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**REPORT FROM THE COMMISSION**

**ANNUAL REPORT 2016**

**ON SUBSIDIARITY AND PROPORTIONALITY**

# ANNUAL REPORT 2016 ON SUBSIDIARITY AND PROPORTIONALITY

## 1. INTRODUCTION

This is the 24th annual report on the application of the principles of subsidiarity and proportionality in European Union law making. The report is submitted in accordance with Article 9 of Protocol No 2 to the Treaty on European Union and to the Treaty on the Functioning of the European Union.

The report looks at how the European Union's institutions and bodies implemented these two principles in 2016 and how the practice has evolved in comparison with previous years. It also provides an analysis of the Commission proposals that were the subject of reasoned opinions from national Parliaments during the year. Given the close links between the subsidiarity control mechanism and the political dialogue between national Parliaments and the Commission, this report should be seen as complementary to the Commission's annual report on relations with national Parliaments for the year 2016.<sup>1</sup>

## 2. APPLICATION OF THE PRINCIPLES BY THE INSTITUTIONS

### 2.1. The Commission

Checking the compliance of Commission initiatives with the principles of subsidiarity and proportionality is an integral part of the Commission's regulatory practices. In 2016, the Commission continued putting into practice its reinforced Better Regulation agenda, which includes strengthened guidance on how to assess subsidiarity and proportionality in the policy-making process and new opportunities for citizens and stakeholders to provide feedback. The Commission is also pursuing its practice of evaluating existing policy frameworks, before coming forward with legislative revisions. These evaluations include assessments of whether existing policy measures are still 'fit for purpose' and to what extent they comply with the principles of subsidiarity and proportionality. Better regulation principles and instruments, including subsidiarity and proportionality assessments, are applied at various stages of the decision-making process, taking account of relevant analysis and input provided by stakeholders:

1. At the early stage of the policy planning process, roadmaps or inception impact assessments are published on the Commission's Europa website<sup>2</sup> for all new major initiatives. These provide a preliminary description of the envisaged initiative and outline the Commission's plans for impact assessment and consultation work. The roadmaps or inception impact assessments also include an initial justification for action as regards subsidiarity and proportionality.
2. During the policy development process, subsidiarity and proportionality aspects are analysed in impact assessments, which are also accompanied by an open public consultation. The impact assessments address how subsidiarity and proportionality principles apply to each concrete case. The quality of this analysis is subject to the independent scrutiny of the Regulatory Scrutiny Board.

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<sup>1</sup> COM(2017) 601 final.

<sup>2</sup> [http://ec.europa.eu/smart-regulation/roadmaps/index\\_en.htm](http://ec.europa.eu/smart-regulation/roadmaps/index_en.htm).

3. Finally, the explanatory memorandum accompanying the Commission proposal itself summarises how the principles of subsidiarity and proportionality are met. After adoption by the Commission, stakeholders may still provide feedback on the proposal and related impact assessment, including on subsidiarity and proportionality issues. Any such feedback is then provided as an input to the legislative process.<sup>3</sup>

The Commission website 'Lighten the load – Have your say'<sup>4</sup>, which was launched in 2015, as well as the Regulatory Fitness and Performance (REFIT) Platform, which began to operate in 2016, also provide ways for the public and stakeholders to communicate with the Commission on possible excessive burdens or inefficiencies of existing regulatory measures, which may include questions on subsidiarity or proportionality. In 2016, the REFIT Platform delivered a first set of recommendations to the Commission on how to simplify and reduce regulatory burdens of existing EU legislation, which the Commission is responding to through the implementation of its 2017 Work Programme. The new Interinstitutional Agreement on Better Law-Making was signed by the Presidents of the European Parliament, the Council and the Commission in April 2016 demonstrating the three institutions' commitment to Better Regulation. This agreement includes commitments from the three institutions to observe and implement the principles of subsidiarity and proportionality and, more particularly, for the Commission to present, in the explanatory memoranda accompanying its proposals, the Commission's assessment of these aspects.

### **Subsidiarity analysis**

The Better Regulation guidelines and their accompanying 'toolbox'<sup>5</sup> adopted in May 2015, require the Commission to carry out a subsidiarity analysis when considering a new initiative in areas where the Union does not have exclusive competence, and when evaluating the relevance and European added value of an existing intervention. The Commission addresses subsidiarity with regard to both legislative and non-legislative initiatives. The objective of the analysis is twofold: first, to assess whether action at national, regional or local level is sufficient to achieve the objective pursued; second, to assess whether Union action would provide added value over action by the Member States.

