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**REPORT FROM THE COMMISSION**

**ANNUAL REPORT 2015**

**ON SUBSIDIARITY AND PROPORTIONALITY**

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## **1. INTRODUCTION**

This is the 23rd annual report on the application of the principles of subsidiarity and proportionality in European Union law making. The report is submitted in accordance with Article 9 of Protocol (No 2) to the Treaty on European Union and to the Treaty on the Functioning of the European Union on the application of the principles of subsidiarity and proportionality.

The report looks at how the European Union's institutions and bodies implemented these two principles in 2015 and how the practice has evolved in comparison with previous years. It also provides an analysis of the Commission proposals that were the subject of reasoned opinions during the year. Given the close links between the subsidiarity control mechanism and the political dialogue between national Parliaments and the Commission, this report should be seen as complementary to the Commission's 2015 annual report on relations with national Parliaments.<sup>1</sup>

## **2. APPLICATION OF THE PRINCIPLES BY THE INSTITUTIONS**

### **2.1. The Commission**

Before taking office in November 2014, the Juncker Commission made a commitment to be '*bigger and more ambitious on big things, and smaller and more modest on small things*'. It also undertook to place subsidiarity at the heart of the European democratic process. As a result, the Commission work programme for 2015 put forward a limited number of new initiatives and announced the withdrawal of a large number of pending proposals. This allowed work to focus on the ten priorities set out in the Political Guidelines.<sup>2</sup>

As one of the first actions to deliver on that commitment, the Commission adopted a new Better Regulation package in May 2015. The new policy's aim is to work in a more transparent and inclusive way to produce better proposals, and ensure that existing rules deliver their goals more effectively. It sets out strengthened commitments to how the Commission develops, informs, consults, assesses, checks the quality of, and evaluates its policy measures. This new Better Regulation framework also allows the Commission to apply the principles of subsidiarity and proportionality in a more integrated and comprehensive way than before.

The new Better Regulation framework helps ensure that when developing new policies, the Commission assesses their compliance with the principles of subsidiarity and proportionality. This assessment now takes place at different stages of the decision-making cycle. At the early stage of the policy planning process, roadmaps or inception impact assessments are published for all major new initiatives.<sup>3</sup> They provide a preliminary description of the initiative and existing

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<sup>1</sup> COM(2016) 471 final.

<sup>2</sup> A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change – Political Guidelines for the next European Commission ([http://ec.europa.eu/priorities/docs/pg\\_en.pdf](http://ec.europa.eu/priorities/docs/pg_en.pdf)).

<sup>3</sup> [http://ec.europa.eu/smart-regulation/roadmaps/index\\_en.htm](http://ec.europa.eu/smart-regulation/roadmaps/index_en.htm).

Inception impact assessments are only produced for initiatives where significant impact is envisaged and where the initiative will therefore be accompanied by an impact assessment.

evaluation work. They also outline the Commission's plans for impact assessment and consultation work. The roadmaps or inception impact assessments also include an initial justification for action as regards subsidiarity and proportionality. These aspects are then further developed and analysed in full impact assessments, for those initiatives where these are produced.

In 2015, the Commission also introduced new consultation and feedback mechanisms for new policy initiatives. These mechanisms apply throughout the process from inception, through preparation, to adoption. In addition, consultations for the evaluation of existing policy measures were strengthened. As a result, the possibilities for the public and other stakeholders to follow policy initiatives, and give views on them, have multiplied. Member States and stakeholders – such as regional and local authorities, businesses, organisations and members of the general public – can give their views on how the Commission is developing specific proposals and how subsidiarity and proportionality questions are handled from early on. So, the new Better Regulation policy enables the Commission to take on board concerns stakeholders may have on the issues of subsidiarity and proportionality from the very earliest conceptual stage. In addition, immediately after the Commission adopts a proposal and before the legislative process starts, stakeholders and Member States may once again have their say on specific proposals and their accompanying impact assessments, including on subsidiarity and proportionality, as an input to the legislative process.

In addition, in 2015 the Commission launched the website 'Lighten the load – Have your say'<sup>4</sup> as well as the new REFIT Platform. These provided new ways for communicating with the Commission on possible excessive burdens or inefficiencies of existing regulatory measures. These may include questions on subsidiarity or proportionality.

Finally, the explanatory memorandum accompanying each legislative proposal sets out how the proposal complies with the principles of subsidiarity and proportionality.

### **Subsidiarity analysis**

The new Better Regulation guidance and its accompanying 'toolbox' require a subsidiarity analysis to be carried out when considering a new initiative in areas where the EU does not have exclusive competence and when evaluating the relevance and European added value of an existing intervention. The Commission addresses subsidiarity for both legislative and non-legislative initiatives. The objective of the analysis is twofold: first, to assess whether action at the national level is sufficient to achieve the relevant objective; second, to assess whether Union action would provide added value over action by the Member States.

