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Report on
the results of COSAC's subsidiarity and
proportionality check
on the Commission proposal for a
Regulation on the applicable law and
jurisdiction in divorce matters

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Introduction

1.1 BACKGROUND

The XXXIV COSAC in London in October 2005 agreed in paragraph four of the Contribution that:

“Those national parliaments which wish to participate shall conduct a subsidiarity and proportionality check on a forthcoming EU legislative proposal or proposals, developing their existing scrutiny role as recognised in the Protocol on the Role of National Parliaments attached to the Treaty of Amsterdam, allowing them to test their systems for reaching decisions on subsidiarity and proportionality, enabling an assessment of the justifications presented by the Commission and stressing to the Commission national parliaments’ role in relation to subsidiarity.”

COSAC announced in paragraph two of the Conclusions of the same meeting that:

“The XXXIV COSAC, recalling the existing scrutiny role of national parliaments, the provisions on subsidiarity in the Amsterdam Treaty and the fact that the Protocol on the Role of National Parliaments gives COSAC a role specifically in relation to subsidiarity, decided to encourage national parliaments to conduct a subsidiarity and proportionality check on a forthcoming EU legislative proposal or proposals. The check should be carried out with due respect for national parliaments’ internal work programmes, legal frameworks and traditions. COSAC agreed that, for those national parliaments which wish to participate, the check should operate as follows:

- i. “Within two weeks after the examination by national parliaments of the European Commission’s annual work programme, as envisaged in the initiative “Raising European Awareness“, participating national parliaments should inform the COSAC Presidency of the proposals they wish to be subject to the subsidiarity and proportionality check; they may also make additional proposals at any time; the Presidential Troika should designate the most frequently mentioned proposals to be subject to the check; the list will be distributed to the national parliaments and the European Parliament;
- ii. “the IPEX database should, if possible, be used in connection with the subsidiarity and proportionality check;
- iii. “participating national parliaments should seek to complete their scrutiny within a six-week period;
- iv. “the six-week period should begin when the proposal has been published in all languages;
- v. “participating national parliaments or chambers should send any comments on subsidiarity or proportionality directly to the Commission, the European Parliament and the Council within the six-week period, copying those comments to the COSAC Presidency; and
- vi. “it would be helpful if national parliaments could indicate clearly whether their comments relate to subsidiarity or proportionality.”

According to paragraph 2(i) of the COSAC conclusions cited above, national parliaments who wished to participate in the subsidiarity and proportionality were asked to inform the COSAC Presidency of the proposals they wished to be subject to the check by 30 December 2005. The

Austrian Presidency received written proposals from 18 national parliaments or parliamentary chambers (from 14 Member States).

Based on the proposals from these national parliaments, the COSAC chairpersons, meeting on 20 February 2006 in Vienna, agreed to carry out a subsidiarity and proportionality check on the two most frequently-mentioned legislative proposals, which in this case were:

- Proposal for a Regulation on the applicable law and jurisdiction in divorce matters (2005/JSL/187); and
- Proposal for the full accomplishment of the Internal Market for Postal Services (2006/MARKT/006).

1.2 WHO PARTICIPATED IN THE CHECK?

The check on the commission proposal for a regulation on the applicable law and jurisdiction in divorce matters¹ was launched on 17 July 2006 with the aim of completing it by 27 September. By the deadline, 11 parliamentary chambers from 9 Member States² had concluded the check and sent the report to the secretariat. By the end of October, 22 parliaments³ from 17 Member States had concluded the check. After the secretariat circulated a report on the subsidiarity and proportionality check on 6 November, 5 more parliamentary chambers⁴ answered the questionnaire and some provided further information on their previous answers. In some parliaments the check is still ongoing. From the participating parliaments 15 parliamentary chambers from 12 Member States used the IPEX database as recommended by the secretariat's *aide-mémoire*.

The Parliaments of Austria and Sweden informed the Secretariat that they could not take part in this check due to their parliamentary elections. The Secretariat was also informed that the Spanish *Cortes Generales* was currently revising its procedures of scrutiny of EU documents and could not therefore participate in the check.)

All participating parliaments sent a report to the COSAC secretariat summarising how they conducted the subsidiarity and proportionality check and setting out any lessons learned during the experiment. As requested, the COSAC secretariat has, on the basis of these replies from the national parliaments, made this report to facilitate an exchange of views and best practices between national delegations at the XXXIV COSAC on 19-21 November in Helsinki.

The complete replies of the participating parliaments including the reasoned opinions are compiled in the Annex, which is printed as a separate document.

1.2.1 The procedures used

In most national parliaments the European Affairs Committees were involved in the check (in 24 of the 27 participating parliamentary chambers). In 16 cases sectoral committees also participated in the examination of the Commission's proposal (most frequently either a committee on legal affairs or a committee on justice and home affairs). Only in Luxembourg and in the Belgian Chamber of

¹ Proposal for a Council Regulation amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters, COM(2006) 399 final of 17 July 2006.

² The Czech Senate, the Estonian *Riigikogu*, the Finnish *Eduskunta*, the French *Assemblée nationale* and *Sénat*, the Hungarian National Assembly, the Polish *Sejm* and Senate, the Slovakian National Council, the Hellenic Parliament and (jointly) the Houses of Parliament of the Netherlands.

