



5 YEARS AFTER THE ENTRY INTO FORCE OF THE TREATY OF LISBON
conclusions and proposals on subsidiarity checks by national Parliaments
in documents of COSAC, the EU Speakers Conference, the European Commission and the
European Parliament

**1. APPLICATION OF THE EARLY WARNING MECHANISM BY
PARLIAMENTS**

During 5 years following the entry into force of the Lisbon Treaty, 2010–2014, national Parliaments issued and submitted **276 reasoned opinions** (ROs) on the non-compliance of legislative proposals with the principle of subsidiarity **to the European Commission**¹, and **297 reasoned opinions to the European Parliament**².

During 5 years, the early warning mechanism was triggered 2 times.

The first yellow card referred to **COM(2012) 130**, i.e. the *Proposal for a Council regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services*.

12 Parliaments/Chambers (including the Polish Sejm) representing a total of 19 votes sent a reasoned opinion within the time limit, i.e. by 22 May 2012 (the threshold being 18 votes). Following an analysis, the Commission stated that the subsidiarity principle had not been breached. However, facing the prospect of failure to win sufficient political support in the EP and the Council, it decided to withdraw the proposal on 26 September 2012.

National Parliaments received two letters from Vice President of the Commission Maroš Šefčovič: the first one, dated 12 September 2012, announced the withdrawal of the proposal due to a lack of support, and the second one, dated 14 March 2013, explained briefly why the Commission believed no subsidiarity breach was involved.

The second yellow card referred to **COM(2013) 534**, *Proposal for a Council regulation on the establishment of the European Public Prosecutor's Office*.

14 Parliaments/Chambers representing a total of 18 votes sent a reasoned opinion within the time limit, i.e. by 28 October 2013 (the threshold being 14 votes). On 6 November 2013, the Commission confirmed the triggering of the early warning mechanism, and on 12 November 2013 it sent a letter to Speakers of Parliaments confirming, in compliance with the procedure,

¹ Data for the Commission as at the end of December 2014, based on unofficial information - see Annex no 1.

² Data for the European Parliament as at 3 March 2015 - see Annex no 1.

that the threshold had been reached. On 27 November, the Commission issued Communication COM(2013) 851 to uphold its proposal on the establishment of the European Public Prosecutor's Office as being in compliance with the principle of subsidiarity, and justified its position on 14 pages.

2. THE MAIN FORA AND TOOLS OF DEBATE ON THE APPLICATION OF THE PRINCIPLE OF SUBSIDIARITY UNDER THE LISBON TREATY

COSAC, i.e. the Conference of Parliamentary Committees for Union Affairs of the EU Parliaments, a representation of European Affairs Committees of national Parliaments, is the main forum monitoring subsidiarity checks.

Until the entry into force of the Treaty of Lisbon, COSAC had conducted **coordinated subsidiarity checks** of legislative proposals selected jointly by national Parliaments. Their purpose was to test, in Parliaments, the procedure stipulated in the rejected Constitutional Treaty (which provided a basis for the amendment adopted by the Treaty of Lisbon (2007)). Such checks were carried out once or twice a year and their results were published and discussed in the COSAC bi-annual reports³.

After the entry into force of the Treaty of Lisbon, COSAC recognised its role would henceforth be to monitor the early warning mechanism and exchange information and best practices of national Parliaments concerning subsidiarity checks, which was reflected in the semi-annual reports, and in conclusions and contributions adopted after each meeting.

The Commission, which undertook in 2009 to provide full responses to COSAC Contributions⁴, regularly addresses such a document to the incumbent COSAC presidency (see below, p. 6).