Under the Better Regulation guidelines and toolbox, a key part of the analysis is to assess the 'Union relevance' of the initiative in question. The key considerations are: the geographical scope, the number of players affected, the number of Member States concerned and the key economic, environmental and social impacts. In addition, the analysis determines in qualitative – and as far as possible in quantitative – terms, whether there is a significant cross-border problem. The analysis should also cover both the advantages and the disadvantages of Union action compared to action by Member States.

### **Proportionality analysis**

Under the principle of proportionality, the content and form of Union action must not exceed what is necessary to meet the objectives of the Treaties.<sup>6</sup> Respect for the principle of proportionality is about ensuring that the approach and degree of regulatory intervention of a policy match its

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<sup>3</sup> See also Chapter 2.2. as regards the Commission's follow-up to reasoned opinions from national Parliaments.

<sup>4</sup> [http://ec.europa.eu/smart-regulation/refit/simplification/consultation/contributions\\_en.htm](http://ec.europa.eu/smart-regulation/refit/simplification/consultation/contributions_en.htm).

<sup>5</sup> [http://ec.europa.eu/info/better-regulation-guidelines-and-toolbox\\_en](http://ec.europa.eu/info/better-regulation-guidelines-and-toolbox_en).

<sup>6</sup> Article 5(4) of the Treaty on European Union.

objective. Proportionality should be clearly referred to in impact assessments<sup>7</sup>, evaluations and fitness checks.

In particular, the Better Regulation guidelines and toolbox require the Commission to consider in its proportionality analysis:

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

### **Impact assessments**

Impact assessments are required whenever an initiative is expected to have significant economic, social or environmental impacts. They include an assessment of the problem, possible policy options, and their likely impacts and how they comply with the principles of subsidiarity and proportionality.

The Regulatory Scrutiny Board replaced the Impact Assessment Board in July 2015. In 2016, the Board was comprised of a Chair (Director-General level) and five full-time members, of which two were from outside the Commission. A third and final external member was appointed in 2017. All members of the Board are independent and function in a personal capacity based on their individual expertise. The Board reviews the quality of impact assessments, of major evaluations and fitness checks. Subsidiarity and proportionality are part of this quality check.

In 2016, the Regulatory Scrutiny Board examined 60 impact assessments. Nine of these cases (15 %) were judged as needing improvement in their analysis of subsidiarity and/or proportionality aspects. While the total number of cases assessed in 2015 was lower (29) the share of cases with subsidiarity and proportionality issues was higher (23 %). The following examples from 2016 illustrate how the Board assessed subsidiarity and proportionality:

- In the opinion on the impact assessment on the proposal amending the Directive on the posting of workers<sup>8</sup>, the Regulatory Scrutiny Board stressed that the report should better substantiate the argumentation on the principles of subsidiarity and proportionality. The Board asked for a justification why alternative options had not been included in the analysis. As regards the issue of proportionality, the Board asked for a clarification on the way the report addressed concerns of small and medium-sized enterprises in relation to procedural burdens. In a resubmitted version of the report, which obtained a positive opinion of the

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<sup>7</sup> In the context of impact assessments, proportionality is a key criterion to consider in the comparison of policy options.

<sup>8</sup> SWD(2016) 52 final.

Board, both issues were better addressed, notably as concerns the overall justification of the proposal. A section was also added on small and medium-sized enterprises and the likely burdens from administrative procedures. While the revised report better justified the discarding of some options, the Board still asked for the report to better explain why an exemption for short term posting was not considered. An amended report was adopted in March 2016.<sup>9</sup>

- In the impact assessment on the proposal for a Council Directive on a general reverse charge mechanism for value added tax<sup>10</sup>, the Regulatory Scrutiny Board found that proportionality was not sufficiently justified for the individual policy options, especially regarding impacts. The report received a negative opinion and the resubmitted version was improved by adding an analysis of proportionality resulting in a stronger assessment of the options and risks. For instance, secondary consequences were better described regarding impacts on compliance costs to businesses and on other Member States that do not use the general reverse charge mechanism.
- In the impact assessment on the proposal for a Council Regulation on geo-blocking<sup>11</sup> based on the principle of residence and nationality, the Board asked for a better justification of how the preferred option was proportionate in relation to the identified problem. The Board called for a better explanation of the difference the initiative is expected to make given that traders would not be required to deliver to another Member State and for more substantive evidence as to why cross-border trade would increase even where consumers are required to collect goods in a foreign country. The report received a negative opinion. The report was subsequently improved and an amended version obtained a positive opinion from the Board.
- On the proposal for a Regulation on the modernisation of EU copyright rules in the Digital Single Market<sup>12</sup>, the Board gave a positive opinion on the impact assessment on the condition that the report be improved specifically with respect to the evidence supporting the need for EU action and the proportionality of the proposed measures. In particular, the Board asked the Commission to provide more evidence as regards the use of protected content in user uploaded content, fair remuneration of authors and performers and audio visual content on Video on Demand platforms. The Board's concerns led to a revision of the impact assessment report accompanying the draft legislative proposals adopted by the Commission in September 2016.
- In the context of the proposal for a revised Renewable Energies Directive<sup>13</sup>, the Regulatory Scrutiny Board raised concerns with the proportionality of some of the options and the extent to which the principle of subsidiarity was met. The Commission took due account of the Board's reservations in its proposal. In particular, as regards the provisions on heating and cooling, the Commission did not propose binding obligations but instead introduced several options for Member States, thus providing flexibility of implementation at national