Under the new guidelines and toolbox, a key part of the analysis is to assess the 'Union relevance' of the initiative being considered. The greater the relevance, the more likely Member State action alone would be insufficient. Key considerations are: the geographical scope, the number of businesses or other players affected, the number of Member States concerned, and the economic impact. In addition, the analysis determines in qualitative – and as far as possible in quantitative – terms whether there is a significant cross-border problem. For example, assessing how much of an environmental problem is due to the activities of other Member States. Relevant situations involve cross-border effects (such as pollution) or obstacles to the free movement of people, goods, services and capital. The analysis also covers both the advantages and the disadvantages that Union action may have relative to action by Member States.

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<sup>4</sup> [http://ec.europa.eu/priorities/democratic-change/better-regulation/feedback/index\\_en.htm](http://ec.europa.eu/priorities/democratic-change/better-regulation/feedback/index_en.htm).

## Proportionality analysis

Under the principle of proportionality, the content and form of Union action must not exceed what is necessary to meet the objectives of the Treaties.<sup>5</sup> Respect for the principle of proportionality is about ensuring that the approach and force of a policy match the objective. Proportionality is clearly referred to in the impact assessments,<sup>6</sup> evaluations and fitness checks.<sup>7</sup>

The new Better Regulation guidelines and toolbox require Commission departments to consider:

- whether measures comply with the principle of proportionality;
- whether they go beyond what is necessary to address the problem and achieve the objective satisfactorily;
- whether the initiative is limited to those aspects that Member States cannot achieve satisfactorily on their own and where the EU can do better;
- whether the action or choice of instrument is as simple as possible, and consistent with satisfactory achievement of the objective and effective enforcement;
- whether the costs are kept to a minimum and commensurate with the objective to be achieved;
- whether there is a solid justification for the choice of instrument (Regulation, Directive, or alternative regulatory methods); and
- whether well-established national arrangements and special circumstances in individual Member States are respected.

## Impact assessments

When an impact assessment is required – as is the case whenever significant economic, social and environmental impacts are expected – stakeholders are invited to comment on the need for action and on the possible solutions to the problems identified. Based on responses to this consultation and other relevant input, impact assessments analyse how the options examined comply with the principles of subsidiarity and proportionality. The Better Regulation guidelines adopted in May 2015 provide further guidance for assessing the need for European action and the added value this would bring.

The Impact Assessment Board (the independent committee that assesses all Commission impact assessments) was reformed in the 2015 Better Regulation package and was replaced by the new Regulatory Scrutiny Board on 1 July 2015. The Board comprises six full-time members, including three from outside the Commission. The Chair is appointed at Director-General level. All members are independent and function in a personal capacity based on their individual expertise. The Regulatory Scrutiny Board also assesses major evaluations and fitness checks in addition to impact assessments.

Subsidiarity and proportionality are part of the quality check that the Board performs on impact assessments. Many of the Board's opinions question and make recommendations on the way in which the problem under consideration has been defined. The description of the problem is often directly or indirectly linked to the EU's right to act and therefore relates to the principle of subsidiarity. Furthermore, the discussion of policy options and their potential impact is closely

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<sup>5</sup> Article 5(4) of the Treaty on European Union.

<sup>6</sup> In the context of impact assessments, proportionality is a key criterion to consider in the comparison of policy options.

<sup>7</sup> A fitness check is a comprehensive evaluation of a policy area that usually addresses how several related legislative acts have contributed (or otherwise) to the attainment of policy objectives. Fitness checks are particularly well-suited to identify overlaps, inconsistencies, synergies and the cumulative impacts of regulation.

related to the application of the principle of proportionality, since the purpose is always to find the option most proportionate to the policy problem given the objectives stated.

In 2015, the Impact Assessment Board and subsequently the Regulatory Scrutiny Board assessed 30 impact assessments. Seven of these (23 %) were judged as needing improvements on either subsidiarity or proportionality, or both. The following cases from 2015 are particularly noteworthy:

- On the proposal for a Directive on accessibility requirements for products and services,<sup>8</sup> the Board asked for a better justification of why the options of self-regulation by industry and adoption of voluntary European standards had been discarded. The Board called for more convincing evidence – and for better reporting of stakeholder views – as to why these options were not considered feasible. In addition, the Board considered that the report did not sufficiently justify the proposed proportionality clause. The report received a negative opinion. The report was subsequently improved and an amended version passed the Board.
- On the draft Commission Regulation establishing a network code on interoperability and data exchange in gas transmission,<sup>9</sup> the Board called for the need for European Union action to be better demonstrated. It recommended that the impact assessment should present more evidence on the problems identified on interconnection agreements, data exchange, gas quality, units and odourisation and their negative impact on gas trading and market integration in the European Union. The Board considered that the baseline scenario should be further developed to take better account of the impact of declining European gas production, an increased variety in import sources and the third energy package on cross-border gas trade and gas quality in the European Union. The Board's comments were taken into account in the final version.
- On the proposal for a Regulation on cross-border portability of online content services,<sup>10</sup> the Board called for the impact assessment to present more evidence in support of the EU's need to act. It recommended taking proper account of other digital single market initiatives and stakeholder views on this issue. The Board also asked for further evidence about whether the online content services market might, over time, solve the cross-border problems identified without legislation. The Board's comments were taken into account to a large extent in the final version.

