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Report on
the results of COSAC's Pilot project on
the 3rd Railway Package to test the
“Subsidiarity early warning mechanism”

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Introduction

COSAC agreed at its XXXII meeting in the Hague on 23 November 2004 to conduct a 'pilot project' in order to assess how the subsidiarity early-warning mechanism provided for in the Constitutional Treaty might work in practice. COSAC chose the Commission's 3rd Railway Package as the subject for this initiative, and the pilot project was launched on 1 March 2005 and completed by national parliaments on 12 April.

All participating parliaments sent a report to the COSAC secretariat summarising how they conducted the pilot project and setting out any lessons learnt during the experiment. As requested, the COSAC secretariat has, on the basis of these replies from the national parliaments, made this report to facilitate an exchange of views and best practises between national delegations at the XXXIII COSAC on 17-18 May in Luxembourg.

The replies of the participating parliaments and the reasoned opinions are compiled in two Annexes, which are printed in a separate document.

1. Who participated in the pilot project?

The COSAC secretariat received reports on the pilot project from all 31 of the 37 national parliamentary chambers that participated in the test.¹

European Affairs Committees were involved in the test in most national parliaments (in 27 of the 31 participating parliamentary chambers). In 16 cases sectoral committees also participated in the examination of the Commission's proposals (most frequently these were either a transport committee or a committee on economic affairs).

Only in the two chambers of the Netherlands' Parliament, the Swedish *Riksdagen* and the Belgian Chamber of Representatives did the European Affairs Committees have a role in the examination. In the Netherlands the new "Joint Subsidiarity Committee" dealt with the 3rd Railway Package, while in Sweden the Constitutional Affairs Committee was responsible for coordinating the experiment and for giving the overall assessment of the *Riksdagen*. In both of these national parliaments sectoral committees played a key role in the test. In the Netherlands the transport committees of the two Houses were consulted; and in Sweden the task of examining the Package was given to the Transport Committee and the Committee on Civil Law. In the Belgian Chamber of Representatives the Committee on Infrastructure examined the proposals.

Governments were invited to take part in the process by around half of the participating parliamentary chambers, either by providing written information/assessments on whether the 3rd Railway Package complied with the subsidiarity principle or by giving oral evidence to the committees scrutinising the proposals.

¹ The six national parliamentary chambers of the EU 25 that did not participate in the test were: the German Bundestag, the Italian Chamber of Deputies, the Maltese Parliament, the Portuguese Parliament, and the Spanish Congress and Senate. The Portuguese Parliament was dissolved until 5 April because of the spring election and was therefore unable to participate. The Maltese Parliament did not participate because Malta has no railways.

2. Did anyone find a breach of the principle of subsidiarity?

In total 14 parliamentary chambers indicated that they found that one or more of the legislative proposals in the 3rd Railway Package breached the principle of subsidiarity. (And 11 of these chambers adopted a reasoned opinion - see Appendix II.) In addition, a further 3 national parliaments expressed doubts as to whether one or more of the four proposals conformed to the principle of subsidiarity.

The national parliaments did not, however, identify problems with the same legislative proposals.

The voting system under the Constitutional Treaty

Each Member State national parliament has two votes in the “early warning system”. In a unicameral parliamentary system the national parliament has two votes; in a bicameral system each parliamentary chamber has one vote. There are a total of 50 votes in the EU 25.

The Commission will “review” a draft legislative act, if at least one third of the national parliaments within six weeks submit a reasoned opinion that states that a proposal does not comply with the principle of subsidiarity.

This means that at least 17 of the 50 votes are needed to initiate a review of a proposal.

10 parliamentary chambers (representing 10 votes) found that the proposal for a Regulation on “*compensation in cases of non-compliance with contractual quality requirements for rail freight services*” (**Com(2004)144**) breached the principle of subsidiarity. And a further two parliaments (representing 4 votes) expressed doubts about the proposal’s conformity with subsidiarity, but did not adopt reasoned opinions. Furthermore, one parliament (2 votes) considered that the objectives of the proposal would be better achieved by Member States through existing international agreements (COTIF), but it did not say that this constituted a breach of the principle of subsidiarity. And one parliament (2 votes) considered that the proposal breached the principle of proportionality, although the Protocol in the Constitutional Treaty only provides for national parliaments to send reasoned opinions on the principle of subsidiarity. (For more on the distinction between subsidiarity and proportionality, see the separate section below.)