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<sup>9</sup> See also Chapter 3 as regards the Commission's follow-up to the reasoned opinions from national Parliaments on the posting of workers proposal.

<sup>10</sup> SWD(2016) 457 final.

<sup>11</sup> COM(2016) 289 final.

<sup>12</sup> Proposal for a Regulation of the European Parliament and of the Council laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes – COM(2016) 594 final.

<sup>13</sup> Proposal for a Directive of the European Parliament and of the Council on the promotion of the use of energy from renewable sources (recast) – COM(2016) 767 final.

level. These more proportionate and less burdensome provisions were combined with strengthened provisions in the governance framework to safeguard the achievement of the 2030 targets.

As demonstrated by these examples, the Regulatory Scrutiny Board in 2016 helped to improve the analysis of how proposals comply with the principles of subsidiarity and proportionality. By so doing, the Board provided critical information for the Commission's political decision-making process.

### **Evaluations and fitness checks**

Subsidiarity and proportionality were also essential for the retrospective evaluations and fitness checks carried out in 2016. These tools assess whether European actions are delivering the expected results in terms of efficiency, effectiveness, coherence, relevance and European value added. They also assess whether actions remain necessary, or whether the objectives could be achieved better in other ways. The Commission is committed to the principle of 'evaluating first' – in other words, to analysing the past performance of existing policies before considering new measures. By gathering evidence and identifying lessons that can feed into decision-making, the EU is making evaluation an integral and permanent part of its policymaking.

The Commission normally produces between 100 and 120 evaluations every year. In 2016, the Commission published 43 evaluations and Fitness Checks.<sup>14</sup> The Commission completed two fitness checks (evaluations of broader policy areas); one on Reporting, Planning and Monitoring Obligations in the EU Energy acquis and one on the Birds and Habitat Directives. The following examples from 2016 highlight evaluations where subsidiarity, European added value and proportionality issues were raised:

- An evaluation of the Cross-Border Enforcement of Traffic Fines Directive<sup>15</sup> concluded that the Directive generated European added value because it put in place a mechanism for the exchange of information of vehicle registration data that is crucial to pursue offences committed with vehicles registered in other Member States. Achieving the same results by other means than a directive would have been nearly impossible considering: a) the number of agreements that Member States would have to sign in order to exchange the same type of data; b) the necessary time to ratify similar agreements in all Member States; and c) the possible outcomes of such agreements as well as the lack of transparency that some bilateral or multilateral agreements can entail.
- An evaluation of the Action Plan against the rising threats from antimicrobial resistance<sup>16</sup> concluded that the Action Plan had clear European added value. It stimulated actions in Member States, strengthened international cooperation and provided a framework to coordinate activities on antimicrobial resistance at international level. Overall, therefore, the evaluation findings support continued action at EU level. The evaluation shows that there is a clear need to support and assist Member States in developing and implementing national action plans to reduce differences between the use of antimicrobials and the prevalence of

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<sup>14</sup> With the Better Regulation package of May 2015, a new policy was introduced of publishing Staff Working Documents with every evaluation. 2016 was, however, still a transition year with a number of evaluations published without a Staff Working Document. The total number of evaluations and Fitness checks Staff Working Documents and external studies for evaluation was 111 in 2016.

<sup>15</sup> [https://ec.europa.eu/transport/modes/road/news/2016-06-17-evaluation-study-cross-border-enforcement\\_en](https://ec.europa.eu/transport/modes/road/news/2016-06-17-evaluation-study-cross-border-enforcement_en).

