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from: Secretary-General of the European Commission,
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(15th report on Better Lawmaking, 2007)

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COMMISSION OF THE EUROPEAN COMMUNITIES

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**REPORT FROM THE COMMISSION
ON SUBSIDIARITY AND PROPORTIONALITY**

(15th report on Better Lawmaking, 2007)

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1. Introduction

This is the 15th annual review of the application of the principles of subsidiarity and proportionality which the Commission presents to the European Council and the European Parliament in line with the protocol annexed to the Treaty establishing the European Community. Unlike the reviews for the previous three years, this review does not cover the wider issues of better regulation as these were addressed in the Second Strategic Review of Better Regulation in the European Union¹.

The review also highlights two developments in 2007 which have an impact on how subsidiarity and proportionality are applied. First the establishment of the Impact Assessment Board which has led to reinforced scrutiny of subsidiarity and proportionality in Commission impact assessments; and secondly, the agreement on a new Treaty which – if ratified – would give an important new role to national parliaments in assessing how the two principles are applied.

2. The legal and institutional framework

2.1 The principles of subsidiarity and proportionality

The general definitions of subsidiarity and proportionality are found in paragraphs 2 and 3 of Article 5 of the Treaty establishing the European Community (TEC). Protocol 30 of the Treaty provides further details on how the two principles should be applied.

Subsidiarity is a guiding principle for defining the boundary between Member State and EU responsibilities - that is, *who should act?* If the Community has exclusive competence in the area concerned, there is no doubt about who should act, and subsidiarity does not apply. If the Community and the Member States share the competence, the principle clearly establishes a presumption in favour of decentralisation. The Community should only take action if the objectives cannot be achieved sufficiently by the Member States (necessity test) and if they can be better achieved by the Community (value-added test or compared effectiveness).

¹ COM(2008) 32, 30.01.08

Subsidiarity is a dynamic concept, any assessment of which will evolve over time. It allows Community action within the limits of its powers to be expanded where circumstances so require, and conversely, it means that Community action should be restricted or discontinued where it no longer meets the subsidiarity test.²

Proportionality is a guiding principle when defining how the Union should exercise its competences, both exclusive and shared (*what should be the form and nature of EU action?*). Both Article 5 TEC and the Protocol provide that the action should not go beyond what is necessary to achieve the objectives of the Treaty. Any decision must favour the least demanding option.

2.2 Modes of application, opportunity for comments, and ex-post control

All institutions of the Union have to comply with both principles when exercising their powers. Specific obligations have been set out in the Protocol and in the Inter-Institutional Agreement of 1993 on subsidiarity³. Some of the key elements are summarised here, while the changes that the Treaty of Lisbon would introduce are presented in section 4.1.

The Commission must: consult widely before proposing legislation; state in the explanatory memorandum for each legislative proposal the reasons for concluding that the proposal complies with subsidiarity and proportionality; and take into account the burden falling on the Community, national governments, local authorities, economic operators and citizens. As explained in section 3.1, the Commission's impact assessment system is helping to ensure that subsidiarity and proportionality are rigorously analysed for all major proposals.

The European Parliament and Council must provide a justification regarding subsidiarity if an amendment they make affects the scope of Community action⁴. If the consultation or cooperation procedure applies, the Council has to inform Parliament of its position on the application of subsidiarity and proportionality in a statement of reasons⁵.

The European Economic and Social Committee and the Committee of the Regions express their views either when they are consulted or in own-initiative opinions. The 'Conference of European Community Affairs Committees' (COSAC) can also express an opinion on the application of the principle of subsidiarity⁶.

Since September 2006, the Commission has transmitted new legislative proposals to the national parliaments inviting them to react. Although this exchange is much wider in scope than the application of the principles of subsidiarity and proportionality, many of the comments received from national parliaments relate to these principles.

Finally, the Court of Justice and the Court of First Instance can review the legality of acts of the institutions for compliance with the principle of subsidiarity.

² Article 3 of the Protocol

³ Adopted 17.11.93, OJ C 329, 06.12.93, p. 132.

⁴ Section 2, point 3 of the Inter-Institutional Agreement on subsidiarity of 1993.

⁵ Article 12 of the Protocol.