Five parliamentary chambers (representing 6 votes) concluded that the proposal for a Directive on the “*certification of train crews operating locomotives and trains on the Community's rail network*” (**Com(2004)142**) did not adhere to the principle of subsidiarity. Also, a further parliament (representing 2 votes) expressed doubts about the proposal’s conformity with subsidiarity, but did not adopt a reasoned opinion. And one parliament (2 votes) considered that the proposal breached the principle of proportionality.

Four parliamentary chambers (representing 4 votes) expressed doubts about the conformity with the principle of subsidiarity of the proposal for a Regulation on “*International Rail Passengers' Rights and Obligations*” (**Com(2004)143**). Furthermore, one parliament (2 votes) found that the objectives of this proposal would be better achieved through existing international agreements. And one further parliament (2 votes) considered that the proposal breached the principle of proportionality.

Finally, three parliamentary chambers (representing 4 votes) found that the proposal for a Directive amending Council Directive 91/440/EEC “*on the development of the Community's railways*” (**Com(2004)139**) breached the principle of subsidiarity.

For further details see Table 1 (below) or Annexes I and II (which are printed in a separate document).

Table 1: Participation in the Pilot project on 3rd Railway Package

Member State Parliament	Examined the 3rd Railway Package?	Parliamentary Committees involved?	Breach of the subsidiarity principle?	Government participated/ provided information?
Austria - Nationalrat	√	EAC	No	Yes
Austria - Bundesrat	√	EAC	No	Yes
Belgium - Chamber of Representatives and Senate	√	Committee on Infrastructure	No	Yes
Cyprus	√	EAC	No	No
Czech Republic - Chamber of Deputies	√	EAC	√ (all proposals)	Yes, the government provided a framework position
Czech Republic - Senate	√	EAC	√ Com 142 Com 143 Com 144	Yes
Denmark	√	Transport Committee and EAC	No	Yes, the Minister of transport appeared before TC. Answered written question.
Estonia	√	EAC and Economic Affairs Committee	No, but found that objectives in Com 143 and Com 144 would be better achieved by Member States through existing international agreements	Yes, the Ministry of Economics appeared before Economic Affairs Committee
Finland	√	EAC and the Transport and Communications Committee.	No, but found that Com 142 raised problems with the principle of proportionality	
France - Senate	√	EAC	√ Com 144	Yes, the Permanent Representative of France was consulted
France - National Assembly	√	EAC and Committee on Economic Affairs	√ Com 144	No
Germany - Bundestag	No			
Germany - Bundesrat	√	EAC, as well as the committees on transport, health, legal affairs, labour and social affairs, family and senior citizens affairs, and the committee on cultural affairs	√ Com 144	Yes, when developing final statement for the European commission
Greece	√	EAC and the Committee on Social Affairs	No	Yes, the government provided explanatory memoranda on proposals.
Hungary	√	EAC and the Committee on Economic Affairs, which was asked for its opinion	No, but raised doubts about the conformity with subsidiarity regarding Com 142 and Com 144	Yes, government was asked for its opinion
Ireland - Dáil and Seanad	√	Joint Committee on EU Affairs and Subcommittee on Economic Affairs	No, but raised genuine doubts about the conformity with subsidiarity regarding Com 144	The Department of Transport provided a Note.

Italy - Chamber of Deputies	No	/	/	/
Italy - Senate	√	EAC	√ Com 144	No
Latvia	√	EAC	No	Yes, Ministry of Transport asked for its opinion
Lithuania	√	EAC and Committee on Economy	No, but the Committee on Economy recommended that Com 144 possibly breached subsidiarity	Yes, the Ministry of Transport and Ministry of Justice.
Luxembourg	√	EAC and Committee on Transport	√ Com 139 (and proportionality on Com 143 and Com 144)	Yes, Ministry of Transport
Malta	No	/	/	/
Netherlands - House of Representatives	√	Joint Committee and Committee on Transport	√ Com 144	No
Netherlands - Senate	√	Joint Committee and Committee on Transport	√ Com 144	No
Poland - Sejm	√	EAC	√ Com 139 Com 143 Com 144	No, subsidiarity not within government competence.
Poland - Senate	√	EAC and "State Treasury and Infrastructure Committee".	√ Com 143 Com 144	Yes, there was a hearing of representatives of the government
Portugal	No	/	/	/
Slovakia	√	EAC and Committee on Economy, Privatisation and Undertaking.	No	Yes, the Ministry of Transport, Post and Telecommunication was asked to forward an opinion.
Slovenia - National Assembly	√	EAC and Transport Committee	No	Yes, the Ministry of Transport
Slovenia - National Council	√ - consulted by the National Assembly	EAC	No	Yes, the Ministry of Transport
Spain - Congress and Senate	No	/	/	/
Sweden	√	Committee on the Constitution, Committee on Transport, Committee on civil Law.	√ Com 142 (And the Committee on Transport recommended that Com 144 breached subsidiarity.)	Yes, the government provided an explanatory memoranda and answered questions from committee members.
United Kingdom - House of Commons	√	EAC	√ Com 142	Yes, as part of the examination of the documents in 2004.
United Kingdom - House of Lords	√	Sub-Committee B (Internal Market) of the European Union Select Committee	√ Com 142	Yes, the government provided an explanatory memorandum