<sup>16</sup> SWD(2016) 347 final.

infections, to foster collaboration across sectors, to improve the knowledge of citizens and to strengthen monitoring and surveillance systems by developing expertise on methodologies, solid indicators and instruments. The evaluation demonstrated the need for continued coordination and collaboration on research and on developing new antimicrobials, rapid diagnostic tests, vaccines and alternative treatments, and new business models to sustain investment and increase the knowledge on transmission of antimicrobial resistance.

- The ex post evaluation of the seventh Framework Programme for Research<sup>17</sup> concluded that tackling pan-European challenges through European research is among the most important areas of European added value compared to Member State action. The European Research programmes include a set of ‘societal challenge’ prizes, which offer cash rewards to those who most effectively meet a defined challenge. They act as an incentive for innovation. They prescribe the goal but not how the goal should be achieved. In 2014, the German biopharmaceutical company CureVac GmbH won the Innovation Prize and was awarded EUR 2 million for progress towards a novel technology to keep life-saving vaccines stable at any ambient temperature, thereby overcoming one of the biggest barriers to using vaccines in developing countries. In 2015, the prize leveraged additional private investment in research when the Bill and Melinda Gates Foundation announced a commitment to invest EUR 46 million in CureVac in order to accelerate the development of its innovative vaccine technology and the production of numerous vaccines against infectious diseases.

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

In 2016, the Commission received 65<sup>18</sup> **reasoned opinions** from national Parliaments on the principle of subsidiarity.<sup>19</sup> This was 713% more than the eight reasoned opinions received in 2015. The number of reasoned opinions received in 2016 is the third highest in a calendar year since the subsidiarity control mechanism was introduced by the Lisbon Treaty in 2009 (after 84 in 2012 and 70 in 2013). The reasoned opinions received in 2016 also accounted for a higher proportion (10.5%) of the total number of opinions received by the Commission in that year under the political dialogue (620). It should be noted that the total number of opinions submitted by national Parliaments under the political dialogue also increased significantly in 2016.<sup>20</sup>

The 65 reasoned opinions received in 2016 included 38 opinions related to four Commission proposals. The proposal giving rise to most reasoned opinions was the proposal for a review of the Directive on the posting of workers<sup>21</sup>, which generated 14 reasoned opinions, thereby triggering the procedure under Article 7(2) of Protocol No 2 to the Treaties (the so-called "yellow card" procedure). The proposal for a review of the Dublin Regulation<sup>22</sup> received eight reasoned opinions and the two proposals establishing the Common Consolidated Corporate Tax Base received eight

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<sup>17</sup> [https://ec.europa.eu/research/evaluations/index\\_en.cfm?pg=fp7](https://ec.europa.eu/research/evaluations/index_en.cfm?pg=fp7).

<sup>18</sup> This number refers to the total number of opinions received from parliamentary chambers under Protocol No 2 to the Treaties. Reasoned opinions jointly concerning more than one Commission document therefore only count as one reasoned opinion. See the Annex to this report for more details.

<sup>19</sup> See the Annex to this report.

<sup>20</sup> 620 opinions received under the political dialogue in 2016 compared to 350 opinions received in 2015.

<sup>21</sup> Proposal for a Directive amending Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services – {COM(2016) 128 final}.

<sup>22</sup> Proposal for a Regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) {COM(2016) 270 final}.



reasoned opinions.<sup>23</sup> Other proposals received between one and four reasoned opinions. The cases on which the Commission received the highest number of reasoned opinions are described in more detail in Chapter 3.

The significant increase in the total number of reasoned opinions issued in 2016 translated into a substantial increase in the number of reasoned opinions issued per chamber. 26 out of 41 chambers issued reasoned opinions in 2016 (compared with 8 in 2015). The reasoned opinions were issued by the Bulgarian *Narodno sabranie* (3), the Czech *Senát* (3), the Czech *Poslanecká sněmovna* (4), the Danish *Folketing* (2), the Estonian *Riigikogu* (1), the Irish *Dáil Éireann* (2), the Irish *Seanad Éireann* (1), the French *Sénat* (3), the Croatian *Hrvatski sabor* (1), the Italian *Senato della Repubblica* (3), the Latvian *Saeima* (1), the Lithuanian *Seimas* (1), Luxembourg's *Chambre des Députés* (2), the Hungarian *Országgyűlés* (2), the Maltese *Kamra tad-Deputati* (5), the Dutch *Eerste Kamer* (1), the Dutch *Tweede Kamer* (3), the Austrian *Bundesrat* (4), the Polish *Senat* (2), the Polish *Sejm* (2), the Portuguese *Assembleia da República* (1), the Romanian *Camera Deputaţilor* (2), the Romanian *Senat* (1), the Slovak *Národná rada* (2), the Swedish *Riksdag* (12) and the British House of Commons (1).