⁶ Point 6 of the Protocol on the role of national parliaments in the European Union, Treaty of Amsterdam.

3. Application of the principles by the Commission in 2007

3.1 Impact Assessments and the Impact Assessment Board

Consideration of subsidiarity and proportionality is part of the Commission's daily work of developing new policy initiatives, but the development of impact assessments has added an extra layer of focused scrutiny. The Commission's impact assessment system is helping to facilitate better-informed decision making throughout the legislative process. It improves the quality of proposals by ensuring that initiatives are based on transparent evidence, stakeholder input, and a thorough and integrated analysis of the economic, social and environmental impacts of different ways of addressing a problem. An analysis of subsidiarity and proportionality is a key aspect of this approach.

While impact assessment has become embedded in the working practices and decision-making of the Commission, the institution is committed to improving the system even further. A key development was the creation of the Impact Assessment Board (IAB) in November 2006 to provide independent quality support and control for impact assessments prepared by Commission services.⁷ The IAB's opinions are formally integrated into the Commission's internal decision-making, from inter-departmental consultation to the final adoption by the College. They are also available to the other institutions and the general public, once the corresponding Commission initiative is adopted. In its opinions, the IAB frequently recommends substantial improvements to core elements of the impact assessments, including on subsidiarity and proportionality. Some examples are provided in Section 3.2⁸.

On the basis of the IAB's work and of an external evaluation of the impact assessment system, the Commission has decided to make more operational the guidance it provides on the analysis of subsidiarity and proportionality in the revised Impact Assessment Guidelines to be adopted in the second half of 2008. The Guidelines will contain explicit questions, closely based on protocol 30 of the Treaty establishing the European Community, which each impact assessment will have to address. The revised Guidelines will also reinforce the message that, while impact assessments typically examine problems that can be addressed by action at EU-level, they must take into account the fact that the problems and the measures taken to address them, may have different effects in different Member States and regions of the Union⁹.

These changes will help to ensure that the Commission provides a more rigorous and transparent analysis and justification of its proposals than ever before. This is essential given the increased role that national parliaments will play if the Lisbon Treaty enters into force.

3.2 Examples of how the Commission applied the principles

This section illustrates how the Commission has examined subsidiarity and proportionality in its impact assessments, reorienting or abandoning its proposals as a result.

Two proposals in the area of company law were stopped in 2007 on the basis of the analysis in the impact assessments. The first concerned a possible *Recommendation on proportionality between capital and control in listed companies*. The impact assessment concluded that, in

⁷ "Enhancing quality support and control for Commission Impact Assessments - The Impact Assessment Board" - SEC(2006) 1457.

⁸ For an overview of the IAB's first year of operation SEC(2008)120, 30.01.08.

⁹ http://ec.europa.eu/governance/impact/key_en.htm

terms of proportionality, it was not clear that a Directive or a Recommendation were the least onerous ways to reduce the risk of private benefit extraction by insiders across the EU Member States. It concluded that the combination of market forces, Member State regulatory initiatives and the existing Community legal framework were sufficient and that, in the absence of empirical evidence on the existence and extent of shareholder expropriation, adopting further measures could entail a risk of imposing significant costs to issuers and controlling shareholders without proportional benefits.¹⁰

The second company law case concerned a proposal for a *Directive on the cross border transfer of registered offices*. The impact assessment concluded that the effects of existing legislation on cross-border mobility (Directive on cross-border mergers) are not yet known, and that the issue of the transfer of the registered office might be clarified by the Court of Justice in the near future. As a result, the assessment concluded that a Directive was not a proportionate response to the problem, and that it would be more appropriate to wait until the impacts of those developments can be fully assessed and the need and scope for any EU action better defined.¹¹

A number of initiatives were revised significantly as a response to the scrutiny of the Impact Assessment Board. For example, an *Initiative on the quality of teacher education*¹² became much more explicit on the possible supportive role of EU initiatives in the light of Member State competence. Likewise, for the *Action plan on effective consular protection in third countries*¹³, the need for EU action was carefully re-examined and a more modest approach proposed.