Major conclusions and proposals of national Parliaments raised in COSAC (in Contributions and Conclusions⁵)

*definition of the principle of subsidiarity*⁶

- the need for a more uniform interpretation of breach of the principle of subsidiarity. A narrow majority of national Parliaments (20-17) supported the formal determination of guidelines on the scope and content of reasoned opinions (October 2012),

Based on COSAC reports, it can be concluded that almost all Parliaments consider, in general, the principle of subsidiarity when scrutinising legislative proposals. The majority believe that the effectiveness of subsidiarity checks requires the inclusion of proportionality

³ See http://oide.sejm.gov.pl/oide/en/index.php?option=com_content&view=article&id=196&Itemid=286

⁴ See *the Commission's Report. Annual Report 2009 on relations between the European Commission and national Parliaments*, COM(2010) 291, p. 10.

⁵ See COSAC documents at: <http://www.cosac.eu/>

All the cited COSAC documents, including semi-annual reports, see Annex no 2.

⁶ The vagueness of the concept of subsidiarity was already pointed out at the conference held by the Sejm and the Senate in 2010 on "TL as a Treaty of EU Parliaments". Based on questionnaires completed by national Parliaments, it was determined that subsidiarity as a legal concept caused many difficulties and its practical application depended on political assessment.

checks. The lack or insufficiency of an explanatory memorandum is considered to be a breach of the principle of subsidiarity. All the Parliaments which supported the guidelines were of the opinion that they must be non-binding.

8-week time limit

- COSAC concludes that the 8-week time limit is sufficient in principle; during the next review of the Treaties, an extension of the period should be considered, as this would improve the procedure without slowing down the legislative process (June 2013),

responses of the Commission and other institutions

- the European Commission should formulate replies to Parliament's opinions in a timely and more substantive manner (October 2011, June 2013, October 2013),
- the European Commission should meet the 3-month time limit for replies to Parliaments' opinions (October 2011, June 2013, October 2013),
- EU institutions should demonstrate the influence of reasoned opinions and contributions within the framework of political dialogue on the final wording of a proposal, also in the Commission's annual reports (October 2013),
- COSAC takes note of the discussions at COSAC meetings concerning the Commission's response to yellow cards and regrets that the Commission has rejected the yellow card concerning the European Public Prosecutor's Office (June 2014),

yellow card

- after the first yellow card was triggered (on the Monti II Regulation), some misunderstandings have built up about the cooperation procedures between the Commission and the EP; a proposal was made to refine the rules of cooperation under the early warning mechanism (June 2013),
- national Parliaments suggest that the yellow card procedure be improved (December 2014),

consultations

- the Commission should draw Parliaments' attention to public consultations, communicate to the public Parliaments' opinions on consultative documents and refer in explanatory memoranda accompanying legislative proposals to Parliaments' opinions formulated within the consultation framework (April 2012, June 2013),

Since December 2013, Parliaments have been receiving information from the Commission on the launch of public consultations.

- COSAC supports the idea of *ad hoc* public consultations with national Parliaments (December 2014),
- the Commission should examine the possibility of including in the public consultation summary report a special section dedicated to national Parliaments' replies (December 2014),

proposals with a large number of objections from NPs

- COSAC supports the tightening of cooperation on proposals for which numerous reasoned opinions have been presented even though the thresholds set in the TL have not been reached (October 2012),

- The Commission should place a special focus on legislative proposals for which at least one-third of Parliaments have submitted opinions within the framework of political dialogue and provide information in advance and in writing, or at interparliamentary meetings, about the Commission's position on such opinions (June 2013),

prioritisation of tasks as part of subsidiarity checks

- better results of subsidiarity checks can be achieved by determining priority legislative proposals based on the Commission's Annual Work Programme before 31 January (December 2014),

information exchange

- COSAC recognises that the most commonly used sources of information from other Parliaments are the network of national Parliament Representatives based in Brussels and the IPEX database; considers all attempts made to exchange information between Parliaments as constructive and helpful for enhancing Parliamentary scrutiny of EU affairs (April 2012); COSAC is in favour of an improvement of the IPEX website content to cover the substantive reasons for breaching the subsidiarity principle, and that Parliaments ensure well-timed and accurate information (June 2013),
- COSAC welcomes the call for developing further exchanges of information and best practices on the subsidiarity principle checks in the framework of COSAC following the issuing of two "yellow cards"; supports, amongst others, initiatives that enhance closer cooperation between Members on specific issues of common interest, such as formal and informal meetings (June 2014),
- the effectiveness of subsidiarity checks could be helped by the early exchange of information on positions of Parliaments/Chambers, especially with the use of the IPEX database and the network of national Parliament Representatives based in Brussels (December 2014).