The Swedish *Riksdag* was the national Parliament which issued by far the highest number of reasoned opinions (12). The Maltese *Kamra tad-Deputati* issued the second highest number of reasoned opinions (5) followed by the Czech *Poslanecká sněmovna* and the Austrian *Bundesrat* (4 each).

Furthermore, some regional parliaments took the opportunity to inform the Commission directly of their opinions on certain Commission proposals, which in some instances had also been submitted to their respective national parliamentary chambers as part of the subsidiarity scrutiny procedure under Article 6 of Protocol No 2 to the Treaties. The Commission takes these views into account where appropriate.

### 2.3. The European Parliament and the Council

#### a) The European Parliament

The European Parliament has taken a series of measures to fulfil its obligations under the Treaties as regards the application of the principles of subsidiarity and proportionality. With particular reference to national Parliaments' reasoned opinions, the following procedure is currently in place:

- reasoned opinions are transmitted to the European Parliament's Committee on Legal Affairs and to the parliamentary committee responsible for the subject-matter for distribution to all committee Members; they are also included in the meeting file;
- reasoned opinions are systematically translated into all EU official languages (except Irish and Maltese);
- preambles to legislative resolutions make reference to reasoned opinions received;
- the parliamentary committee responsible for the subject-matter ensures that the European Parliament does not proceed to its final vote before the end of the deadline of eight weeks for submitting reasoned opinions under Protocol No 2 to the Treaties.<sup>24</sup>

<sup>23</sup> Proposals for Council Directives on a Common Consolidated Corporate Tax Base and on a Common Corporate Tax Base – {COM(2016) 683 final and COM(2016) 685 final}.

<sup>24</sup> Except in cases of urgency as referred to in Title I, Article 4 of Protocol No 1 to the Treaties on the role of national Parliaments in the European Union.

In 2016, the European Parliament formally received 410 submissions by national Parliaments.<sup>25</sup> Of these, 76<sup>26</sup> were reasoned opinions submitted under Protocol No 2 to the Treaties, whilst the other 334 were contributions (submissions not related to the subsidiarity control mechanism). These figures increased in comparison with 2015, when nine reasoned opinions and 242 contributions were officially transmitted to the European Parliament. All submissions from national Parliaments to the European Parliament are made available in an internal database (CONNECT).

Pursuant to Annex V to the European Parliament's Rules of Procedure, the Committee on Legal Affairs is the parliamentary committee with horizontal responsibility for ensuring respect for the principle of subsidiarity. Every six months a Member of the Committee is appointed as standing rapporteur for subsidiarity on the basis of rotation among the political groups. Mr Gilles LEBRETON (ENF) was appointed as the standing rapporteur for the first half of 2016. He was succeeded by Mr Kostas CHRYSOGONOS (GUE/NGL). The rapporteur follows the reasoned opinions received and has the opportunity to take up issues raised in reasoned opinions for debate in the committee and for possible recommendations to the committee responsible for the subject-matter of the proposal in question.

A report is also regularly drawn up by the Committee on Legal Affairs on the Commission's annual reports on subsidiarity and proportionality. Mr Sajjad KARIM (ECR) was appointed rapporteur for the 2014 Annual Report on Subsidiarity and Proportionality. Ms Mady DELVAUX (S&D) was appointed rapporteur for the 2015 Annual Report. The Committee also contributes to the bi-annual reports drawn up by the Conference of Parliamentary Committees for Union Affairs (COSAC) on questions related to subsidiarity.

On 24 May 2016, the Committee on Legal Affairs held an exchange of views on the reasoned opinions received under the procedure covered by Article 7(2) of Protocol No 2, the so-called "yellow card" procedure on the proposal for a targeted revision of the posting of workers Directive (see also below under chapter 3 of this report). On 12 October 2016, the Committee on Employment and Social Affairs invited national Parliaments to an exchange of views on the proposal.

The Committee on Legal Affairs is also responsible for ensuring respect for the principle of proportionality, which it takes into account in discharging its task of verifying the legal basis of proposals and in exercising its responsibility for better law-making.

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

- by systematically scrutinising the subsidiarity and proportionality aspects of Commission impact assessments and drawing attention to any concerns expressed in this respect, notably by national Parliaments and the Committee of the Regions;
- by ensuring that these principles are fully respected in the European Parliament's own work, for example when carrying out impact assessments of its own substantive amendments or

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<sup>25</sup> The European Parliament also received a number of submissions from national Parliaments concerning the European Parliament's proposal for a reform of the electoral law of the European Union. For further details, please see the European Parliament's Annual Report 2014-2015 on Relations between the European Parliament and national Parliaments under the Lisbon Treaty: <http://www.europarl.europa.eu/relnatparl/en/about/annual-reports.html>.