The proposal for a *Directive on the cross-border enforcement of sanctions in the field of road safety* originally consisted of two separate parts: the first to set up an efficient cross-border enforcement system ensuring that all speeding violations committed in a Member State by drivers from another Member State could be followed up; and the second to make national road safety enforcement practices comply with certain requirements with regard to the number of controls carried out and the follow-up to registered offences. In its opinion on the draft impact assessment, the IAB asked for the two parts of the proposal to be clearly distinguished, and for each part to be assessed separately in terms of EU added value, proportionality and subsidiarity. In March 2008 the Commission adopted a proposal on only the first part of the initial draft, having dropped the part on requirements for national enforcement systems.¹⁴

¹⁰ SEC(2007) 1705.

¹¹ SEC(2007) 1707.

¹² COM(2007) 392

¹³ COM(2007) 767

¹⁴ COM(2008) 151

4. Application of the principles by other actors

4.1 National parliaments

If ratified, the Treaty of Lisbon would lead to a number of changes in the role of national parliaments in EU lawmaking.¹⁵ One of the most important innovations concerns the introduction of *ex ante* political control and *ex post* judicial control over the principle of subsidiarity. *Ex ante* political control would be provided by the introduction of an early warning mechanism. This would allow national parliaments to send a reasoned opinion when they consider that a European legislative proposal does not comply with the subsidiarity principle¹⁶. National parliaments would be informed systematically of all legislative proposals and, except in duly justified urgent cases, will have eight weeks in which to make their views known¹⁷. Depending on the number of responses received from national parliaments, the Treaty would provide two mechanisms - the 'yellow card' and the 'orange card' - which lead to a review and possible withdrawal of the proposal. In terms of *ex-post* judicial control, the Treaty would contain new provisions for national parliaments and the Committee of the Regions to bring suspected violations of the principle of subsidiarity before the European Court of Justice.¹⁸

In a procedure that is distinct from – though in some aspects similar to – this early warning mechanism, the Commission has been transmitting all new initiatives to national parliaments since 2006, and has put in place a procedure for replying to the opinions they produce¹⁹. By December 2007, the Commission had received 166 opinions from 25 national parliaments in 19 Member States. These related to 86 Commission texts²⁰.

Subsidiarity and proportionality have been important themes in the issues raised by national parliaments. For example:

- The German Bundesrat was of the view that the proposal on the framework for soil protection²¹ did not respect the principle of subsidiarity, while the French Senate was of the opinion that there was insufficient information on the costs of the provisions on soil contamination to verify whether the proportionality principle was respected. As indicated in section 4.2, the proposal was subject to active discussions on subsidiarity and proportionality in both the European Parliament and Council.
- Both the French Senate and German Bundesrat also expressed doubts on the need for the proposal on the safety of road infrastructures²². In the European Parliament views differed:

¹⁵ Protocols N°1 and 2

¹⁶ This concerns: proposals of the Commission; initiatives of a group of Member States (cf. penal cooperation); initiatives of the European Parliament; requests of the European Court of Justice; recommendations of the European Central Bank; and requests of the European Investment Bank for adoption of a European legislative act.

¹⁷ Article 4 of the Protocol on the Role of national Parliaments in the European Union.

¹⁸ Article 8 of the Protocol on the application of the principles of subsidiarity and proportionality

¹⁹ "A Citizens' Agenda - Delivering Results For Europe", COM(2006) 211.

²⁰ Annex 1 provides a more detailed overview of the opinions.

²¹ COM(2006)232

²² COM(2006)569

a majority of Members wanted the Commission to be more ambitious, while others opposed it on the grounds of subsidiarity.

- The French Senate expressed the view that the Commission had not justified its proposal on the reform of the fruit and vegetable market²³ from the point of view of subsidiarity and proportionality. In the debate in Council, the Commission modified and completed the recital of the text to make it more explicit on these points.
- On the Green Paper on Tobacco²⁴, the Folketing (DK) and the Riksdag (SE) raised the issue of subsidiarity and expressed a preference for these issues to be dealt with at national level.

It should be noted that 35 opinions were produced in the framework of two co-ordinated exercises on subsidiarity led by COSAC and launched at the end of 2006. In 2007 COSAC launched a further exercise of this type, focusing on the Framework Decision of the Council on the fight against terrorism²⁵. By the end of January 2008, 29 assemblies out of 40 had participated in the exercise. The exercise was designed to simulate the procedures proposed under the Treaty of Lisbon, although in the event the thresholds triggering action would not have been met. The House of Commons opposed the proposal on the grounds of subsidiarity, while the Bundestag opposed it on the grounds of proportionality. Several chambers considered that the arguments for subsidiarity were insufficient. All of the chambers questioned the value added of Union action compared to action by the Council of Europe.