³ The secretariat received answers from the Belgian Chamber of Deputies, the parliament of Cyprus, the Czech Chamber of Deputies, the Danish *Folketinget*, the German *Bundestag* and *Bundesrat*, the *Seimas* of the Republic of Lithuania, the Luxembourg *Chambre des Députés*, the Portuguese *Assembleia da Republica* and the UK House of Commons and House of Lords.

⁴ The Belgian Senate, Italian *Camera dei Deputati* and Senate, Irish Houses of *Oireachtas* and jointly the Slovenian National Assembly and National Council.

Deputies the check was conducted without the participation of the EU Affairs Committee (solely by the Legal Affairs Committee, as in Luxembourg or in the sub-committee of the Legal Affairs Committee, as in Belgium). In Hungary the check was carried out by the EU Affairs Committee secretariat due to the summer recess.

The plenary was involved in the Belgian Senate, the Czech Senate, German *Bundestag*, German *Bundesrat* and in both Houses of Parliament of the Netherlands. In Slovenia, the decision of the EU Affairs Committee was in this case equal to the decision of the National Assembly. The Parliament of Cyprus reported that the plenary was not involved this time, but it might be in the future. The Portuguese Parliament gave the lack of time as the reason why the plenary was not involved and the Hungarian Parliament explained that the plenary would be involved only if a breach of the principle of subsidiarity was found by the EU Affairs Committee.

Governments were involved in the process in almost all of the participating parliamentary chambers, either by providing written information in form of explanatory memoranda or by giving oral evidence to the committees scrutinising the proposal.

Regional parliaments or assemblies were consulted only in the United Kingdom where the House of Commons received an opinion from the Scottish Parliament and the House of Lords notified the Scottish Parliament, Welsh Assembly and the Local Government Association. Elsewhere (where there are regional parliaments with legislative powers) the subject was considered not to be within the remit of the regional parliaments. The German Bundesrat did not involve regional parliaments as it is of the opinion that this lies within the responsibility of *Länder* governments.

In the case of bicameral parliaments, the two chambers cooperated formally only in Ireland, Slovenia and the Netherlands. In other bicameral parliaments cooperation consisted of an informal exchange of information between the officials.

In Denmark, Luxembourg and the Netherlands, the procedure used for the subsidiarity check was consistent with measures envisaged to operate the subsidiarity check under the Constitutional Treaty. Elsewhere the check was either conducted following the normal scrutiny mechanism, or the applicable procedure had not formally been decided. In Belgium the COSAC subsidiarity and proportionality checks were used to test the internal procedures.

Table 1: Participation in the subsidiarity and proportionality check

Chambers	Examined the proposal?	Parliamentary Committees involved?	Plenary involved?	Other administrative services involved?	Procedure of examination?
Austria	N/A ⁵				
Belgium - Chamber of Deputies	√	The sub-committee "family law" of the Legal Affairs Committee	No	The Secretariat of the committee for the opinion on European questions	The sub-committee has heard experts from the Ministry of Justice, it will now formulate opinion on subsidiarity (by 2nd week of November)
Belgium - Senate	√	Committee for Justice Affairs, Senate delegation to the Federal Advisory Committee on EA	Yes	Secretariat of the EAC, Legal Affairs Department & Service of the Plenary	See the Annex for detailed explanation
Cyprus	√	EAC (= EU Affairs Committee)	Not this time, but might be in the future	The EU Affairs Service	See the Annex for detailed explanation
Czech Republic - Chamber of Deputies	√	EAC	No	Parliamentary Institute of the Office of Chamber of Deputies	See the Annex for detailed explanation

⁵ The Austrian Parliament has informed the COSAC Secretariat that it was unable to take part in this check owing to parliamentary elections.

Chambers	Examined the proposal?	Parliamentary Committees involved?	Plenary involved?	Other administrative services involved?	Procedure of examination?
Czech Republic - Senate	√	EAC	Accepted the EAC's recommendation on 5 October	EU division of the Senate office and the legislative department	See the Annex for detailed explanation
Denmark	√	EAC and the Committee on Legal Affairs	No	The secretariat of the Committee on Legal Affairs	See the Annex for detailed explanation
Estonia	√	EAC and Legal affairs committee	No	Translation bureau of the documentation department	See the Annex for detailed explanation
Finland	√	EAC and Legal Affairs Committee	No	No	The Grand Committee asked the Legal Affairs Committee to examine the proposal.
France - <i>Assemblée nationale</i>	√	Delegation for the EU	No	No	Delegation examined the text on the 19 September (the minutes of the meeting annexed)
France - <i>Sénat</i>	√	EAC	No	No	The delegation seized the text on 26 July and gave its opinion on 19 September
Germany - <i>Bundestag</i>	√	Committee on Legal Affairs + Opinions from the committees on Family Affairs, Senior Citizens, Women and Youth and the EAC.	Based on the Legal Affairs Committee recommendation for a decision, the report was on the agenda of the plenary sitting of 28 September 2006	The Committee on Legal Affairs has commissioned the research services of the administration of the Bundestag to submit a legal analysis.	See the Annex for detailed explanation
Germany - <i>Bundesrat</i>	√	EAC, the Committee on Legal Affairs, the Committee on Family and Senior Citizen Affairs as well as the Committee on Women and Youth.	The Bundesrat plenary adopted an opinion on 3 November 2006.	No	See the Annex for detailed explanation
Greece	√	EAC and the Standing Committee for Public Administration, Home Affairs and Justice	No	No	See the Annex for detailed explanation
Hungary	√	EAC (normally, but due to summer break check was done by the EAC Secretariat)	The plenary is only involved if a breach of the principle of subsidiarity is found by the EAC	No	N/A
Italy - <i>Camera dei Deputati</i>	√	EAC and the Committee on Justice	No	The Office for the relations with the EU and the Research Service	The normal procedure for the scrutiny of EU Draft legislative acts is followed.
Italy - Senate	√	The EAC and the Justice Committee.	No	Yes, the European affairs Bureau	The rules of procedure related to the drafting of the opinion of the parliament were followed.
Ireland	√	The Joint Committee on European Affairs, EU Scrutiny Committee, the Joint Committee on Justice, Equality, Defence and Women's Rights and the Joint Committee on Social and Family Affairs.	No. The matter was considered within committees of the Houses of the Oireachtas.	Yes. Legal advice was available on the principles concerned	See the Annex for detailed explanation