As demonstrated by these examples, the Impact Assessment Board and Regulatory Scrutiny Board helped improve the analysis of how proposals complied with the principles of subsidiarity and proportionality. By so doing, they provided critical information for the Commission's political decision-making process.

## **Evaluations and fitness checks**

Subsidiarity and proportionality were also key for retrospective evaluations and fitness checks carried out in 2015. These assessed whether European actions are delivering the expected results in terms of efficiency, effectiveness, coherence, relevance and European value added. They also assessed whether such actions remain necessary, or whether the objectives could be achieved better in other ways. The Commission is committed to 'evaluating first' – in other words, to

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<sup>8</sup> COM(2015) 615 final of 2 December 2015 – Proposal for a Directive of the European Parliament and of the Council on the approximation of the laws, regulations and administrative provisions of the Member States as regards the accessibility requirements for products and services.

<sup>9</sup> C(2015) 2823.

<sup>10</sup> COM(2015) 627 final of 9 December 2015 – Proposal for a Regulation of the European Parliament and of the Council on ensuring the cross-border portability of online content services in the internal market.

analysing past performance before considering potential legislative changes. By gathering evidence and identifying lessons that can feed into decision-making, the EU is making evaluation an integral and permanent part of its policymaking.

The Commission normally produces between 100 and 120 evaluations every year (122 in 2015). Since the first one was conducted in 2012, the Commission has completed 7 fitness checks, 2 of which were in 2015). The following examples highlight evaluations where subsidiarity, European value added and proportionality issues were raised:

- **Fiscalis and Customs 2013** – The Fiscalis and Customs programmes supports IT systems allowing for the exchange and availability of information between Member States' tax and customs administrations in a rapid and secure manner. This common network ensures that each national administration only needs to connect once to be able to exchange information with any of the Member States. Evaluations in 2015 confirmed the strong European added value of the programmes. If such infrastructure were not available, a Member State would have to link 27 times to the national systems of each of the other Member States. This would create substantially higher administrative costs.<sup>11</sup>
- **Public procurement** – The 2011 evaluation of the European Union's public procurement rules found that savings generated by European public procurement directives far exceed the costs for public purchasers and suppliers. However, the evaluation also suggested that there may be certain areas where the costs of running regulated procedures may be disproportionate to the benefits. Hence, the Commission proposed a range of measures to simplify requirements and introduce greater flexibility for Member States to make public procurement more efficient and more strategic. The Commission's proposals were broadly adopted by the European Parliament and Council and the amended legislation, which came into effect in April 2014, is currently being implemented by Member States. In five Member States, cost savings were estimated in the range of 29 to 58 %.
- **Prospectus** – The Prospectus Directive was evaluated in 2015 in the context of the regulatory fitness and performance programme.<sup>12</sup> This was largely in response to stakeholder concerns about the high cost of preparing prospectuses. It also assessed the proportionate disclosure regime, introduced in 2011, to lighten the burden for small and medium-sized enterprises. The evaluation found that the small and medium-sized enterprises scheme had not been used to the expected extent as the disclosure requirements were too burdensome. In response, by the end of 2015 – on the basis of the evaluation and an impact assessment – the Commission adopted a revised proposal to improve the directive's requirements. The revised proposal reduces the administrative burden for companies (notably small and medium-sized enterprises) and makes the prospectus a more valuable information tool for potential investors. The estimated potential savings for small and medium-sized enterprises are in the range of EUR 45-67 million per year.

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<sup>11</sup> SWD(2015) 124 final of 26 June 2015 – Commission Staff Working Document on examples of EU added value, accompanying the Report from the Commission to the European Parliament and the Council on the evaluation of the Union's finances based on results achieved.

<sup>12</sup> COM(2014) 368 final of 18 June 2014 – Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the Regulatory Fitness and Performance Programme (REFIT): State of Play and Outlook.

## 2.2. Follow-up to reasoned opinions from national Parliaments

In 2015, the Commission received **eight reasoned opinions** from national Parliaments on the principle of subsidiarity.<sup>13</sup> This was a decrease of 62 % compared with the 21 received in 2014. The reasoned opinions received in 2015 accounted for a considerably lower proportion (2 %) of the total number of opinions received by the Commission that year under the political dialogue (350).