<sup>26</sup> There is a discrepancy in the number of reasoned opinions registered by the European Parliament, the Council and the Commission, as not all institutions have received all reasoned opinions or the institutions count the number of reasoned opinions received differently.

analysing the added value of Parliament's proposals for new legislation, based on Article 225 of the Treaty on the Functioning of the European Union, and the cost of the absence of action at EU level;

- by scrutinising the subsidiarity and proportionality aspects when drafting impact assessments, focussing on the added value of EU rather than national spending or actions.

In 2016, the European Parliament produced 36 Initial Appraisals, one Impact Assessment of substantive parliamentary amendments and 14 ex-post European Impact Assessments. In addition, seven reports on the cost of non-Europe and four European Added Value Assessments were completed. The European Parliamentary Research Service also scrutinises the implementation and effectiveness of existing EU legislation whenever the European Commission announces in its annual work programme that this legislation will be amended. In 2016, some 28 such "Implementation Appraisals" were produced.

Every year, the European Parliament renews its invitation to national Parliaments to forward any information they deem useful in this context.

#### *b) The Council*

The Council's obligations as regards national Parliaments' monitoring of the principle of subsidiarity are set out in Protocols No 1 and 2 to the Treaties. The responsibilities of the Council mainly consist in forwarding to national Parliaments draft legislative acts which do not originate from the Commission.

Under Article 4 of Protocol No 2 to the Treaties, the Council has to forward to national Parliaments all draft legislative acts originating from a group of Member States, the Court of Justice, the European Central Bank and the European Investment Bank. As a corollary to the above obligation, under Article 6 of Protocol No 2, the Council must forward any national Parliament opinion on a legislative proposal originating from a group of Member States to the proposing Member States. Similarly, the Council forwards national Parliaments' opinions on legislative proposals from the Court of Justice, the European Central Bank and the European Investment Bank to the institution concerned. In 2016, no such draft legislative acts or opinions were received.<sup>27</sup>

In addition to its Treaty requirements, the Council also keeps Member States informed of national Parliaments' opinions on Commission legislative proposals. In 2016, the Council Secretariat distributed to the delegations 69<sup>28</sup> reasoned opinions received within the framework of Protocol No 2 and 280 opinions issued within the framework of the political dialogue.<sup>29</sup>

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

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

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<sup>27</sup> In this context it is recalled that at the end of 2015, the Council forwarded to the national Parliaments a proposal from the Court of Justice for a Regulation of the European Parliament and of the Council on the transfer to the General Court of the European Union of jurisdiction at first instance in disputes between the Union and its servants (doc. 14306/15).

<sup>28</sup> There is a discrepancy in the number of reasoned opinions registered by the European Parliament, the Council and the Commission, as not all institutions have received all reasoned opinions or the institutions count the number of reasoned opinions received differently.

<sup>29</sup> The Council Secretariat does not systematically receive all opinions from the national Parliaments.

In line with the reference to local and regional levels in Article 5(3) of the Treaty on European Union, the Committee of the Regions in 2016 monitored the application of the principle of subsidiarity through its various instruments. Via the Subsidiarity Work Programme<sup>30</sup>, four initiatives selected from the Commission Work Programme 2016 were monitored with particular attention. In addition, via its own internal rules<sup>31</sup>, the Committee of the Regions assessed compliance with the subsidiarity and proportionality principles of all legislative proposals on which it issued opinions. In 2016, 13 opinions were issued on legislative proposals, nine opinions of which were relevant in terms of subsidiarity and proportionality monitoring, in addition to those included in the Subsidiarity Work Programme. For the majority of the proposals, the Committee of the Regions found that they complied with the principles of subsidiarity and proportionality. In two cases, and to differing degrees, the Committee of the Regions raised some proportionality concerns, notably on the Circular Economy Package<sup>32</sup> and on the revision of the audiovisual media services Directive.<sup>33</sup> On the establishment of a European Deposit Insurance Scheme<sup>34</sup> the Committee of the Regions found that the justification was incomplete, and asked the Commission to submit a more substantiated justification to allow an informed assessment of compliance with the principles of subsidiarity and proportionality.