Chambers	Examined the proposal?	Parliamentary Committees involved?	Plenary involved?	Other administrative services involved?	Procedure of examination?
Lithuania	√	The EAC and the Committee on Legal Affairs.	No	Yes. The Legal Department	See the Annex for detailed explanation
Luxembourg	√	Legal Affairs Committee	No	The secretariat of the committees and the international relations' service	The check was done exclusively by the Legal Affairs Committee
Netherlands Senate and House of Representatives	√	Temporary committee on subsidiarity, Standing committee of Justice of the Senate, Special committee on Justice and Home Affairs Council of the Senate, Standing committee of Justice of the House of Representatives and the EAC of the House of Representatives.	Yes, both the plenary of the Senate and the plenary of the House of Representatives	Yes, staff of the supporting committees	See the Annex for detailed explanation
Poland - <i>Sejm</i>	√	EAC	No	Legal Team of the Research Bureau and European Information and Documentation Centre	See the Annex for detailed explanation
Poland - Senate	√	EAC, Family and Social Policy Committee and Human Rights and the Rule of Law Committee.	No	Senate Proceedings Office, Legislative Office and the Information & Documentation Office	See the Annex for detailed explanation
Portugal	√	The EAC coordinated & requested an opinion from the Committee for Constitutional Affairs, Rights, Freedoms and Guarantees.	No - due to lack of time ⁶	No	See the Annex for detailed explanation
Slovakia	√	EAC, Constitutional and Legal Affairs Committee, Committee for Social Affairs and Housing, Committee for Human Rights, Minorities and Status of Women.	No	Department for European Affairs	See the Annex for detailed explanation
Slovenia - the National Council and the National Assembly	√	In National Council: Commission for International Relations and EU Affairs, which sent its opinion to the National Assembly. In the NA first by the Committee on Domestic Policy, Public Administration and Justice - then the EAC.	No. In this case, the decision of the EAC was equal to a decision of the National Assembly	All technical departments that normally are involved	See the Annex for detailed explanation

⁶ Law 43/2006, of 25 August 2006, on the *Monitoring, assessment and pronouncement by the Portuguese Parliament within the scope of the process of constructing the European Union*, requires the Plenary to take part in monitoring European legislative proposals in three situations:

- when the AR is required to pronounce on matters which fall within the scope of its reserved legislative powers (Article 2);
- when an opinion is required on compliance with the principle of subsidiarity (Article 3);
- in assessment of proposals for Community acts of a normative nature (Article 7);

As regards Articles 2 and 3, which apply to the case in hand, the Law states that in duly substantiated urgent situations, an opinion from the European Affairs Committee, stating due grounds, will suffice. In view of the tight deadline for replying to questionnaire, this was the procedure adopted.

Chambers	Examined the proposal?	Parliamentary Committees involved?	Plenary involved?	Other administrative services involved?	Procedure of examination?
Spain	N/A ⁷				
Sweden	N/A ⁸				
UK- House of Commons	√	European Scrutiny Committee	No	No	See the Annex
UK- House of Lords	√	EUC's Sub-Committee E (Law & Institutions) is scrutinising the proposal and preparing a report, which will be adopted by the EUC.	No	No	See the Annex

Table 2: Further information on the procedures used

Chambers	Government participated/ provided information?	Regional parliaments consulted?	Other external actors involved?	Cooperation between two chambers in the bicameral systems?	Procedure in accordance with Constitutional Treaty's plans?
Belgium - Chamber of Deputies	Yes, the sub-committee has heard experts of the Ministry of Justice	No. Regional parliaments do not have competence in this matter	No	No ⁹ .	The procedure is still provisional and meant to provoke interest in the concerned committees.
Belgium - Senate	No	No. The other parliaments were informed that the Senate considered itself competent in this matter	No	No. Same remark as under question 6	Yes. This was the first trial run of the procedure that was set up after the first COSAC pilot project (see attachment 1). The final trial run is planned during the second COSAC check
Cyprus	No, but might in the future	N/A (no regional parliaments with legislative powers)	No	N/A (unicameral system)	May follow similar procedure in the future as well.
Czech Republic - Chamber of Deputies	The Ministry of Justice provided preliminary position & the Deputy Minister of Justice introduced the position to the EAC	No	No	No	The procedure used was in accordance with the current Rules of procedure
Czech Republic - Senate	Yes, provided an explanatory memorandum	No	No	No	No special procedure is presupposed, normal scrutiny procedure takes place
Denmark	Yes, the Minister of Family and Consumer Affairs gave evidence at a joint hearing. The Minister also replied to 8 written questions by the Committee on Legal Affairs.	N/A. There are no regional parliaments with legislative powers	No	N/A	Yes
Estonia	Yes, Ministry of Justice participated gave written opinion.	N/A Estonia does not have regional parliaments	No	N/A	The <i>Riigikogu</i> has not yet decided what procedure to use
Finland	Yes	No	No	N/A	Partly yes