The number of reasoned opinions received in 2015 is the lowest received in a calendar year since the subsidiarity control mechanism was introduced by the Lisbon Treaty in 2009. It should also be noted that the total number of opinions submitted by national Parliaments in 2015 under the political dialogue also decreased significantly.<sup>14</sup>

As in previous years, reasoned opinions continued to vary in form. The arguments put forward by national Parliaments in support of their conclusions that the principle of subsidiarity had been breached also differed. The eight reasoned opinions issued in 2015 related to three Commission proposals. The proposal that gave rise to the most reasoned opinions, namely the proposal for a Regulation establishing a crisis relocation mechanism,<sup>15</sup> generated five reasoned opinions. Two reasoned opinions were issued on the proposal amending Regulation (EC) No 1829/2003 as regards the possibility for the Member States to restrict or prohibit the use of genetically modified food and feed on their territory,<sup>16</sup> and a single reasoned opinion was issued on the proposal amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation.<sup>17</sup> For more details, see Section 3 below and the Annex to this report.

The significant decrease in the total number of reasoned opinions issued in 2015 translated into a substantial decrease in the number of reasoned opinions issued per chamber. Eight out of 41 chambers issued reasoned opinions in 2015 (compared with 15 in 2014). The reasoned opinions were issued by the Czech *Senát*, the Czech *Poslanecká sněmovna*, the Spanish *Congreso de los Diputados / Senado*, the Hungarian *Országgyűlés*, the Dutch *Tweede Kamer*, the Romanian *Camera Deputaţilor*, the Swedish *Riksdag* and the Slovak *Národná Rada*. No chamber issued more than one reasoned opinion.

Despite the small number of reasoned opinions submitted in 2015, a number of chambers continued their call for the subsidiarity control mechanism to be strengthened. In January, the Dutch *Tweede Kamer* organised an informal meeting in Brussels on the role of national Parliaments, which also discussed ways to improve the subsidiarity control mechanism. In May and October, an informal working group of national Parliaments met in Warsaw and in Luxembourg respectively to discuss possible improvements to the mechanism. On the basis of the discussions in that working group, the LIV COSAC invited the Commission to consider excluding the Christmas / New Year break as well as recess periods in the EU institutions from the calculation of the eight-week period within which national Parliaments may issue a reasoned

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<sup>13</sup> See the Annex to this report.

<sup>14</sup> 350 compared to 506 in 2014.

<sup>15</sup> COM(2015) 450 final of 9 September 2015 – Proposal for a Regulation on establishing a crisis relocation mechanism and amending Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third country national or a stateless person.

<sup>16</sup> COM(2015) 177 final of 22 April 2015 – Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1829/2003 as regards the possibility for the Member States to restrict or prohibit the use of genetically modified food and feed on their territory.

<sup>17</sup> COM(2015) 135 final of 18 March 2015 – Proposal for a Council Directive amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation.

opinion. It invited the incoming COSAC Presidency to present a follow-up on this matter to COSAC. It also called upon the Commission to strengthen efforts to ensure better quality and more timely responses to national Parliaments' reasoned opinions. Finally, COSAC noted the wide support for an enhanced form of political dialogue – also known as a 'green card' – by which a group of national Parliaments would be able to call on the Commission to table proposals for new or amended legislation.

## **2.3. The European Parliament and the Council**

### *a) The European Parliament*

In 2015, the European Parliament formally received 254 submissions by national Parliaments. Eight of these were reasoned opinions while the other 246 were contributions (i.e. submissions not raising issues related to the subsidiarity principle). These figures represent a minor decrease in comparison with 2014, when 18 reasoned opinions and 269 contributions were officially sent to the European Parliament.

The European Parliament's Committee on Legal Affairs (JURI Committee) is responsible for monitoring compliance with the principle of subsidiarity. The JURI Committee appoints a 'standing rapporteur' for subsidiarity for a six-month period on the basis of a rotation among the political groups. Laura Ferrara (EFDD/IT) was the standing rapporteur during the first half of 2015. She was succeeded by Sajjad Karim (ECR/UK) for the second half of the year. The rapporteur monitors the reasoned opinions received. Issues raised may be debated in the JURI Committee and can lead to possible recommendations to the committee responsible for the subject matter of the proposal in question.

A report is also regularly drawn up by the JURI Committee on the Commission's annual report on subsidiarity and proportionality. On 13 October 2015, the Committee adopted a report drawn up by Sajjad Karim on the Commission's annual reports for 2012 and 2013. The Committee also contributes to the biannual reports by COSAC on questions related to subsidiarity. As the Committee responsible for verifying the legal basis of proposals, as well as for Better Regulation and REFIT, the JURI Committee also pays close attention to compliance with the principle of proportionality.

