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

**(17th report on Better Lawmaking covering the year 2009)**

# REPORT FROM THE COMMISSION

## ON SUBSIDIARITY AND PROPORTIONALITY

(17<sup>th</sup> report on Better Lawmaking covering the year 2009)

### 1. INTRODUCTION

This is the 17<sup>th</sup> report on the application of the principles of subsidiarity and proportionality which the Commission presents to the European Council, the European Parliament, the Council and national Parliaments in line with the Protocol to the Treaty on these issues<sup>1</sup>. The report covers 2009 when the Nice Treaty was still in force, and briefly explains the changes introduced by the Lisbon Treaty, which came into force on 1 December 2009. As was the case for the 2007 and 2008 reports, it does not cover wider issues of smart regulation which are addressed in a specific Communication on Smart Regulation<sup>2</sup>.

### 2. THE LEGAL AND INSTITUTIONAL FRAMEWORK

#### 2.1. The principles of subsidiarity and proportionality

Subsidiarity and proportionality are fundamental principles of European law which are defined in Article 5 of the Treaty on European Union (TEU).

Within the limits of the Union's competences, subsidiarity is a guiding principle for defining the boundary between Member State and EU responsibilities – that is, *who should act?* If the Union has exclusive competence in an area, it is clear that it is the Union which should act. If the Union and the Member States share the competence, the principle clearly establishes a presumption in favour of the Member States taking action. The Union should only act if Member States cannot achieve the objectives sufficiently and, by the reason of the scale or effects, the Union can achieve them better.

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?* Article 5 (4) provides that the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties. Any decision must favour the least restrictive option.

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<sup>1</sup> Protocol (No 30) to the Treaty establishing the European Community, applicable until 30/11/2009 and Protocol (No 2) to the Treaty on the Functioning of the European Union (TFEU), applicable since 1/12/2009

<sup>2</sup> Commission Communication on Smart Regulation in the European Union

## 2.2. Application, opportunity for comments, and ex-post control

All institutions of the Union have to comply with both principles. The Protocol on the application of the principles of subsidiarity and proportionality and the Inter-Institutional Agreement of 1993 on subsidiarity<sup>3</sup> provide further details on how the two principles should be applied. The key elements of this framework are summarised here.

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 Union, national governments, local authorities, economic operators and citizens. The European Parliament and Council must provide a justification regarding subsidiarity if an amendment they make affects the scope of Union action<sup>4</sup>. 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.

Finally, the Court of Justice of the European Union can review the legality of acts of the institutions for compliance with the principle of subsidiarity.

### *Changes introduced by the Lisbon Treaty*

The Lisbon Treaty has introduced several changes to how the principles of subsidiarity and proportionality should be applied.

The revised Protocol contains a more specific requirement to provide for all draft legislative acts a statement making it possible to appraise compliance with the principles. While it no longer mentions the guidelines for assessing conformity (such as 'necessity' and 'EU value-added' tests), the Commission will continue to use these guidelines and recommends the other actors to do likewise.

The Lisbon Treaty provides an enhanced role for national Parliaments which can express their views on whether draft legislative proposals comply with the principle of subsidiarity. If they consider that the proposal does not comply, they have the right to send an opinion to the initiator of the legislation. Depending on the number of negative opinions, the Treaty provides two mechanisms as set out in Article 7 of the Protocol – the so called 'yellow card' and 'orange card'. Where the number of negative opinions from national Parliaments represents at least one third of all the votes allocated to them (or one quarter for proposals in the area of judicial cooperation in criminal matters and police cooperation)<sup>5</sup>, the 'yellow card' mechanism applies. Under the ordinary legislative procedure, where the number of negative opinions represents a simple majority, the 'orange card' mechanism applies. Both mechanisms foresee a review of the draft legislation and may lead to amendment or withdrawal of the proposal. The 'orange card' also involves the possibility for either the European Parliament or Council to stop the legislative procedure.