3. What were the main difficulties encountered by national parliaments?

The lack of sufficient arguments justifying the proposals in terms of subsidiarity

As a number of national parliaments pointed out, because the Constitutional Treaty is not in force, and the four legislative proposals examined in the pilot project were adopted by the Commission in March 2004, the Commission did not justify its proposals with regard to the principles of subsidiarity and proportionality in accordance with Article 5 of the Protocol on the application of the principles of subsidiarity and proportionality annexed to the new Treaty (see box below).

However, the concept of subsidiarity is not, of course, a new principle introduced by the Constitutional Treaty. And, as some national parliaments mentioned in their reports, there are a number of existing Treaty provisions that mean the Commission already has to justify the relevance of its proposals with regard to the principle of subsidiarity (see box below).

Despite these provisions, a large number of parliaments commented on the difficulty of reaching a decision on whether the proposals in the 3rd Railway Package complied with the principle of subsidiarity on the basis of the Commission's justifications. The justifications put forward by the Commission in the four legislative proposals examined in the pilot project were criticised as insufficient by a large number of parliaments who felt that the Commission will have to make a greater effort in this area and produce more substantial arguments. In total 20 of the 31 participating parliamentary chambers mentioned in their reports that the Commission's justifications regarding subsidiarity and proportionality were less than satisfactory for one or more proposal.

Treaty provisions on subsidiarity and proportionality already in force

Article 5 of the Treaty establishing the European Community gives a general definition of subsidiarity and proportionality, indicating respectively when and how the Community should act.

The Treaty on European Union provides that any action taken by the EU to achieve its objectives must be in accordance with the principle of subsidiarity: Article 2 states that "the objectives of the Union shall be achieved as provided in this Treaty ... while respecting the principle of subsidiarity".

Furthermore, the Treaty of Amsterdam (which was agreed in June 1997 and came into force in May 1999) introduced a Protocol on the application of the principles of subsidiarity and proportionality to the Treaty on European Union. This Protocol provides that

"For any proposed Community legislation, the reasons on which it is based shall be stated with a view to justifying its compliance with the principles of subsidiarity and proportionality; the reasons for concluding that a Community objective can be better achieved by the Community must be substantiated by qualitative or, wherever possible, quantitative indicators."

Furthermore, the Protocol provides that the Commission should "justify the relevance of its proposals with regard to the principle of subsidiarity; whenever necessary, the explanatory memorandum accompanying a proposal will give details in this respect."

Moreover, since the Commission's Communication on *Better Lawmaking* (Com(2002)275) and the European Council in Seville in June 2002, the Commission has developed the practice of providing impact assessments for important policy initiatives.

The Belgian Senate said that the Commission's justifications regarding subsidiarity and proportionality must be systematic and explicit, demonstrating why the Commission judges that the action taken by Member States is insufficient, and, where the action of the Member States is judged to be insufficient, why it considers that the Union can better achieve the goals. The Irish *Oireachtas* asked the Commission to include more detailed background to its conclusions on subsidiarity and proportionality. And the Swedish *Riksdag* was concerned with "the lack of proper analysis and argumentation by the Commission with regard to the subsidiarity principle" and called for the justifications to be presented "in such a way as foreseen in the new Treaty".

Justifications on subsidiarity under the Constitutional Treaty

Article 5 of the Protocol on the application of the principles of subsidiarity and proportionality annexed to the Constitutional Treaty provides that

"Draft European legislative acts shall be justified with regard to the principles of subsidiarity and proportionality. Any draft European 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 European framework law, 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 European 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."

The lack of official translation into all the languages of the EU 25

The Commission adopted the four legislative proposals examined in the pilot project in March 2004, before the accession to the EU of ten new Member States on 1 May 2004. This meant that the Commission documents were only available in the languages of the old EU 15. New Member States reported that not having official versions of the texts available in their languages caused them considerable difficulties.