In addition, the European Parliamentary Research Service continued to assist the European Parliament in taking account of the principles of subsidiarity and proportionality in its work:

- by systematically scrutinising the subsidiarity and proportionality aspects of the Commission's impact assessments and drawing attention to any concerns expressed, notably by national Parliaments and the Committee of the Regions;
- by ensuring that these principles are fully respected in the European Parliament's own work, for example when carrying out impact assessments of its own substantive amendments or analysing the added value of the Parliament's proposals for new legislation, based on Article 225 of the Treaty on the Functioning of the European Union, and the cost of the absence of action at European level;
- by scrutinising the subsidiarity and proportionality aspects when drafting impact assessments, focusing on the EU added value over national spending or actions.

In 2015, the European Parliament prepared 13 initial appraisals, one impact assessment of substantive parliamentary amendments and six ex post impact assessments. In addition, it prepared four reports on the cost of non-Europe and two European added value assessments.



The European Parliament also started a new, more general approach to assessing the added value of action at European level, by drawing up a ‘cost of non-Europe’ report,<sup>18</sup> mapping the gains of actions at European level proposed by the European Parliament.

#### *b) The Council*

The Council’s obligations towards national Parliaments’ subsidiarity scrutiny mainly consist in forwarding to national Parliaments draft legislative acts that do not originate from the Commission or the European Parliament. On that basis, the Council sends all draft legislative acts originating from a group of Member States, the Court of Justice, the European Central Bank or the European Investment Bank.<sup>19</sup>

On 4 December 2015, the Council forwarded to national Parliaments the Court of Justice’s proposal for a Regulation of the European Parliament and of the Council on the transfer to the General Court of jurisdiction at first instance in disputes between the EU and its servants.<sup>20</sup>

As a corollary to the above obligation, the Council forwards any national Parliament opinions on legislative proposals originating from a group of Member States to the proposing Member States. Similarly, the Council forwards to the institution concerned opinions received from national Parliaments on legislative proposals originating from the Court of Justice, the European Central Bank or the European Investment Bank. The Council did not receive any opinions from national Parliaments in 2015 on the above-mentioned proposal from the Court of Justice.

In addition, the Council keeps Member States informed of national Parliament opinions on legislative proposals from the Commission. Hence, in 2015, the Council Secretariat distributed to delegations 9 reasoned opinions<sup>21</sup>, and 86 opinions issued under the political dialogue, on Commission legislative proposals.

Finally the Council, as part of its legislative work, checks compliance with the principles of subsidiarity and proportionality when reviewing impact assessments accompanying Commission proposals.

## **2.4. The Committee of the Regions**

In 2015, the Committee of the Regions adopted and implemented its third Subsidiarity Work Programme.<sup>22</sup> The Committee selected from the Commission’s 2015 work programme a number of priority initiatives to be monitored from a subsidiarity and proportionality point of view using the following criteria:

- a) Initiatives should present a clear political interest for local and regional authorities;
- b) Initiatives should touch on areas of competence of local and regional authorities;
- c) Initiatives should bear a potential subsidiarity dimension.

Among the priority initiatives selected was the proposal amending Regulation (EC) No 1829/2003 as regards the possibility for the Member States to restrict or prohibit the use

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<sup>18</sup> Mapping the Cost of Non-Europe 2014-19, Third edition: April 2015, European Added Value Unit [http://www.europarl.europa.eu/RegData/etudes/STUD/2015/536364/EPRS\\_STU%282015%29536364\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/536364/EPRS_STU%282015%29536364_EN.pdf).

<sup>19</sup> Article 6 of Protocol No 2.

<sup>20</sup> Doc. 14306/15.

<sup>21</sup> Including one received after the 8-week deadline.

<sup>22</sup> CdR 01517/2015, adopted by the Committee of the Regions’ Bureau on 15 April 2015.

of genetically modified food and feed on their territory.<sup>23</sup> On that proposal, the Committee of the Regions consulted its Subsidiarity Expert Group, consisting of 13 practitioners from the local and regional level. The group concluded that the proposal complied with the principles of subsidiarity and proportionality, although some experts raised questions as to whether the proposal would in fact enable Member States to lawfully impose national bans and restrictive measures on genetically modified food and feed. The Committee echoed this concern considering in its opinion that *‘a prohibition option entails unreasonably high hurdles for a Member State to overcome before it can exercise this option at national level and impose a ban; this raises subsidiarity concerns and indicates that the proportionality principle would clearly be breached under this proposal.’*<sup>24</sup>

The Committee of the Regions also adopted four opinions in accordance with its Rules of Procedure,<sup>25</sup> assessing the compliance of legislative proposals with the principles of subsidiarity and proportionality:

In its opinion on the proposal creating a programme on interoperability solutions for European public administrations, businesses and citizens<sup>26</sup>, the Committee of the Regions found that the proposal complied with the principles of subsidiarity and proportionality. However, the Committee pointed out *‘that effective involvement of the Member States and their local and regional authorities in the ISA2 programme will be essential in order to fully achieve its aims and guarantee the continuous respect of the subsidiarity principle during the implementation of the programme.’*<sup>27</sup>