### Consultations of the Subsidiarity Expert Group

A consultation of the Subsidiarity Expert Group<sup>35</sup> was undertaken for each of the initiatives included in the Subsidiarity Work Programme. The Subsidiarity Expert Group was first consulted on the proposals for Directives in the new Circular Economy package. The majority of experts considered that the waste management targets did not give cause for concern in terms of subsidiarity. However, as regards the principle of proportionality, some believed that the targets included in the legislative proposal from 2014 were disproportionate. The opinion<sup>36</sup> concluded that: *"while there is no cause for concern as regards compliance with subsidiarity, the European Commission's proposals do give rise to concerns as regards compliance with proportionality"*.

The second consultation in 2016 concerned the revision of the posting of workers Directive. The consultation respondents highlighted that the proposal included significant new elements and the proposed measures were not justified in an adequate and substantiated manner. In terms of material aspects of subsidiarity, the opinion<sup>37</sup> did not raise any issue and agreed with the Commission proposal *"that the objective of the proposed revised Directive, that is, a common definition of the rules applicable to the posting of workers, can be better achieved at EU level"*.

As regards the proposal for the revision of the audiovisual media services Directive, experts concluded that the proposal appeared to comply with the subsidiarity principle but that extremely detailed rules on national regulatory authorities did not leave much room for national decision making, and that through this the proposal raised proportionality concerns.<sup>38</sup>

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<sup>30</sup> COR-2016-00911-09-00-NB adopted by the Committee of the Regions' Bureau on 4 April 2016.

<sup>31</sup> Rule 55.2 of the Rules of Procedure OJ L 65, 5.3.2014, p. 41-64, <http://cor.europa.eu/en/documentation/Documents/Rules-of-Procedure-of-the-Committee-of-the-Regions/EN.pdf>.

<sup>32</sup> COM(2015) 593 final, COM(2015) 594 final, COM(2015) 595 final and COM(2015) 596 final.

<sup>33</sup> COM(2016) 287 final.

<sup>34</sup> COM(2015) 586 final.

<sup>35</sup> The Subsidiarity Expert Group, which is part of the Committee of the Regions' Subsidiarity Monitoring Network, currently consists of 12 experts who provide support at technical level and the Committee of the Regions' contact points for subsidiarity monitoring in Member States.

<sup>36</sup> COR-2016-00585.

<sup>37</sup> COR-2016-02881.

<sup>38</sup> COR-2016-04093.

The final Subsidiarity Expert Group consultation in 2016 concerned a proposal for a Directive on Copyright in the Digital Single Market. No issues were raised with regard to subsidiarity or proportionality. The Committee of the Region's opinion was adopted on 8 February 2017.<sup>39</sup>

### **REGPEX – the platform for regions with legislative powers**

In 2016, the Committee of the Regions further upgraded and developed REGPEX - the sub-network of the Subsidiarity Monitoring Network open to parliaments and governments of regions with legislative powers which at the end of 2016 counted 76 partners (47 regional assemblies and 29 regional governments). The REGPEX search engine facilitates a selection of priorities for subsidiarity monitoring and an exchange of information between partners by providing direct access to information for subsidiarity analysis. REGPEX continues to be an important tool for subsidiarity monitoring. It fosters the exchange of good practices and a more common approach to subsidiarity monitoring.

A total of 28 contributions submitted by REGPEX partners were uploaded to the platform in 2016. The Upper Austrian State Parliament, the Emilia Romagna Regional legislative Assembly and the Bavarian State Parliament were among the more active partners. In 2016, the proposal for a Directive concerning the posting of workers received three regional parliaments' contributions. The Bavarian State Parliament argued that as the Union has no competence in the area of remuneration, any action in terms of harmonisation of posting of workers was inadmissible. The regional assembly of the Friuli Venezia Giulia welcomed the application of the host country's pay system to posted workers. The regional assembly of Marche believed that industrial relations (including the scope of collective agreements) could be best regulated at national level, due to the specificities of national collective bargaining systems. These positions were reflected in the Committee of the Regions' consultation report in view of the Committee's opinion on the proposal on the posting of workers.

### **Conference on Subsidiarity, Better Regulation and Political Dialogue**

The Conference on Subsidiarity, Better Regulation and Political Dialogue co-organised by the Conference of Italian Regional Parliaments, the Italian *Senato della Repubblica* and the Committee of the Regions was held in Rome on 19 February 2016. This pilot subsidiarity awareness raising project and training event was developed as a part of a new concept to match the needs of local and regional authorities against the backdrop of the intended reform of the Italian *Senato della Repubblica*. The event gathered 150 participants and emphasised the role of regional parliaments in the EU decision making process and highlighted subsidiarity monitoring as a constructive exercise.

