambers stated that **the exact dates** of periods excluded from the 8-week-period should be **communicated by the European Commission**.

C.) Discussion

Proposal:

Taking into account the results of the discussions so far, it is proposed to include following elements to the non-binding guidelines on the yellow card:

- Mentioning of the legislative proposal the reasoned opinion refers to
- Clear indication that the text is a reasoned opinion
- Translation in English of the reasoned opinion or a summary in English should be provided
- Summary of argumentation
- Legal basis
- Motivation

Need for further discussion on:

- Improvement of the answers of the European Commission should give to RO
- Extension or adjustment of the current 8-week deadline.
- Better justification by the European Commission with regard to the observance of subsidiarity principle.
- One Parliament suggested that each legislative act published in the Official Journal should contain a note detailing those national Parliaments which had responded and those which had raised subsidiarity concerns.