The Committee of the Regions’ opinion on the Commission’s proposal for a European Fund for Strategic Investments<sup>28</sup> also found that the proposal complies with the subsidiarity and proportionality principles. In that regard the Committee stated: *‘As its main objective is to contribute to a relaunch of investments at European level with clear transnational aspects, the CoR considers that the draft regulation is compliant with the principle of subsidiarity. With regard to the proportionality principle, the CoR considers that the draft regulation is the appropriate legal instrument, because its financial provisions need to be directly applicable in all Member States.’*<sup>29</sup>

In its opinion<sup>30</sup> on the proposal for a Council Decision on guidelines for the employment policies of the Member States<sup>31</sup>, the Committee of the Regions acknowledged that *‘while these employment guidelines are addressed to Member States, the Europe 2020 Strategy should be implemented in partnership with the local and regional authorities, which, considering their competences and capacities in the fields covered by these guidelines and according to the*

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<sup>23</sup> COM(2015) 177 final of 22 April 2015.

<sup>24</sup> CdR 03636/2015.

<sup>25</sup> Rule 55.2.

<sup>26</sup> COM(2014) 367 final of 26 June 2014 – Proposal for a Decision of the European Parliament and of the Council establishing a programme on interoperability solutions for European public administrations, businesses and citizens (ISA2): Interoperability as a means for modernising the public sector.

<sup>27</sup> CdR 05514/2014.

<sup>28</sup> Proposal for a Regulation of the European Parliament and of the Council on the European Fund for Strategic Investments and amending Regulations (EU) No 1291/2013 and (EU) No 1316/2013 COM(2015) 10 final.

<sup>29</sup> CdR 00943/2015.

<sup>30</sup> CdR 01419/2015.

<sup>31</sup> COM(2015) 98 final of 2 March 2015 – Proposal for a Council Decision on guidelines for the employment policies of the Member States.

*principle of subsidiarity, are essential for designing and implementing National Reform Programmes and for overall communication on the Strategy.*<sup>32</sup>

Finally, in its opinion<sup>33</sup> on the Tax Transparency Package,<sup>34</sup> the Committee was convinced by ‘*entirely persuasive arguments on the added value of legislating at European Union level*’ in the explanatory memorandum accompanying the legislative proposal and concluded that the proposal complied with the principles of subsidiarity and proportionality.

A major subsidiarity event in 2015 was the 7th Interinstitutional Subsidiarity Conference, jointly organised by the Committee of the Regions and the Flemish Parliament. The conference took place on 17 November 2015 at the Flemish Parliament in Brussels. It was attended by more than 200 participants from various national and European institutions, representing all relevant levels of governance. The conference, which is held every two years and seeks to strengthen the European Union’s interinstitutional dialogue on subsidiarity scrutiny, allowed for a genuine exchange of views between all players involved in the subsidiarity monitoring process. The Conference additionally provided an opportunity to discuss how to make the proposals in the Commission’s May 2015 Better Regulation package a practical reality. The Conference brought together key institutional players, including First Vice-President Frans Timmermans, Luxembourg Minister Nicolas Schmit representing the Presidency of the Council, and the Chair of the European Parliament’s JURI Committee, Pavel Svoboda (EPP/CZ). The debate made it clear that Better Regulation and its practical application is a matter of primary concern not only for the European Union’s institutions and Member States, but also for local and regional authorities who bring a unique added value to European policy development and to the legislative process. It was also considered that proper compliance with the principles of subsidiarity and proportionality is a prerequisite for achieving Better Regulation. Moreover, the Conference triggered an exchange of practical experience between players at different levels of governance and provided an occasion to link the activities of the Luxembourg Presidency and the vision of the incoming Dutch Presidency.<sup>35</sup>

A more detailed description of subsidiarity-related activities is provided in the 2015 Subsidiarity Annual Report issued by the Committee of the Regions.<sup>36</sup>

## **2.5. The Court of Justice of the European Union**

The main judgment in 2015 on the application of the principles of subsidiarity and proportionality was issued by the Court of Justice of the European Union on 18 June 2015 in the Case C-508/13, *Estonia v Parliament and Council*.<sup>37</sup> In this case, Estonia had requested that the Court annul certain provisions of Directive 2013/34/EU<sup>38</sup> for breaching the principles of subsidiarity and proportionality and the obligation to state reasons.

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<sup>32</sup> Resolution of the Committee of the Regions ‘*For a better tool-box to implement the EU 2020 Strategy: the integrated guidelines for the economic and employment policies of the Member States and the Union*’ (CoR 175/2010 fin).

<sup>33</sup> CdR 02697/2015.

<sup>34</sup> COM(2015) 129 final of 18 March 2015 – Proposal for a Council directive repealing Council Directive 2003/48/EC; and COM(2015) 135 final of 18 March 2015.