The revised Protocol also includes a provision concerning the role of the Committee of the Regions. For those cases where the TFEU provides for the Committee to be consulted, it now

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<sup>3</sup> OJ C 329, 6.12.1993, p. 132

<sup>4</sup> Section 2, point 3 of the Inter-Institutional Agreement on Subsidiarity of 1993

<sup>5</sup> Each national Parliament has two votes, in bicameral systems each of the two chambers has one vote.

has the right to bring a case before the European Court of Justice if it believes that the subsidiarity principle has not been respected. Member States, themselves or on behalf of their national Parliaments, have a similar right.

### 3. APPLICATION OF THE PRINCIPLES

#### 3.1. The Commission

The legislative work of the Commission has always been governed by the need to respect subsidiarity and proportionality. Checks are now applied at three key stages of the policy development process:

- A preliminary analysis in roadmaps which are published for major initiatives when the Commission Work Programme is agreed. These roadmaps provide a preliminary description of a planned Commission initiative and aim to allow all interested actors to be informed in a timely manner. From 2010, the Commission is also publishing roadmaps for initiatives with significant impacts which are not in the Commission Work Programme.
- A fuller analysis of subsidiarity as part of the impact assessment process, taking into account views expressed during stakeholder consultations.
- Finally, a justification in terms of subsidiarity and proportionality in the explanatory memorandum and recitals of each legal proposal.

The most detailed analysis of subsidiarity and proportionality is provided in impact assessments. The Impact Assessment Board controls the quality of this analysis, and in 2009 it made recommendations on subsidiarity and proportionality in 27 out of 79 impact assessments (34 %). In its 2009 Report<sup>6</sup> the Board recommended that the Commission services should use more consistently the structured questions for the subsidiarity and proportionality analysis provided in the revised Impact Assessment Guidelines<sup>7</sup>.

The Board has asked for a better analysis of the principles in areas such as asylum, migration, consumer and health policies, transport and energy. For example, for the impact assessments for the proposals for *Directives on Minimum Standards for the Qualification and Procedures of Asylum Seekers*<sup>8</sup>, the Board asked the lead service to demonstrate better that the costs of the measures were proportionate to the objectives, and did not go beyond the obligations established by the Treaty and international law. For the impact assessment for the *Consumer Rights Directive*<sup>9</sup>, the Board asked the lead service to clarify how harmonisation of domestic sales in addition to cross-border sales would comply with the subsidiarity principle. For the *Directive on Cross-Border Healthcare*<sup>10</sup>, it noted the need to consider the appropriate level of action while applying definitions such as 'appropriate care' and 'undue delay'. For the *Directive on Energy Performance of Buildings*<sup>11</sup>, the Board recommended that the lead service strengthen the cost-benefit analysis to demonstrate the value added of measures such

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<sup>6</sup> SEC(2009) 1728

<sup>7</sup> SEC(2009) 92

<sup>8</sup> COM(2009) 551 and COM(2009) 554

<sup>9</sup> COM(2008) 614

<sup>10</sup> COM(2008) 414

<sup>11</sup> COM(2008) 780

as the lower threshold for compulsory energy requirements for major renovations and a compulsory benchmarking system for new buildings. The Board recommendations have helped the Commission services to improve the subsidiarity analysis, and there have also been cases where its advice has led to changes in the proposals to ensure compliance with the subsidiarity and proportionality principles (see Section 4).

### 3.2. National Parliaments<sup>12</sup>

Since 2006, the Commission has on its own initiative transmitted all new proposals to national Parliaments, and has put in place a procedure for replying to their opinions<sup>13</sup>. The Commission received 250 opinions in 2009 compared to 115 in 2007. About 10% contained comments on subsidiarity and/or proportionality, with in most cases only one national chamber expressing a view<sup>14</sup>. The chambers with a particular interest in subsidiarity questions were the French *Sénat*, the Austrian *Bundesrat*, the German *Bundesrat* and the Dutch, Portuguese and Greek Parliaments. Some opinions did not question the respect of subsidiarity as such, but indicated that the Commission's justification was not sufficient.