In its Contribution of June 2013, the XLIX COSAC also notes that national Parliaments should be more effectively involved in the legislative process of the European Union not just as the guardians of the subsidiarity principle but also as active contributors to that process; urges to continue strengthening cooperation under the political dialogue and its improvement.

According to the Contributions and Conclusions of LII COSAC of December 2014, most national Parliaments/Chambers consider subsidiarity checks an important tool towards influencing the content of the EU policies and decisions, and, furthermore, a majority of Parliaments/Chambers are in favour of creating new instruments aimed at involving national Parliaments in EU decision-making without any formal Treaty changes. The most frequently made suggestions (a full list is provided in the 22. semi-annual report) include the possible "green card" procedure, i.e. the possibilities of new legislative proposals being recommended by national Parliaments, an enhanced political dialogue on proposals which do not give rise to objections in terms of subsidiarity, and the improvement of the "yellow card" procedure.

3. CONFERENCE OF SPEAKERS OF THE EU PARLIAMENTS

The Conference dealt with the issue of subsidiarity in 2009 and 2010⁷. It presented proposals to intensify cooperation with regard to subsidiarity checks and encouraged Parliaments to promptly exchange information, also through informal contacts. It suggested that the definition of the principle of subsidiarity be discussed and the Parliaments' position be presented in a letter to the Commission.

The EU Speakers Conference dealt with the issue of subsidiarity at length in 2014. In its **Conclusions of April 2014**, in the section *Five Years after the Coming into Force of the Treaty of Lisbon: Lessons of Subsidiarity Checks in Parliaments*, the Conference notes that:

- the current system of subsidiarity checks in effect limits national Parliaments to expressing either a positive or a negative view with regard to subsidiarity. Efforts should therefore be made to make the engagement of national Parliaments in the legislative process of the Union more constructive aiming to empower national Parliaments to positively shape EU legislation,
- the replies of the Commission to opinions of national Parliaments could be more timely and nuanced,
- the 8 week period to submit a reasoned opinion is not always sufficient to all national Parliaments; in any future Treaty revisions consideration should be given to extending the period,
- basic weaknesses in subsidiarity checks should be first corrected within the framework of political dialogue by making full use of existing tools and thus avoiding the need to amend the Treaty; COSAC should explore the possibilities for more efficient use of subsidiarity checks, and then the EU Speakers Conference could consider any such work undertaken by COSAC,
- irrespective of any Treaty revisions, there should be a political agreement with the Commission to improve the existing subsidiarity check procedure, including extending the 8-week time period.

The EU Speakers Conference has indicated the IPEX platform from the beginning as a tool that may play a key role in implementing the provisions of the Treaty of Lisbon concerning subsidiarity checks. At their recent meeting in Vilnius in April 2014, the Speakers stated that IPEX should not only be a reliable tool for interparliamentary cooperation and exchange, but also an important source of information for the European citizens.

4. EUROPEAN COMMISSION

⁷ The EU Speakers Conference documents are available at: <http://www.ipex.eu/IPEXL-WEB/euspeakers/getspeakers.do>

Reasoned opinions, submitted under Protocol No 2 to the European Commission, are published under the "**National Parliament opinions and Commission replies**" tab⁸ on the Commission website.