<sup>35</sup> The report on key messages of the Conference is available at:

<http://portal.cor.europa.eu/subsidiarity/Pages/default.aspx>.

<sup>36</sup> Available after adoption by the Committee of the Regions’ Bureau in June 2016 at:

<http://portal.cor.europa.eu/subsidiarity/Pages/default.aspx>.

<sup>37</sup> EU:C:2015:403.

<sup>38</sup> Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, OJ L 182, 29.6.2013, p. 19.

In its judgment, the Court held that the determination of compliance with the principle of subsidiarity should be made for the Directive as a whole, and not for each of its provisions individually (paragraph 51). Second, the Court made clear that the principle of subsidiarity is not intended to limit the EU's competence on the basis of the situation of any particular Member State taken individually. It merely requires that the proposed action can, by reason of its scale or effects, be better achieved at Union level (paragraph 53). Third, as regards the obligation to give reasons, the Court recalled that it is sufficient to disclose the essential objective pursued by the institution. It would be excessive to require a specific statement of reasons for each of the technical choices made (paragraph 60). In addition, as a participant in the legislative procedure leading to the adoption of the Directive, Estonia could not validly claim that it was not in a position to know the reasons for the choice of measures (paragraph 61).

On the principle of proportionality, the Court recalled its constant case law according to which the EU legislature must be allowed broad discretion in areas entailing political, economic and social choices, and in which it is called upon to undertake complex assessments. This means that legality of measures adopted in that sphere can be affected only if the measure is manifestly inappropriate having regard to the objective that the competent institution is seeking to pursue (paragraph 29). The Court rejected Estonia's plea based on a breach of the principle of proportionality, considering that Estonia had not established that the various choices made by the EU legislature manifestly exceeded the limits of its discretion (paragraphs 32 to 38). In particular, the Court rejected the argument that the principle of proportionality had been infringed since the EU legislature had not taken account of its particular situation as a Member State advanced in electronic administration. It noted that the contested Directive has an impact in all Member States and requires that a balance between the different interests involved is ensured. For the Court, the attempt to strike such a balance, taking into account not the particular situation of a single Member State, but that of all Member States, cannot be regarded as being contrary to the principle of proportionality (paragraph 39).

Finally, the General Court on 26 November 2015 issued a judgment in Case T-461/13, *Spain v Commission*,<sup>39</sup> confirming that the principle of subsidiarity is not applicable in the field of state aid review (paragraph 182).

### **3. KEY CASES WHERE SUBSIDIARITY AND PROPORTIONALITY CONCERNS WERE RAISED**

- *Proposal for a Regulation of the European Parliament and of the Council establishing a crisis relocation mechanism and amending Regulation (EU) 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third country national or a stateless person*<sup>40</sup>

In response to the refugee crisis and in line with its European agenda on migration,<sup>41</sup> on 9 September 2015 the Commission adopted a proposal<sup>42</sup> for a crisis relocation mechanism aiming to introduce a structured solidarity mechanism. The Commission could trigger this at any time to help any Member State experiencing a crisis situation and extreme pressure on its asylum system as a result of a large and disproportionate inflow of non-EU nationals. Such future emergency situations would be set out by the Commission based on objective and verifiable criteria. This is part of a package of proposals that includes the emergency relocation of 120 000

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<sup>39</sup> EU:T:2015:891.

<sup>40</sup> COM(2015) 450 final of 9 September 2015.

<sup>41</sup> COM(2015) 240 final of 13 May 2015.

<sup>42</sup> COM(2015) 450 final of 9 September 2015.

refugees from Greece, Hungary and Italy<sup>43</sup>, a common European list of safe countries of origin<sup>44</sup> and making the return policy more effective<sup>45</sup>.

National Parliaments issued five reasoned opinions<sup>46</sup> on the proposal, representing seven votes. In their reasoned opinions, the national Parliaments argued: that the proposed mechanism constituted an unacceptable interference in the asylum systems of the Member States; that the reasoning was insufficient; and that by introducing a permanent mandatory distribution key instead of provisional measures, the proposals violated the principle of subsidiarity. The justification for the choice of Article 78(2)(e) of the Treaty on the Functioning of the European Union as the legal basis was also challenged.

In its replies, the Commission recalled that the refugee crisis had put Member States' asylum systems under extreme pressure, which could jeopardise application of the Dublin rules. In that regard the current system does not provide for any derogation from the responsibility criteria, thus generating imbalances and in some cases aggravating the crisis.

The Commission further argued that a crisis mechanism for the relocation of applicants would allow the EU – without having to go through a lengthy adoption procedure each time – to respond to an urgent situation and to help Member States facing an emergency situation. The Commission stressed that action by individual Member States would not be sufficient to address these situations. Implementation of uncoordinated solutions would not be able to achieve a comprehensive response to the disproportionate inflow of persons nor a fair sharing of responsibility between Member States.