#### *Subsidiarity exercises run by COSAC*

In the past three years, the Conference of Community and European Affairs Committees of Parliaments of the European Union (COSAC) has conducted exercises to simulate the subsidiarity control mechanism introduced by the Lisbon Treaty. This has enabled national Parliaments to refine and test their institutional arrangements. In 2009 COSAC conducted three such exercises on Commission proposals for *Standards of Human Organs Intended for Transplantation*<sup>15</sup>, *Right to Interpretation and to Translation in Criminal Proceedings*<sup>16</sup> and *Instruments in Matters of Succession*<sup>17</sup>. In all cases a large majority of participating chambers confirmed that the proposals complied with the subsidiarity principle, with very few seeing a reason for concern (the number of negative opinions was respectively one, three and one).

### 3.3. The European Parliament and Council

In the European Parliament compliance of draft legislative acts with the principle of subsidiarity is ensured by the committees in charge of a specific legislative dossier, together with the Committee on Legal Affairs<sup>18</sup>. In the Council, the Committee of the Permanent Representatives of each Member State (Coreper) ensures that the principles of legality, subsidiarity and proportionality are respected<sup>19</sup>.

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<sup>12</sup> See also the Commission report on relations between the European Commission and national Parliaments (COM(2010) 291)

<sup>13</sup> COM(2006) 211

<sup>14</sup> See the Annex I for the list of the initiatives

<sup>15</sup> COM(2008) 818

<sup>16</sup> COM(2009) 338

<sup>17</sup> COM(2009)154

<sup>18</sup> Rules of Procedure of the European Parliament,  
<http://www.europarl.europa.eu/sides/getLastRules.do?language=EN&reference=TOC>

<sup>19</sup> Council Decision 2004/338/EC, Euratom of 22 March 2004 adopting the Council's Rules of Procedure, OJ L 106, 15.4.2004, p. 22

### 3.4. The Committee of the Regions

The Subsidiarity Monitoring Network (SMN) of the Committee of the Regions operates through an interactive website<sup>20</sup> and its membership grew by 20% in 2009 to 111 partners. The SMN enables its members to take part in the Committee's consultations on new EU initiatives. The SMN also held two consultations to feed local and regional views into the Commission's impact assessment work<sup>21</sup>. In 2009 the first SMN Action Plan was launched to identify best practice in applying the subsidiarity principle in Europe's regions and cities in selected policy areas – immigration, climate change, social policies, health policy and innovation. Given the new role which the Lisbon Treaty creates for the Committee, it has adapted its Rules of Procedure<sup>22</sup> and as from 2010 all its opinions will contain an explicit reference to the subsidiarity and proportionality principles.

### 3.5. The Court of Justice

The 2008 subsidiarity report mentioned the *Roaming Regulation*<sup>23</sup>, where the High Court of Justice of England and Wales asked the Court of Justice of the European Union if the regulation infringed the principles of proportionality and/or subsidiarity by setting price caps on the costs of using a mobile phone while in another Member State. Following the opinion of the Advocate General in November 2009, the Court ruled in June 2010. It confirmed that the Regulation is proportionate to the objective of protecting consumers against high charges, and is justified on the grounds of subsidiarity as it is necessary to ensure the smooth functioning of the internal market in roaming services. In its findings, the Court underlined the fact that, before proposing the Regulation, the Commission had considered in its impact assessment the effectiveness and economic impacts of regulating the retail market, the wholesale market or both.

## 4. KEY CASES WHERE SUBSIDIARITY CONCERNS WERE RAISED

This section of the report gives an overview of Commission proposals which gave rise to most discussion among the co-legislators and stakeholders on subsidiarity and proportionality. Some of these cases were mentioned in previous reports and discussions continued in 2009.

### *Directive on Aviation Security Charges*<sup>24</sup>

The proposal lays down common principles that Member States and airport authorities must respect when determining how to recover the costs of airport security. The aim is to prevent distortions of competition. The Commission verified the proportionality of different measures as part of the impact assessment process, and as a result some elements such as an obligatory 'one-stop' for security were dropped from the final proposal. The proposal also refrained from regulating how security measures should be financed, leaving Member States to decide this issue. The European Parliament wanted to reinforce the Directive by requiring that security

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<sup>20</sup> <http://subsidiarity.cor.europa.eu>

<sup>21</sup> Reducing Health inequalities in the EU and revision of the Drinking Water Directive.