Just to take two illustrative examples: the lack of an official translation was described as "a serious obstacle" by the Czech Chamber of Deputies; and the Latvian Parliament reported that this made it impossible to involve sectoral committees.

Difficulties with the six-week period

A number of national parliaments reported that a six-week period (as provided for in the Constitutional Treaty) was a relatively short period of time to carry out the whole process of examining proposals and preparing reasoned opinions. In particular, parliaments raised concerns about how the timetable limited their ability to make consultations. The Parliament of Cyprus mentioned that the short amount of time available made it difficult to consult interested parties. The two Houses of the French Parliament pointed out the difficulty of consulting sectoral committees with the timeframe. And the House of Commons in the UK noted that the timetable was particularly tight if national parliaments were to consult regional parliaments with legislative powers.

The national parliaments of Slovakia and Sweden reported that the timetable could be a particular problem if parliament were not in session. The *Riksdag* concluded that this emphasised the need for national parliaments to follow EU proposals from an early stage and suggested that this could be done through examining the Commission's work programme and by using national parliament representatives in Brussels.

The Finnish *Eduskunta* pointed out that there was potential for uncertainty regarding the date from which the six-week period would start: if the six-week period starts when the last of the different language versions becomes available, by what mechanism will national parliaments be made aware of this date?

The difficulty of distinguishing between subsidiarity and proportionality

The Protocol to the Constitutional Treaty covers the application of the principles of subsidiarity and proportionality. And two national parliaments concluded that proposals in the 3rd Railway Package breached the principle of proportionality: the Luxembourg Parliament found that Com 143 and Com 144 breached the principle of proportionality; and the Finnish *Eduskunta* found that Com 142 breached the principle of proportionality. However, the Protocol only provides for national parliaments to send reasoned opinions on the principle of subsidiarity.

But a number of parliaments (such as the French *Sénat* and the Hungarian Parliament) reported that it was difficult to make a distinction between the principle of subsidiarity and the principle of proportionality.

The Swedish *Riksdag* concluded that more work needed to be done to define the principle of subsidiarity and the criteria to be used when assessing it.

The Parliament of Cyprus questioned whether national parliaments could indeed examine legislative proposals to see whether they conform to the principle of proportionality and considered that this issue should be clarified.

Some national parliaments (such as the French *Assemblée Nationale*) raised a related issue, reporting that it was difficult to distinguish between opinions on the content of a proposal and opinions on whether the proposal complied with the principle of subsidiarity.

In addition, four chambers (the Czech Senate, the Estonian Parliament, the German Bundesrat and the Luxembourg Parliament) questioned what happens when a Commission proposal deals with a subject that is already regulated by existing international agreements (such as COTIF), which raises the issue of what the consequences of such an overlap are when judging a proposal against the principles of subsidiarity and proportionality.

The difficulty of knowing about the results in other national parliaments

A number of national parliaments (including the French *Sénat* and the German Bundesrat) reported that it was difficult for the committee considering the proposals in their parliament to know at the time of their consideration the position adopted by other national parliaments. This was because the information from other national parliaments was often not available until the end of the six-week period. The French *Assemblée Nationale* considered that this could lead to chambers considering proposals as late as possible within the six-week period in order to first be able to know the positions of other parliaments. The *Assemblée Nationale* concluded that in order to avoid this situation national parliaments would need an informal network for exchanging information within the six weeks.

The Irish *Oireachtas* also considered that "encouragement be given to the development of a practical and efficient means of communicating between the national parliaments". The Swedish *Riksdag* reported that several of its members "wanted more information on what other parliaments did." It suggested that in the future IPEX would "facilitate the exchange of information", but it stressed that "personal contacts/networks" would also be "necessary".