⁷ The Spanish *Cortes Generales* is currently revising its procedures of scrutiny of EU documents.

⁸ The Swedish Parliament has informed the COSAC Secretariat that it was unable to take part in this check owing to parliamentary elections

⁹ During the negotiations (December 2005) on the cooperation procedure concerning the subsidiarity control the assemblies expressed their wish to develop their own procedure to formulate their opinion autonomously.

Chambers	Government participated/ provided information?	Regional parliaments consulted?	Other external actors involved?	Cooperation between two chambers in the bicameral systems?	Procedure in accordance with Constitutional Treaty's plans?
France - <i>Assemblée nationale</i>	Yes, provided a report (<i>rapport d'impact</i>) about the proposal, its contents and its consequences in national legislation	N/A	No	Contacts between the secretariats of the EU delegations	The procedure has not been decided yet.
France - <i>Sénat</i>	Yes, transmitted the <i>rapport d'impact</i> on 28 August	N/A	The professions concerned (notaries and lawyers) have been consulted	No coordination but information exchange	The future procedure has not been decided yet.
Germany - <i>Bundestag</i>	The German government has submitted a report (<i>Ressortbericht</i>)	The consultation of regional Parliaments is the responsibility of the Bundesrat	No	There was no particular coordination with the Bundesrat	No, the procedure followed the current legal basis and the rules of procedure of the Bundestag ¹⁰
Germany - <i>Bundesrat</i>	The Federal Government explained its position in the deliberations of the committees.	Not directly. It is the responsibility of the government of each Land to consult regional parliament.	A survey among experts, primarily judges from competent courts, was conducted.	An exchange on the state of proceedings took place	No ¹¹
Greece	Yes, the government provided an explanatory memorandum	N/A (no regional parliaments)	No	N/A	No formal decision yet
Hungary	No, it was not asked for.	N/A	No	N/A	No (see under question 1) ¹²
Italy - <i>Camera dei Deputati</i>	No	No	No	No	No. See answer 4
Italy - <i>Senate</i>	Yes	No	No	No	See answer to the question 4.
Ireland	Yes. A statement of the Minister for Justice, Equality and Law Reform on the matter was provided, under the existing scrutiny procedures in place.	N/A	Notification of the consideration of the matter was posted on the Oireachtas web-site	The committees concerned are joint committees that bring together members from both houses	The procedure used was that established under the current legal framework.
Lithuania	Yes. The Ministry of Justice drafted an opinion. EAC received also a special opinion of the European Law Department of the Ministry of Justice.	No	Yes. The Institute of Law, provided for an analysis	N/A	13 November 2004 the <i>Seimas</i> amended it's Rules of Procedure for the examination of the compliance with the principle of subsidiarity.
Luxembourg	The counsellor to the Minister of Justice provided oral evidence to the Committee	N/A (no regional parliaments)	No	N/A	Yes

¹⁰ The procedure foreseen in the case of entering into force of the Constitutional Treaty is described in the national implementation law which is not yet applicable.

¹¹ No. In case of the entering into force of the Constitutional Treaty the *Bundesrat* would ensure that the six weeks deadline was kept. For this purpose the *Bundesrat* can create a chamber for urgent EU matters, the so called Chamber of European Affairs, whose decisions have the same effect as decisions of the plenary.

¹² The procedure will be governed by the Act LIII of 2004 on the cooperation of the Parliament and the Government in European Union affairs and the Standing Orders of the National Assembly, both of which contain the rules for the procedure of the subsidiarity check.

Chambers	Government participated/ provided information?	Regional parliaments consulted?	Other external actors involved?	Cooperation between two chambers in the bicameral systems?	Procedure in accordance with Constitutional Treaty's plans?
Netherlands Senate and House of Representati ves	No, but its reaction on the Green paper has been consulted.	N/A	No, but a notification of the procedure was published on the website to generate responses of civil society	Yes ¹³	Yes
Poland - <i>Sejm</i>	Yes, the government's position has been presented to the committee.	N/A (no regional parliaments)	The staff of the Sejm Research Bureau, representatives of government and of the Commission Representation in Poland	No	No. Question not resolved yet.
Poland - Senate	Yes, the government prepared a position and a justification thereof	No ¹⁴	Government representatives participated in a joint committee session and two expert opinions were submitted in writing.	No	It is too early to answer this question
Portugal	No - due to time constraints. Informal exchange of information	No, because subject is not within the remit of autonomous areas.	No	N/A	The procedure adopted was that laid down in Law 43/2006, of 25 August 2006 (attached to this report). ¹⁵
Slovakia	Yes, the government referred its position on the Commission proposal.	N/A	No	N/A	This question has not been decided yet. However, it is likely to refer to this procedure in the future as well.
Slovenia - the National Council and the National Assembly	Yes. The Government sent its assessment of the compliance with the principles of subsidiarity and proportionality, together with a draft position on the regulation.	NA.(No regional parliaments)	No	Yes. See the reply under Question 4 in the Annexe	This exercise showed that amendments to the Rules of Procedure of the National Assembly and maybe also to the Act on Cooperation between the Government and the National Assembly in EU Affairs would be necessary.