<sup>22</sup> OJ L 6/14, 9.1.2010, p. 14

<sup>23</sup> Case C-58/8 *Vodafone Ltd, Telefónica O2 Europe plc, T-Mobile International AG, Orange Personal Communications Services Ltd v. Secretary of State for Business, Enterprise and Regulatory Reform* about EC Regulation No 717/2007

<sup>24</sup> COM(2009) 217

measures, such as those to protect citizens from acts of terrorism, should be financed through public funds rather than by passengers<sup>25</sup>. While it also proposed to include all commercial airports, several Member States in Council proposed to limit the scope to airports where annual passenger traffic exceeds a certain threshold, in order to ensure that compliance costs are proportionate to the objectives of the initiative<sup>26</sup>. Political agreement has not yet been reached.

### *Directive on Energy Performance of Buildings*<sup>11</sup>

The Commission proposed a recast of the Directive as part of the Second Strategic Energy Review in November 2008. While in general all institutions welcomed the initiative, views varied on the appropriate content and ambition level of EU action.

In 2009 the Commission received opinions from the two chambers of the Dutch Parliament. While the First Chamber was positive, the Second Chamber argued that the proposal breached the subsidiarity principle because in its opinion it is for Member States to determine how and in which sectors the national climate targets are to be achieved.

The European Parliament proposed amendments which added to the level of ambition including a condition that from 2019 new buildings would have to be 'zero-energy'<sup>27</sup>. In Council, several Member States were concerned that the level of ambition was too high and that "several amendments proposed by the European Parliament appear at first sight to be overly ambitious and unrealistic"<sup>28</sup>. They considered that the definition of low and zero carbon buildings and the quantitative targets raised subsidiarity issues and entailed further costs and disproportionate administrative burdens. A compromise was agreed in November 2009: all new buildings should comply with high energy-performance standards and supply a significant share of their energy requirements from renewable sources after the end of 2020. It is up to each Member State to define the standards for achieving these objectives.

### *Directive on Equal Treatment outside Employment*<sup>29</sup>

In 2008, the Commission adopted this proposal to extend protection against discrimination on the grounds of age, disability, sexual orientation, religion or belief outside employment, and it was discussed in the 2008 subsidiarity report. To comply with the subsidiarity principle, the Commission made a clear distinction between EU and Member States competences with the aim to exclude from the scope of the directive issues that could potentially be considered part of national competence. While the Commission's proposal stated *inter alia* that 'this Directive is without prejudice to national laws on marital or family status and reproductive rights', the European Parliament Committee on Legal Affairs nevertheless considered that the boundaries between Community law and national law in the areas of family law, marriage and reproduction needed to be further specified<sup>30</sup>. In Council, some Member States raised questions related to the respect of the subsidiarity principle, and others expressed concerns

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<sup>25</sup> Press release, 1.3.2010, ref. 20100301IPR69737

<sup>26</sup> Press release, 18.12.2009, ref. PRES/09/373

<sup>27</sup> EP position, 1st reading, ref. P6\_TA(2009)0278

<sup>28</sup> Council doc. 8989/09

<sup>29</sup> COM(2008) 426

<sup>30</sup> Opinion of the Committee on Legal Affairs (13.2.2009) for the Committee on Civil Liberties, Justice and Home Affairs on the proposal for a Council directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation



about administrative and financial costs created by the Directive, including the possibility that they may be disproportionate to the objectives. Discussions under the Swedish and Spanish presidencies in 2009 and 2010 lead to a more precise definition of the scope of the action and more detailed references to the division of competences between the Member States and the EU, but political agreement has not yet been reached.