4.2 European Parliament and Council

The European Parliament and the Council raised the issues of subsidiarity and proportionality on a number of occasions.

In the discussions on the *Marine Strategy Framework Directive*, the Parliament in first reading amended the Commission's proposal by introducing a more stringent and legally binding obligation of result. Certain Member States subsequently argued that the main objective of the Directive as amended by the Parliament ('to achieve or maintain good environmental status of the marine environment') might raise a problem in terms of proportionality. These Member States were concerned that the implementation of the Framework Directive could in certain situations lead to disproportionate costs, and requested a clause to address this. The European Parliament in second reading agreed a new text on the objective ('shall take the necessary measures to achieve') and also stated that subject to certain conditions Member States do not have to take specific measures where the costs would be disproportionate taking into account the risks to the marine environment.. Some Member States were of the opinion that the agreed safeguard on costs was itself disproportionately cautious and for this reason abstained at Council to express their opinion that it had been unnecessarily weakened.

In Council discussions on the *Directive on the protection of soil* in December 2007, an effort has been made to provide flexibility for Member States and reduce costs of implementing the Directive. However, certain Member States continue to argue that soil policy is a national competence and that the proposal does not respect the principles of subsidiarity and

²³ COM(2007)17
²⁴ COM(2007)27
²⁵ COM(2007)650

proportionality. While the Committee on Legal Affairs of the European Parliament adopted an opinion rejecting this proposal on the grounds of subsidiarity, the European Parliament did not follow this opinion.

As noted in section 2.2, Council and the European Parliament should address subsidiarity and proportionality when proposing an amendment that affects the scope of Community action. The low number of amendments that actually does so reflects wider difficulties for the European Parliament and the Council to provide impact assessments of significant amendments that are proposed, especially when during political discussions they are changed, split, or combined before coming to a vote. The review of the "Common Approach for Impact Assessment"²⁶ – which will take place in 2008 – provides an opportunity for the Council, the European Parliament and the Commission to discuss ways of facilitating the assessment of amendments.

4.3 Committee of the Regions

The Committee of the Regions launched an interactive Subsidiarity Monitoring Network in March 2007, building on test phases carried out in 2005 and 2006. The network is primarily aimed at local and regional authorities, but EU and national institutions are also invited to participate. The network is organised through an inter-active website²⁷. Registered participants receive an email alert when compliance with the subsidiarity principle needs to be examined for a new policy document from the Commission. The time for submitting comments to the Committee of the Regions (using a standardised electronic form) is approximately 6 weeks after the test has been announced on the network. This electronic platform will, among other things, help the European Commission and the Committee of the Regions to implement their co-operation agreement of November 2005, according to which they will identify priorities which need specific follow-up in the field of subsidiarity and proportionality.

4.4 The Court of Justice

2007 was a year in which the established case-law on the principles of subsidiarity and proportionality was confirmed. The Court of First Instance (CFI) made interesting comments on subsidiarity, by way of obiter dicta in two cases, and further elaborated on the applicability of the principle of proportionality in the field of competition law.

In Case T- 374/04 *Germany v. Commission*²⁸ the CFI linked the burden of proof on the Commission when it is exercising its supervisory powers under secondary legislation, to the principle of subsidiarity. The CFI was considering a challenge from Germany to the Commission's decision on its national plan for the allocation of greenhouse gas emission allowances, in which the Commission rejected rules on downwards ex-post adjustments proposed by Germany, on the grounds that they infringed Directive 2003/87/EC.²⁹ The CFI examined the legality of the Commission's finding that Germany had infringed the criteria of the directive. In the course of its judgment, the CFI addressed the division of powers between the Commission and the Member States in this area. It concluded that, where there is no Community rule which prescribes clearly and precisely the form and methods which Member States must use to ensure the effectiveness of directives, it is for the Commission to prove to

²⁶ Adopted under the 2003 Inter-institutional Agreement on Better Lawmaking.