¹³ Yes, the Temporary Committee on Subsidiarity (TCS) is especially installed to coordinate and to tune the subsidiarity check in both chambers. The committee's ultimate goal is that both chambers of Parliament express the same views as regards to whether the Commission proposal complies with the principles of subsidiarity and proportionality. In case of divergence of views between the committees of both chambers, the TCS mediates in order to reach consensus. In this case, there was no need for a conciliation procedure, because the committees of both chambers did agree.

¹⁴ Polish provincial councils do not operate as "regional parliaments" and, hence, they were not consulted by the Senate within the framework of the process of checking compliance of the Commission proposal.

¹⁵ The Committee considers that the question should not be posed in these terms at this stage, as it has not received confirmation of the procedure to be adopted within the framework of a future Constitutional Treaty.

Chambers	Government participated/ provided information?	Regional parliaments consulted?	Other external actors involved?	Cooperation between two chambers in the bicameral systems?	Procedure in accordance with Constitutional Treaty's plans?
United Kingdom - House of Commons	Yes. Submitted an Explanatory Memorandum.	Yes. The Scottish Parliament submitted an opinion.	No	No formal coordination, but the officials of the EACs of the two Houses exchanged information.	The procedure was part of the standard procedures of the EAC for scrutinising EU legislation
United Kingdom - House of Lords	Yes. They submitted an Explanatory Memorandum and gave oral evidence to the Committee	Yes. The EU Committee notified the Scottish Parliament ¹⁶ , the Welsh Assembly and the Local Government Association	Yes. The Sub-Committee received written evidence ¹⁷ .	No formal coordination, but the officials of the EACs of the two Houses exchanged information.	The procedure for this check was part of the standard procedures of the EU Committee for scrutinising EU legislation.

2 Results

2.1 WERE BREACHES OF THE PRINCIPLES OF SUBSIDIARITY OR PROPORTIONALITY FOUND?

2.1.1 Breach of the subsidiarity principle

Four participants of the check - the Belgian Senate, the Houses of Parliament of the Netherlands, the Czech Chamber of Deputies and the UK House of Lords - indicated that they found that the Commission proposal breached the principle of subsidiarity.

The Dutch parliament argues that even if problems with regard to the divorce of international marriages as outlined by the Commission occur, they can in essence be attributed to differences in the substantive divorce law of the Member States. Thus it would be logical for any solutions to concern substantive divorce law rather than the national conflict-of-law rules. However, the Community is not competent to take measures that address this matter directly. The present proposal does therefore not affect the substantive divorce law of the Member States. The proposal may be considered contrary to the principle of subsidiarity because it cannot be considered to have an added value compared to whatever actions on the national level.

The UK House of Lords states that while in principle a measure such as Rome III should meet the requirements of subsidiarity, the House of Lords EU Committee doubts whether the Commission's statistical analysis provides a sufficient basis on which to act. The shortcomings raise questions of *vires* (Article 65 TEC) as well as subsidiarity.

The Czech Senate did not report a breach of the subsidiarity principle as such but found that the Commission proposal was premature, since there was insufficient judicial experience to justify the necessity for amending the existing Regulation (EC) No 2201/2003. The evaluation by the Czech Senate related also to the next question, namely the breach of the proportionality principle.

¹⁶ The Scottish Parliament submitted an opinion to the House of Lords EU Committee

¹⁷ The Sub-Committee received written evidence from: Professor Adrian Briggs, St Edmund Hall, Oxford; Resolution (formerly the Solicitors Family Law Association of England and Wales); The Law Society; and Panorama Legal Services.

2.1.2 Breach of the proportionality principle

The Czech Senate's opinion was shared by the Czech Chamber of Deputies, the Parliament of Cyprus, the Houses of Parliament of the Netherlands, the Belgian Chamber of Deputies and the Belgian Senate as well as the UK House of Lords, which questions whether the objective of the proposal could be achieved by simpler, possibly less prescriptive means.

According to both Chambers of the Parliament of the Netherlands the proportionality principle is closely linked to the question of competence of the Community. The question is whether the nature and scope of the problems outlined by the Commission are so serious as to constitute an obstacle to the proper functioning of the internal market (i.e. the free movement of persons), thereby necessitating the proposed measures. According to the Parliament of the Netherlands this is *not* the case, because:

1. According to the figures of the Commission, an estimated 170,000 "international" divorce proceedings take place each year. It follows that approximately 340,000 people are faced each year with the conflict-of-law rules of the Member States, which is equivalent to some 0.074% of the EU population (about 457 million). The possible scope of the (potential) obstacles to the free movement of persons in the internal market should therefore not be overestimated.