#### *Directive on the Protection of Soil*<sup>31</sup>

The discussions on this proposal were signalled in the 2007 and 2008 subsidiarity reports, and continued in 2009. The Commission proposal was supported by the European Parliament, but stopped in the Council by a blocking minority of delegations, some of which opposed the proposal on the grounds of subsidiarity and others because of expected costs and administrative burdens. Other Member States consider that EU level action is necessary, not least because soil has an influence on climate change and biodiversity which both have cross-border effects. The file was a priority of the Spanish presidency in the first half of 2010, but a consensus has still not been reached.

#### *Directive on Cross-Border Healthcare*<sup>10</sup>

The Commission proposed the Directive in 2008. Although Member States are primarily responsible for their health systems, the need for EU level action arose following a number of rulings of the European Court of Justice in this area. The Commission received seven opinions from the chambers of national Parliaments, three of which raised subsidiarity concerns, on the grounds that the proposal might put into question the Member States' ability to plan and finance health services. While similar issues were raised during discussions in the European Parliament, it adopted the proposal in first reading in April 2009.

The Council reached political agreement on 8 June. The agreement strengthens provisions allowing Member States to develop "prior authorisation systems" for healthcare in another EU Member State and to refuse such authorisation. In addition, comitology is no longer foreseen for eHealth related measures as was the case in the Commission's original proposal. This reflects national concerns over the need to control the flows of patients and to ensure planning and financial balance of their health systems<sup>32</sup>.

#### *Urban Mobility*

The Commission adopted a *Green Paper 'Towards a new culture for urban mobility'*<sup>33</sup> in 2007 to identify what the EU should do in this area. The European Parliament in its resolution on the Green Paper argued that the EU should not legislate, but has a role in developing a European approach and mainstreaming the needs of urban transport into other policy areas. In 2009 the Parliament also adopted an own initiative resolution which stressed that local authorities often cannot meet urban mobility challenges without European coordination. It proposed that the Commission should provide studies and a legal framework, finance research, and promote best practices<sup>34</sup>. However, in its opinion on the 2009 subsidiarity

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<sup>31</sup> COM(2006) 232

<sup>32</sup> Council doc 15181/09

<sup>33</sup> COM(2007) 551

<sup>34</sup> EP Legislative Observatory, ref. INI/2008/2041

report<sup>35</sup> the German *Bundesrat* expressed the view that certain measures in the Green Paper were not in line with the principles of subsidiarity and proportionality, as measures at Member State level are sufficient. This was in contrast to the Leipzig Charter put forward by the German EU Presidency<sup>36</sup> which, while noting that urban development policy should be decided at national, regional or local level, saw value added of EU action in pooling best practice and supporting urban research.

The Commission adopted the *Urban Mobility Action Plan*<sup>37</sup> in September 2009. The impact assessment process helped to focus actions on the exchange of information and good practices. The European Economic and Social Committee welcomed the plan, but called for EU powers and responsibilities to be more clearly defined<sup>38</sup>. The Committee of Regions supported the Action Plan noting that the measures do not undermine the subsidiarity principle<sup>39</sup>. The Council considered the principle of subsidiarity, welcomed the Action Plan and asked the Commission to include in the upcoming White Paper on European transport policy targets and policies for urban mobility<sup>40</sup>.

#### *Directive on Standards of Human Organs Intended for Transplantation*<sup>15</sup>

The Commission proposal, adopted in 2008, aimed at securing basic quality and safety standards for human organs intended for transplantation. COSAC carried out a 'subsidiarity check', and of the 27 opinions received, 23 were positive. The Austrian *Bundesrat* found a breach of the subsidiarity principle. The German Bundestag, UK House of Commons and Dutch *Tweede Kamer der Staten-generaal* noted that the Commission's subsidiarity analysis did not provide a sufficient basis for them to conclude. In addition the German *Bundesrat* and the Italian *Senato della Repubblica* found that some provisions may have gone beyond the Union's competences. No such issues were raised by the co-legislators, however, and Member States in Council gave the Directive political backing, and the European Parliament adopted it in first-reading.