²⁷ <http://subsidiarity.cor.europa.eu>

²⁸ Judgment of 07.11.07 – not yet reported.

²⁹ Directive 2003/87/EC (O.J. 2003 L 275, pg. 32.) (Emissions Trading).

the required legal standard that the instruments used by the Member States are contrary to Community law. It also concluded that when the EC and its Member States share competence in an area, it is for the Commission to prove the extent to which Member States' powers are limited. The Court finally concluded that the Commission had not proved to the requisite legal standard that the downwards ex-post adjustments were contrary to the objectives of the Treaty and annulled the relevant part of the decision.

In the case of *Minin v. Commission*³⁰ the CFI confirmed the reasoning of its rulings in the *Yusuf* and *Ayadi* cases.³¹ This makes clear that the principle of subsidiarity does not apply with regard to economic sanctions against third countries. However, the CFI went on to state that even if the principle of subsidiarity did apply, it is "plain that the uniform implementation in the Member States of Security Council resolutions can be better achieved at Community level than at national level".

In the case of *Alrosa*³², the CFI applied the principle of proportionality for the first time to decisions under Article 9 of Regulation 1/2003³³ on the implementation of the rules on competition. That article concerns commitments made by undertakings and made binding by the Commission. This case centered on a trading agreement, notified to the Commission, between two companies operating in the market for the production and supply of rough diamonds. One of the companies made commitments to the Commission to stop all purchases from the other party, which the Commission made binding in an Article 9 decision. The second company challenged the decision inter alia on the grounds that it infringed the principle of proportionality, arguing that a prohibition of all supplies to the other party was disproportionate. The CFI confirmed that, although Article 9 does not refer explicitly to proportionality, the Commission must comply with this principle as it is a general principle of Community law. It concluded that the complete prohibition of all commercial relations infringed the principle of proportionality and annulled the decision.³⁴

5. Conclusions

On the basis of the above analysis, three broad conclusions can be drawn. First, in 2007 each of the actors in the system, at national and European level, made a contribution to ensuring that Community proposals are scrutinised to ensure consistency with subsidiarity and proportionality. The evidence is that this functions well. Second, the process of scrutiny is being reinforced in a number of ways: in the Commission through reinforcement of the impact assessment system; in national parliaments; and in the Committee of the Regions. Third, the fact that national parliaments and the EU institutions have raised similar issues shows a growing degree of consensus on what is meant by subsidiarity and proportionality in practice. The Commission will continue to follow these developments closely.

³⁰ Case T-362/04 Judgment of 31.01.07, ECR 2007 Page II-2003

³¹ Case T-306/01 *Yusuf and Al Barakaat International Foundation v. Council* [2005] ECR II-3533, paragraphs 112 to 116 and Case T-253/02 *Ayadi v. Council* [2006] ECR II - 2139, paragraphs 87 to 89.

³² T-170/06, Judgment of 11.07.07 not yet reported.

³³ O.J. 2003 L 1, pg.1.

³⁴ It has to be noted that the Commission is appealing this judgement.

Annex 1: Number of opinions received from national parliaments

| | National chamber | Opinions received |
|----|------------------------------|-------------------|
| 1 | FR Sénat | 40 |
| 2 | DE Bundesrat | 21 |
| 3 | UK House of Lords | 18 |
| 4 | SE Riksdag | 17 |
| 5 | PT | 13 |
| 6 | DK Folketing | 12 |
| 7 | CZ Sénat | 11 |
| 8 | IE (Joint EU Committee) | 5 |
| 9 | NL (Both Houses) | 3 |
| 10 | DE Bundestag | 3 |
| 11 | LT Seimas | 3 |
| 12 | FR Assemblée nationale | 2 |
| 13 | BE Sénat | 2 |
| 14 | UK House of Commons | 2 |
| 15 | HU | 2 |
| 16 | LUX | 2 |
| 17 | EE Riigikogu | 2 |
| 18 | CZ Chambre des députés | 1 |
| 19 | IT Camera dei Deputati | 1 |
| 20 | BE Chambre des Représentants | 1 |
| 21 | PL Sejm | 1 |
| 22 | PL Senat | 1 |
| 23 | FI | 1 |
| 24 | SI | 1 |
| 25 | SK | 1 |
| | Total: | 166 |