2. The question of in what percentage of these 170,000 cases the differences between national conflict-of-law rules actually result in the problems identified by the European Commission, including lack of legal certainty and the "rush to court", is disregarded. For example, it is evident from the answers to the questions in the "Green Paper on applicable law in divorce matters" that there is no (statistical) proof available of the "rush to the courts" in the majority of the Member States that have responded to the Green Paper. The Netherlands Government too has indicated in its reaction to the Green Paper that this phenomenon "has not been observed" in the Netherlands. It may therefore be considered very probable that the problems outlined by the European Commission do not occur in all the 170,000 divorce proceedings concerned.

3. Both Chambers also have insufficient evidence that the supposed problems do *actually* constitute an obstacle to the free movement of persons or even represent a *potential* obstacle to the proper functioning of the internal market. Both Chambers therefore have serious doubts about the opportuneness of the decision to choose Article 65 of the EC Treaty as the legal basis for the proposed regulation.

The Belgian Chamber of Deputies also reports that in initial discussions some members of parliament were of the opinion that the matter belonged in the national domain. According to some specialists, Belgian law could be modified in order to resolve the noted problems. The Chamber of Deputies' scrutiny of the proposal is not concluded yet.

2.1.3 Insufficient justification/legal basis

A number of parliaments pointed out the lack of sufficient arguments justifying the proposal in terms of subsidiarity and/or proportionality. The Commission's justification for subsidiarity were found unsatisfactory by 5 parliaments and 2 chambers (the Houses of Parliament of the Netherlands, the Czech Chamber of Deputies and Senate, the French *Sénat*, the Hungarian Parliament, the Lithuanian *Seimas*, the Irish Houses of the *Oireachtas* and the UK House of Lords). The Commission's justification for proportionality were found unsatisfactory by 5 parliaments and a chamber (the Houses of Parliament of the Netherlands, the Czech Chamber of Deputies and Senate, French *Assemblée nationale* and *Sénat*, the Finnish *Eduskunta*, the Lithuanian *Seimas* and the UK House of Lords).

The German *Bundestag*'s Committee on European Affairs agreed to the legal basis chosen by the European Commission (Art. 61 c, 65, 67 EC Treaty) but underlined the necessity of a specific justification. As to how far the regulation as regards jurisdiction and introducing rules concerning

applicable law in matrimonial matters was necessary for the proper functioning of the internal market, the Hungarian Parliament argued along the same lines as the Bundestag and underlined that the justification should have included a broader discussion of the relationship between the proposal and Community objectives, especially given the fact that judicial cooperation in civil matters is, under Article 65, a Community competence with a specific objective, with action to be taken "in so far as necessary for the proper functioning of the internal market". The Chambers of the Parliament of the Netherlands and the UK House of Lords paid attention to the same problem.

According to the Hungarian Parliament, the Community dimension of the problem and the added value of Community action were sufficiently justified, but the explanation of why the objectives could not be achieved by individual Member States was missing.

The French Senate noted that neither the European Commission nor the French Government had been able to provide any numerical indications of the importance of the "forum shopping"¹⁸ (i.e. the possibility for parties to choose the jurisdiction and applicable law, which constituted an important element in any evaluation of the utility of the proposal).

2.2 WHAT WERE THE MAIN DIFFICULTIES ENCOUNTERED BY NATIONAL PARLIAMENTS?

2.2.1 Difficulties with the six-week period and timing

Ten parliaments in total noted in particular that the time available for national parliaments was not sufficient for a proper consultation procedure. Moreover, the fact that the proposal was adopted just before the summer break prevented most national parliaments from complying with a six-week deadline.¹⁹

2.2.2 The difficulty of distinguishing between subsidiarity and proportionality

A number of parliaments (such as the Czech Senate and the Hungarian Parliament) reported that it was difficult to make a distinction between the principle of subsidiarity and the principle of proportionality. The Hungarian Parliament noted that in general the problem was that, when presenting justifications for proposals, the application of the subsidiarity principle was only ever examined in relation to the proposal as a whole, even though individual parts or provisions might equally be in breach of the subsidiarity principle. In the current case, for example, the amendment of provisions relating to jurisdiction and the introduction of new rules pertaining to applicable law should clearly have been treated separately. The same applied to the justifications of proportionality.

2.2.3 Poor quality or lack of translations

The Czech Senate reported that the Czech-language version of the proposal was subjected to substantial criticism during Committee meetings for its unintelligibility and for apparent errors which resulted in an alteration in the legal meaning of particular provisions. The Lithuanian *Seimas*

¹⁸ The term "forum shopping" describes the risk that one of the parties might take his action in the courts of a particular country not because that court is best placed to settle the dispute (since it is, for example, closest to the evidence) but because it applies the law most favourable to his case.

¹⁹ The Protocol on the role of national parliaments in the EU attached to the Amsterdam Treaty provides that six weeks shall elapse between a proposal being made available in all languages to the European Parliament and the Council by the Commission and the date when it is placed on a Council agenda for decision (either for the adoption of an act or for adoption of a common position).

reported that the main difficulty during the examination was a lack of any translation into Lithuanian of the full impact assessment

2.2.4 The difficulty of knowing about the results in other national parliaments

Some national parliaments reported that it was difficult for the committee considering the proposal in their parliament to know the position adopted by other national parliaments at the time they were considering the proposal. This was because information from other national parliaments was often not available.