- *Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1829/2003 as regards the possibility for the Member States to restrict or prohibit the use of genetically modified food and feed on their territory*<sup>47</sup>

When seeking the European Parliament's endorsement as President of the Commission, Jean-Claude Juncker stated his intention to review the legislation on the authorisation of genetically modified organisms. Under the current system, Member States have always failed to reach a qualified majority in favour of or against authorisation, thereby invariably leaving the final decision on authorisation to the Commission. On 22 April 2015, the Commission adopted a proposal for a review of the existing Regulation, which would allow Member States to take decisions at national level – restricting or prohibiting the use of genetically modified food or feed – after they have been authorised at European level. Such decisions would only be taken under the condition that the national opt-outs are compatible with Union law and are not related to health and environmental reasons. These are assessed by the European Food Safety Authority.

The Commission received two reasoned opinions, arguing, on the one hand, that the proposal provided Member States with insufficient room for national prohibition of genetically modified organisms given that this is a sensitive public issue<sup>48</sup> and, on the other, that transferring the decision to restrict or ban the use of genetically modified organisms to Member States was

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<sup>43</sup> Council Decision (EU) 2015/1601 of 22 September 2015.

<sup>44</sup> COM(2015) 452 final of 9 September 2015.

<sup>45</sup> COM(2015) 453 final and C(2015) 6250 final.

<sup>46</sup> The Czech *Poslanecká sněmovna*, the Czech *Senát*, the Hungarian *Országgyűlés*, the Romanian *Camera Deputaţilor* and the Slovak *Národná Rada*.

<sup>47</sup> COM(2015)177 final of 22 April 2015.

<sup>48</sup> Dutch *Tweede Kamer*.

incompatible with the principle of subsidiarity, as Member States are not always able to take such decisions in a way that does not prejudice the functioning of the single market.<sup>49</sup>

In its replies the Commission argued that the proposal does not transfer the entire competence to decide on the authorisation of genetically modified organisms to Member States, but only provides a possibility to adopt measures restricting or prohibiting the use of genetically modified food and feed on their territory, after authorisation by the EU has been issued. Therefore, the proposal does not, in the Commission's view, affect the aspects of the authorisation of genetically modified organisms that are better addressed at the European level.

- *Proposal for Council Directive amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation*

On 18 March 2015, as part of its agenda to tackle corporate tax avoidance and harmful tax competition within the European Union, the Commission presented a package of tax transparency measures. This included a proposal to introduce automatic exchange of information between Member States on their tax rulings.<sup>50</sup> The proposal requires national tax authorities to report regularly to other Member States on cross-border tax rulings that they have issued. The Member States would then be able to ask for more detailed information on a particular ruling. The automatic exchange of information on tax rulings would then enable Member States to detect abusive tax practices by companies and take the necessary action in response. Moreover, the proposal aims at encouraging healthier tax competition, as tax authorities would be less likely to offer selective tax treatment to companies once this is open to scrutiny by their peers.

The Commission received one reasoned opinion.<sup>51</sup> It argued that certain parts of the proposal, including the broad formulation of the obligation to provide information on bilateral and multilateral pricing as part of mutual agreements between the affected states, went beyond what is required to achieve the desired objectives and that the proposal did not comply with the principle of subsidiarity.

In its reply, the Commission stated that the fight against harmful tax practices undermining the functioning of the single market was the reason why the Commission had taken a broad view as to what type of information should be covered by the proposal. Therefore the margin of discretion on which rulings might be harmful and should be exchanged is minimised. This would also ensure that the Directive would have a real effect in practice.

The Commission's proposal was adopted by the Council on 8 December 2015.<sup>52</sup>

#### 4. CONCLUSION

2015 was the first full year under the new Commission, which had committed itself to putting subsidiarity at the heart of the European democratic process. The year also saw the lowest number of reasoned opinions received from national Parliaments ever since the subsidiarity control mechanism was introduced by the Lisbon Treaty in 2009.

Meanwhile, 2015 witnessed an increased interest from national Parliaments in discussing changes to the subsidiarity control mechanism. The Better Regulation agenda adopted in May

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<sup>49</sup> Spanish *Congreso de los Diputados* and *Senado*.

<sup>50</sup> COM(2015) 135 final of 18 March 2015.

<sup>51</sup> Swedish *Riksdag*.

<sup>52</sup> Council Directive (EU) 2015/2376 of 8 December 2015 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation – OJ L 332, 18.12.2015, p. 1-10.

also provided new guidelines ensuring that new proposals comply fully with the principles of subsidiarity and proportionality.

The European Parliament continued to deal with subsidiarity and proportionality issues in the context of its work on legislative proposals and continued its general approach to assessing the European added value by drawing up its 'cost of non-Europe report'. Finally, the Committee of the Regions continued its work on subsidiarity issues, in particular by adopting and implementing its third Subsidiarity Work Programme and hosting the 7th Subsidiarity Conference.