Each year, the European Commission submits **2 complementary reports** which sum up subsidiarity checks: on relations between the European Commission and national Parliaments and on subsidiarity and proportionality. In the reports, it presents, among other things, statistics on opinions received within the framework of political dialogue, including reasoned opinions, in general and by Parliament, as well as their subjects. It also analyses reasoned opinions, presenting its own practice and referring to the main suggestions from national Parliaments. The last Commission Annual Reports concerned the year 2013 and they appeared in 5 August 2014⁹, while the next ones are due to be released as late as mid-2015.

The key issue raised by the Commission is a high degree of diversification of ROs in terms of form and type of arguments, i.e. the fact that Parliaments are guided by different priorities in selecting proposals for scrutiny and apply different criteria of assessment of compliance with the principle of subsidiarity.

Noting that both the EP and COSAC consider the establishment of common criteria for the assessment of compliance with the principles of subsidiarity and proportionality, the Commission recalls that the Commission Impact Assessment Guidelines defined the criteria applied in assessing the compliance of the Commission proposals with the principles of subsidiarity and proportionality (SEC(2009) 92).

Other important documents in which the Commission refers to the issue of subsidiarity are **replies to COSAC Contributions**¹⁰.

In its reply of 16 October 2013 to the COSAC Contribution of June 2013, the Commission stated that in its opinion the subsidiarity control mechanism worked well in practice, it did not consider it necessary to refine the "yellow card" procedure, as requested by Parliaments, and assured that it would meet the 3-month period for reply to reasoned opinions.

In its reply of 9 April 2014 to the COSAC Contribution of October 2013, the Commission refers to several issues raised. It stresses the role of national Parliaments in the law-making process, especially at its early stage, and encourages Parliaments to continue cooperation. Concerning the yellow card procedure on the proposal for the European Public Prosecutor's Office, the Commission referred to its Communication COM(2013) 851.

As regards the significance of national Parliaments' opinions (both reasoned and political dialogue opinions), the Commission underlined that opinions received early in the legislative process were taken into account in the course of further negotiations with the EP and the

⁸ In addition to reasoned opinions, the website also contains opinions of national Parliaments within the framework of political dialogue together with the Commission's replies. Both types of opinions are published as a "statement" and their identification is not possible until the file is opened (no search engine). The website address is: http://ec.europa.eu/dgs/secretariat_general/relations/relations_other/npo/index_en.htm

⁹ The Commission Annual Reports are published on the page:

http://ec.europa.eu/dgs/secretariat_general/relations/relations_other/npo/index_en.htm

all Commission reports in 2010-2013 – see Annex no 2

¹⁰ The Commission's replies are published on the COSAC website for the respective meetings.

Council, and in considering any adjustments to proposals. It also noted that the Commission's position was the result of a combination of many factors, mainly its commitments to the EU institutions.

In the Commission's view, its replies to opinions received from national Parliaments were sent as soon as possible, and possible delays resulted mainly from the number of the opinions received. Relevant internal procedures aimed to speed up the process of replying have been put in place. The Commission also encourages Parliaments to request further clarification if they are not fully satisfied with the reply. The Committee also stresses that the political dialogue should go further than an exchange of opinions and replies, and be complemented by meetings and other contacts.

In the reply of 29 January 2015 to LII COSAC Contribution of December 2014, the new Commission shares national Parliaments' positive assessment as regards the implementation of the Lisbon Treaty provisions conferring new powers on national Parliaments and welcomes COSAC's invitation to a discussion on a stronger role for the European Parliament and national Parliaments. The Commission confirms its priority to forge a new partnership with national Parliaments, working closely and constructively together. It is in favour of an open debate on democratic legitimacy of the EU and recalls that discussions on the role of the European Parliament and national Parliaments should take place in the framework of the current Treaty provisions and respect the institutional balance.