The Estonian *Riigikogu* asked for a greater exchange of information through the IPEX website. Where national parliaments had reported a breach of the subsidiarity principle, they should strive to provide translations of their opinions into English on the IPEX website. *Riigikogu* also paid attention to the work of sectoral committees, which could be encouraged to exchange information with their colleagues from respective committees in other parliaments.

The Houses of Parliament of the Netherlands noted the IPEX website was checked several times during the scrutiny procedure. Although some national parliaments provided information on the progress in their scrutiny procedure, there were no documents available in French, English or German. The Houses of Parliament of the Netherlands provided the Portuguese Parliament with a translation of the final advice of their Temporary Committee on Subsidiarity and created a link to this document in IPEX.

2.3 CONCLUSIONS

The great majority of parliaments did not find the Commission proposal on the applicable law in divorce matters in breach of the principles of subsidiarity and proportionality.

However, some parliaments found that the Commission did not sufficiently justify the need for the proposed legislation with regard to the legal basis, given that Art. 65 TEC applies only in so far as it is necessary for the proper functioning of the internal market. Some of the concerns raised when checking subsidiarity and proportionality of the proposal seem to rather refer to the question of legal basis than to the principles of subsidiarity and proportionality. The results of this particular check seem to suggest that the scope for subsidiarity complaints can be rather limited even where national parliaments may have genuine concerns with regard to proposed legislation.

In order to make full use of the parliamentary scrutiny with regard to the principles of subsidiarity and proportionality, parliaments should develop a common understanding of the said principles.

Table 3: The results of the check summarised

Member State	Breach of the subsidiarity principle?	reach of the proportionality principle?	Reasoned opinion of non-compliance?	Were the Commission's justifications for subsidiarity satisfactory?	Were the Commission's justifications for proportionality satisfactory?	Difficulties during the examination?	Other comments?
Belgium - Chamber of Deputies	No	Yes ²⁰	The opinion is not yet formulated	The proposal is currently being examined	The response is formulated during the week 45	The response is formulated during the week 45	The response is formulated during the week 45
Belgium - Senate	Yes. See the Annex	Yes. See the Annex	Yes	Yes, as a general introduction ²¹	Yes, as a general introduction	Timing problems related to holidays and election recess	No
Cyprus	No	Yes	No	Yes	Yes, but EAC disagreed with the proposed solution	Time available to not sufficient for proper consultation procedure	See answer to the previous question
Czech Republic - Chamber of Deputies	Yes. See the Annex	Yes. See the Annex	Yes. See the Annex	No	No	Inconvenient that proposal was submitted to the NPs at the time of parliamentary holidays	
Czech Republic - Senate	See note below ²²	See note below ²³		No	No	The Czech translation was criticized for its poor quality	No
Denmark	No. See the opinion attached in the Annex	No	No	Yes	Yes	No	No
Estonia	No	No	No	Yes	Yes	The 6 weeks time limit was unrealistic due to holidays.	Yes ²⁴

²⁰ "In the first discussion some members thought that the matter belongs to the national domain. According to some of the specialists, Belgian law could be modified in order to resolve the problems cited."

²¹ "As a general introduction, it is satisfactory. However, the members of the committee studied the justification in the Belgian context themselves, considering that the Commission only gives its own opinion, based on a European perspective on things."

²² "Subsidiarity and proportionality principles cannot be totally separated one from another. The following problems regarding these principles were discovered: 1. the Proposal is premature, the judicial practice could not verify the necessity to pass the amending regulation; 2. the residual jurisdiction clause as proposed should be subjected to a more profound impact analysis as concerns were voiced that it could interfere with international commitments of Member States and cause difficulties in the recognition of judicial decisions in third countries; 3. the European conflict-of-law rule is not an appropriate measure in order to reach legal certainty and to prevent the risk of the "rush to court", because the risk of interference with national customs and rules cannot be properly avoided."

²³ *cf. ex ante*

²⁴ "The procedure used at the moment by COSAC works well, although the possibility to submit common positions should be more readily employed. In addition, there should be an information exchange system on a regular basis regarding the additional subsidiarity checks conducted by national parliaments that are not coordinated by COSAC. The exchange of information should preferably take place through the IPEX website. In order to facilitate access to the information, national parliaments should strive to provide on the IPEX website translations to English of the opinions where they have found a breach on the subsidiarity principle. The COSAC secretariat should compile annual summaries on the subsidiarity checks conducted by national parliaments. During the subsidiarity and proportionality checks in the *Riigikogu* the standing committees have been involved in the process only by giving their opinion to the EAC. In order to make the subsidiarity and proportionality checks even more efficient, the standing committees could be encouraged to exchange information with their colleagues from respective committees in other parliaments."