Table 2: Further information on the pilot project on 3rd Railway Package

Member State	What internal expertise was used?	Were Regional Assemblies involved?	Were external actors involved?	Were the Commission's justifications satisfactory?
Austria - Nationalrat - Bundesrat	EAC secretariats, the division for EU-coordination, and the division for EU-Relations	No	No	Justifications contained only formal arguments
Belgium - Chamber of Representative	Staff of the Committee on Infrastructure	No	No	[Not mentioned in report]
Belgium - Senate	Legislation Evaluation Service	No (the subject dealt with is a federal prerogative)	No	The Commission's explanations concerning subsidiarity were not standardised, were found in different sections of the documents, and were insufficient. The Commission justification should have to prove 1) that the action taken by Member States is insufficient; and 2) that, where the action of the Member States is insufficient, the Union can better achieve the goals.
Cyprus	European Affairs Service	N/A	No (but this could be done in the future)	Yes
Czech Republic - Chamber of Deputies	Parliamentary Institute	N/A	No	Not always
Czech Republic - Senate	EU-Affairs division	N/A	No	Not sufficiently
Denmark	EU secretariat and Clerk of the Transport Committee	N/A	No	Did not consider them separately
Estonia	EU secretariat and staff of the Economic Affairs Committee	N/A	Yes, independent legal experts and translators.	[Not mentioned in report]
Finland	EU secretariat and staff of the Transport and Communication Committee	No, because there are no railways on the Åland Islands. But the Åland regional parliament will be involved in future proposals.		Com 139 lacked the necessary assessment of subsidiarity and proportionality. Com 142, Com 143, Com 144: yes.
France - National Assembly	EU Delegation secretariat	N/A	No	Not clear enough for Com 144
France - Senate	EU Delegation secretariat	N/A	No	Not satisfactory. Only Com 142 contained a real effort to justify the proposal <i>vis-à-vis</i> the principle of subsidiarity.
Germany - Bundestag	[Did not participate in the pilot project]	/	/	/
Germany - Bundesrat	Sectoral Committees	[Not mentioned in the report]	No	[Not mentioned in the report]
Greece	Division of European Affairs officials did not have an advisory role	N/A	Yes, Greek MEPs.	No
Hungary	EU secretariat (including lawyers) and the Permanent Parliamentary Office in Brussels	N/A	No, but if the Constitutional Treaty were to come into force, professional or corporative organisations might be involved, depending on the nature of the Commission proposal.	Com 139, Com 142 and Com 144: the justifications were quite short but considered together with other elements (the impact assessment and policy scenarios) the information was satisfactory. Com 143: no.
Ireland	Parliamentary Legal Advisor	N/A	[Not mentioned in the report]	No, arguments "less than persuasive". Commission should be asked to include more detailed background to their conclusions.

Italy - Chamber of Deputies	[Did not participate in the pilot project]	/	/	/
Italy - Senate	EAC secretariat	No	No	No: Com 139 and Com 143 were insufficient.
Latvia	EAC secretariat. And in future staff of sectoral committees will be involved as well.	N/A	No	[Not mentioned in the report]
Lithuania	Staff of EAC and Committee of Economy, and the Law Department of the Office of Seimas	N/A	Yes, the Lithuanian Railways Company and Lithuanian European Law experts.	Not fully. The Commission's Impact Assessment related only to the EU-15.
Luxembourg	Committee secretariats	N/A	Yes. Ministry of Transport, the directorate of the Luxembourg railways and the trade unions of the railways sector.	Lack of fiche on subsidiarity.
Malta	[Did not participate in the pilot project]	N/A	/	/
Netherlands - House of Representative -Senate	Committee secretariats	N/A	Yes, the affected civil society organisations, particularly companies, were consulted.	No
Poland - Sejm	EAC secretariat and the Research Bureau of the Chancellery of the Sejm prepared legal opinions	N/A	Yes, the EAC established a team of independent law experts to assist with controversial proposals.	No
Poland - Senate	Staff from the EAC, the State Treasury and Infrastructure Committee, the Chancellery of the Senate, the Legislative Office, the Proceedings Office and from the Information and Documentation Office	N/A	Yes, experts and the joint stock company Polish State Railways (PKP).	Com 143 and Com 144: no.
Portugal	[Did not participate in the pilot project]	/	/	/
Slovakia	EAC secretariat, staff of the Committee on Economy, Privatisation and Undertaking, and the Legislative Department	N/A	No	Com 139, Com 143, Com 144: No. Com 142: yes.
Slovenia - National Assembly	Staff of the EAC and Transport Committee	N/A	Yes, the Slovenian National Council and the Slovenian delegation to the Committee of the Regions were consulted	[Not mentioned in report]
Slovenia - National Council	EAC	N/A	No	[Not mentioned in report of the National Assembly]
Spain -Congress and Senate	[Did not participate in the pilot project]	/	/	/
Sweden	Committee and Chamber secretariats, also the permanent representative of the Swedish Parliament to the EU Institutions	N/A	Yes, representatives from government agencies, a trade union and other interested organisations	No
United Kingdom - House of Commons	EAC secretariat	Yes, but only at the level of officials	No	Com 142: No
United Kingdom - House of Lords	EAC secretariat	Yes, but only at the level of officials	No	Com 142: No