5. EUROPEAN PARLIAMENT

Reasoned opinions submitted under Protocol No 2 to the European Parliament are referred to the competent committee and the Legal Affairs Committee (JURI) responsible for compliance with the principles of subsidiarity and proportionality, which makes them available on its subpage in the "Notices to members" section. In addition, subsidiarity statistics are published on a page dedicated to relations with national Parliaments¹¹.

The European Parliament refers to the issue of subsidiarity in its own-initiative resolutions on relations between the EP and national Parliaments and in resolutions on subsidiarity and proportionality¹². The latter contain some general conclusions on the lessons learned.

In its **Resolution on relations between the EP and the national parliaments of 16 April 2014 (2013/2185(INI))**¹³, the European Parliament acknowledges that:

- the purpose of the early warning mechanism is not to block the European decision-making process, but to improve the quality of EU legislation,
- the early warning mechanism should be viewed as an important instrument of cooperation, consultation and dialogue,

¹¹ See statistics at: <http://www.europarl.europa.eu/relnatparl/en/publications/statistics-on-subsidiarity-checks.html>

¹² All EP resolutions in 2009-2014 – see Annex no 2

¹³ [European Parliament Resolution of 16 April 2014 on relations between the European Parliament and the national parliaments \(2013/2185\(INI\)\)](#), 16.04.2014

- a novel European interparliamentary system is taking shape and needs a legal framework and procedures established in consultation with the national parliaments in order to ensure progress in the "parliamentarisation" of the Union,
- the EU Speakers Conference should provide a stronger political stimulus for interparliamentary cooperation and influence its shape.

In its Resolution on EU Regulatory Fitness and Subsidiarity and Proportionality (2013/2077(INI))¹⁴, adopted on 4 February 2014, the European Parliament recommends that the reasons why so few formal, reasoned opinions are submitted by national parliaments be investigated and that it be determined whether this is due to the fact that the principle of subsidiarity is observed on all sides, or to the fact that the national parliaments are unable to enforce this principle due to a lack of resources or the tightness of their deadlines; considers an analysis by the Commission to be desirable. It believes that it would also be desirable to explore moves to strengthen the subsidiarity check mechanism which, perhaps in the context of future Treaty revision, could give more rights to national parliaments.

In addition, the European Parliament:

- suggests that each legislative act published in the Official Journal should contain a note detailing those national parliaments which had responded and those which had raised subsidiarity concerns,
- suggests that guidelines could be prepared outlining criteria for reasoned opinions on subsidiarity issues,
- proposes mobilising national parliaments to undertake comparative evaluations of *ex ante* assessments which they have conducted and *ex post* assessments drawn up by the Commission.

STATISTICS

During the period 2010–2014, national Parliaments submitted 276 reasoned opinions concerning subsidiarity and 2521 other opinions and positions¹⁵ to the European Commission, and 297 reasoned opinions and 1606 other documents¹⁶ to the European Parliament. During the period 2010-2013¹⁷, the proportion of proposals on which reasoned opinions were issued among all legislative proposals transmitted to national Parliaments was approx. 25% (see Table 4, Annex no 1).

However, in its annual reports the European Commission notes the ratio of reasoned opinions to all opinions submitted (ROs plus political dialogue opinions). The proportion is less than 10% for the 4-year period (Table 2, Annex no 1).

¹⁴ [Resolution of the European Parliament on EU regulatory fitness and subsidiarity and proportionality i – 19th report on Better lawmaking covering the year 2011 \(2013/2077 \(INI\)\)](#), 4.02.2014

¹⁵ Data for the Commission as at the end of December 2014, based on unofficial information - see Annex no 1.

¹⁶ Data for the European Parliament as at 3 March 2015 - see Annex no 1.

¹⁷ No data is available from the Commission on the number of proposals for which reasoned opinions were sent in 2014.

During 5 years, Parliaments reached the yellow card threshold only twice and never reached the orange card threshold.

Moreover, no Parliament has ever referred any UE act to the Court of Justice on grounds of a breach of the principle of subsidiarity.