Member State	Breach of the subsidiarity principle?	reach of the proportionality principle?	Reasoned opinion of non-compliance?	Were the Commission's justifications for subsidiarity satisfactory?	Were the Commission's justifications for proportionality satisfactory?	Difficulties during the examination?	Other comments?
Finland	No	No	Yes	Yes	No ²⁵	No	No
France - <i>Assemblée nationale</i>	No	No		Yes	Not sufficiently	No	No
France - <i>Sénat</i>	No	No	See the annex	No, they were insufficient.	No	Yes ²⁶	No
Germany - <i>Bundestag</i>	No	No	No	Yes	Yes ²⁷	The proposal was transmitted during the summer break and could only be referred by the President of the Bundestag on 8 September.	The check has shown the necessity of strengthening the parliamentary process in EU matters.
Germany - <i>Bundesrat</i>	No	No	No	Yes. The objectives of the proposal cannot be accomplished by the Member States alone.	Yes	No	The conflict-of-law rules should ensure coherent solutions: The Courts should be able to apply the domestic law ("lex fori").
Greece	No	No		Yes	Yes		-
Hungary	No	No	No, in lack of finding a breach of the Treaty.	No. See the Annex	Yes ²⁸	The summer break made it impossible to comply with the 6 weeks limit.	Yes ²⁹
Italy - <i>Camera dei Deputati</i>	No	No	No	Yes	Yes	No	-
Italy - <i>Senate</i>	No	No	No. But the Senate adopted a general opinion on the proposal.	Yes	Yes	No	No

²⁵ "With regard to the proportionality principle, the *Eduskunta* finds the Commission's justifications very general without any assessment on the substance and notes that the Commission's justifications with regard to the proportionality principle are inadequate."

²⁶ "Neither the European Commission nor the French government has been able to provide any numerical indications of the importance of the "forum shopping", which constitutes an important element when evaluating the utility of the proposal."

²⁷ "The Committee on Legal Affairs as the committee responsible and the Committee on Family Affairs, Senior Citizens, Women and Youth as committee asked for an opinion did find the Commission's justification satisfactory. The Committee on European Affairs agreed to the legal basis chosen by the European Commission (Art. 61 c, 65, 67 EC Treaty) but anyhow underlined the necessity of a specific justification, how far the regulation as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters is necessary for the proper functioning of the internal market"

²⁸ "The justification relating to proportionality was, on the whole, satisfactory. However, the question can be raised whether every individual provision is truly necessary as far as the objective of the proposal is concerned (e.g. those pertaining to choice of court or choice of law by the parties)

²⁹ "The primary problem relating to the proposal concerns Community competence, not subsidiarity or proportionality. The issue is whether – taking into account the reference in Article 61 c) – the proposal meets the requirement of Article 65, i.e. that regulation should be "necessary for the proper functioning of the internal market". Once the existence of Community competence is accepted, this particular proposal may not easily be declared to be in breach of the subsidiarity and proportionality. (It is our understanding that a Community competence exists, as reading together the text of Articles 65 b) and c) and 67 (5) specifically justifies the introduction of rules pertaining to conflict of laws in family law disputes.)"

Member State	Breach of the subsidiarity principle?	reach of the proportionality principle?	Reasoned opinion of non-compliance?	Were the Commission's justifications for subsidiarity satisfactory?	Were the Commission's justifications for proportionality satisfactory?	Difficulties during the examination?	Other comments?
Ireland	No. See the annex for rationale	No. See the annex for rationale	No. See the annex for rationale	No ³⁰ .	This justification was somewhat more detailed.	No	See the annex regarding the particular context for, among others, Ireland.
Lithuania	No	No	No	Not fully	Not fully. The Commission could focus more on the issue of proportionality	The main problem was lack of translation into the Lithuanian of the full document of the Impact Assessment.	No
Luxembourg	No	No	No	-	-	--	The committee paid attention to the risk of "lex shopping".
Netherlands	Yes	Yes	Yes. See the Annex	No	No	Yes, the deadlines and publication of the proposal during the summer recess	Yes ³¹
Poland - Sejm	No	No	N/A	Yes	Yes	No	No
Poland - Senate	No	No	N/A	Yes		No	
Portugal	No	No	N/A	Yes	Yes	lack of time	
Slovakia	No	No	No	Yes	Yes	Some problems with regard to the short time limit for the scrutiny.	No
Slovenia	No	No	No	Yes	Yes	No specific difficulties. See the reply under Question 9	
UK - House of Commons	The proposal is currently being examined	*	*	*	*	*	*
UK - House of Lords	Yes ³²	Yes. The EAC questions whether the objective of the proposal might be achieved by simpler, possibly less prescriptive means.	No, the EAC has written to the UK Government and published a Report of its proceedings (which it is sending to the Commission). No formal reasoned opinion as such.	No	No	It was difficult to meet the 6 week timetable because the Parliament was in recess until 9 October. The deadline proposed by COSAC was not critical, since the proposal was not on the Council agenda within that period.	No

³⁰ "It was found to be rather thin, particularly given that it had been flagged that national parliaments would be giving the proposal consideration in the context of a COSAC test."

³¹ "During the scrutiny procedure the IPEX-website was checked several times. Although some National Parliaments provided information on the progress in their scrutiny procedure, there were no documents available in French, English or German. We provided our Portuguese colleagues with a translation of the final advice of the TCS and made a link to this document in IPEX."

³² "While in principle a measure such as Rome III should meet the requirements of subsidiarity, the House of Lords EU Committee doubts whether the Commission's statistical analysis provides a sufficient basis on which to act. The shortcomings raise questions of *vires* (Article 65 TEC) as well as subsidiarity."