#### *Consumer Rights Directive*<sup>9</sup>

The Commission proposal sought to simplify the EU framework for consumer protection by merging four consumer rights directives, and by fully harmonising essential rights of consumers to reduce legal fragmentation.

Five of the six opinions from the chambers of national Parliaments, concluded that full harmonisation of certain rights would be contrary to subsidiarity, as it would not allow for the application of national law which in some cases provides for a higher level of consumer protection. In the European Parliament there were concerns on whether the degree of legal fragmentation among Member States justifies action at EU level and whether full harmonisation would be too restrictive<sup>41</sup>. In Council, a majority of Member States expressed a preference for a mixed and flexible harmonisation<sup>42</sup>. In order to overcome the resistance to full harmonisation, the Commission has suggested that a possible way forward could be to

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<sup>35</sup> Drucksache 745/09 (Beschluss)

<sup>36</sup> Leipzig Charter on Sustainable European Cities and Territorial Agenda of the European Union

<sup>37</sup> COM(2009) 490

<sup>38</sup> Information Memo TEN/414 - CESE 36/2010

<sup>39</sup> Opinion on Action Plan on Urban Mobility, COTER-V-003

<sup>40</sup> Council conclusions on Action Plan on Urban Mobility, 3024<sup>th</sup> Transport, Telecommunications and Energy Council meeting, Luxembourg, 24 June 2010

<sup>41</sup> Press-release, 17.3.2010, ref. 20100317IPR70798

<sup>42</sup> Press release, 25.5.2010, ref. MEMO/10/212

focus full harmonisation on issues with the strongest internal market dimension such as the rules on distance and off-premises contracts<sup>43</sup>.

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<sup>43</sup> Press release, 15.3.2010, ref. SPEECH/10/91

## 5. CONCLUSIONS

The majority of Commission proposals were adopted by the co-legislators without significant discussions on subsidiarity and proportionality. For those proposals compliance with the principles of subsidiarity and proportionality has presumably not been an issue. However, the analysis above has shown that, where compliance is questioned, the actors involved in discussions hold a broad variety of views. This is the case not only between the different institutions, but also within these institutions, and sometimes between the different actors of the same Member State.

The debate on subsidiarity and proportionality will be further enriched by the role of national Parliaments introduced by the Lisbon Treaty. The Commission is committed to strengthening further the relations with national Parliaments within the framework of the political dialogue developed since 2006, and the subsidiarity control mechanism is a key element of this process. An overview of how the mechanism is operating will be presented in the next subsidiarity report<sup>44</sup>.

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<sup>44</sup> By June 2010 the Commission had transmitted 19 proposals to national Parliaments and had received four reasoned opinions

## ANNEX I

### **List of Commission initiatives on which the opinions submitted by national Parliaments contained comments on subsidiarity or proportionality analysis**

1. Directive on Cross-Border Healthcare (COM(2008) 414)
2. Consumer Rights Directive (COM(2008) 614)
3. Directive on the Protection of Animals used for Scientific Purposes (COM(2008) 543)
4. Decision on Critical Infrastructure (COM(2008) 676)
5. Directive on Community Framework for Nuclear Safety (COM(2008) 790)
6. Directive on Minimum Standards for the Reception of Asylum Seekers (COM(2008) 815)
7. Green Paper on Collective Redress (COM(2008) 794)
8. Directive on Energy Performance of Buildings (COM(2008) 780)
9. Communication on Public Procurement for a Better Environment (COM(2008) 400)
10. Late Payment Directive (COM(2009) 126)
11. Decision on Combating Sexual Abuse and Child Pornography (COM(2009) 135)
12. Stockholm Programme (COM(2009) 262)
13. Communication on Production Method of EU Statistics (COM(2009) 404)
14. Green paper on learning mobility (COM(2009) 329)
15. Regulation on prevention of accidents in civil aviation (COM(2009) 611)
16. Urban Mobility Action Plan (COM(2009) 490)
17. Directive on prevention from sharp injuries in the healthcare sector (COM(2009) 577)
18. Communication on joint programming in research (COM(2008) 468)