A more detailed description of subsidiarity related activities is provided in the 2016 Subsidiarity Annual Report issued by the Committee of the Regions.<sup>40</sup>

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

The main judicial decisions delivered by the Court of Justice in 2016 as regards the principle of subsidiarity were the Court's judgments of 4 May 2016<sup>41</sup>, on the legality of the tobacco products Directive.<sup>42</sup> The Court considered that subsidiarity had been respected by the Union legislature.

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<sup>39</sup> COR-2016-05114.

<sup>40</sup> Available after adoption by the Committee of the Region's Bureau at <http://portal.cor.europa.eu/subsidiarity/Pages/default.aspx>.

To reach that conclusion, the Court distinguished between the ex-ante review of compliance with the principle of subsidiarity "*undertaken, at a political level, by national Parliaments in accordance with the procedures laid down for that purpose by Protocol (No 2)*", and the ex-post judicial review, in which the Court of Justice "*must verify both compliance with the substantive conditions set out in Article 5(3) TEU and compliance with the procedural safeguards provided for by that Protocol*".<sup>43</sup>

As regards the substantive conditions, the Court applied a simple test: it had to "*determine whether the EU legislature was entitled to consider, on the basis of a detailed statement, that the objective of the proposed action could be better achieved at EU level*". The Court recalled that the Directive had two objectives: facilitating "*the smooth functioning of the internal market [...], while ensuring a high level of protection of human health, especially for young people*". Even assuming that the second objective could be better attained by the Member States, "*pursuing it at that level would be liable to entrench, if not create, situations in which some Member States permitted the placing on the market of tobacco products containing certain characterising flavours, whilst others prohibit it, thus running completely counter to the first objective of Directive 2014/40, namely the improvement of the functioning of the internal market for tobacco and related products.*" For the Court, the "*[t]he interdependence of the two objectives [...] means that the EU legislature could legitimately take the view that it had to establish a set of rules for the placing on the EU market of tobacco products with characterising flavours and that, because of that interdependence, those two objectives could best be achieved at EU level*". Besides, the Court confirmed that subsidiarity "*is not intended to limit the EU's competence on the basis of the situation of any particular Member State taken individually*".<sup>44</sup>

Concerning procedural safeguards and, in particular, the obligation to state reasons as regards subsidiarity, the Court recalled that observance of that obligation "*must be evaluated not only by reference to the wording of the contested act, but also by reference to its context and the circumstances of the individual case*". The Court found that the Commission's proposal and its impact assessment included "*sufficient information showing clearly and unequivocally the advantages of taking action at EU level rather than at Member State level.*" This "*enabled both the EU legislature and national Parliaments to determine whether the proposal complied with the principle of subsidiarity, whilst also enabling individuals to understand the grounds relating to that principle and the Court to exercise its power of review*".<sup>45</sup>

The judgments also rejected the pleas alleging infringement of the principle of proportionality by various provisions of the tobacco products Directive. The Court of Justice confirmed the proportionality of the choices made by the legislator, which has a broad discretion in areas in which it has to undertake complex political, economic and social assessments, such as the regulation of the market in tobacco products. For the Court, the measures adopted were not manifestly inappropriate

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<sup>41</sup> Cases C-358/14, *Poland v Parliament and Council*, EU:C:2016:323; C-477/14, *Pillbox 38*, EU:C:2016:324; and C-547/14, *Philip Morris*, EU:C:2016:325.

<sup>42</sup> Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products (OJ L 127, 29.4.2014, p. 1-38).

<sup>43</sup> *Poland v Parliament and Council*, paragraphs 112 and 113; *Pillbox 38*, paragraphs 145 and 146; and *Philip Morris*, paragraphs 216 and 217.

<sup>44</sup> *Poland v Parliament and Council*, paragraphs 115 à 121; *Philip Morris*, paragraphs 219 to 224; referring to Case C-508/13, *Estonia v Parliament and Council*, EU:C:2015:403, paragraphs 48 and 53.

<sup>45</sup> *Poland v Parliament and Council*, paragraphs 122 to 125; *Philip Morris*, paragraphs 225 to 227.

having regard to their objective and less restrictive measures did not appear to be equally suitable for achieving that objective.<sup>46</sup>

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

- *Proposal for a revision of the posting of workers Directive*

Delivering on the commitment made in the Commission's Political Guidelines to promote the principle that the same work at the same place should be remunerated in the same manner, on 8 March 2016 the Commission adopted a proposal<sup>47</sup> for a targeted revision of the 1996 Directive on posting of workers.<sup>48</sup> In essence, the purpose of the review is to ensure that the implementation of the freedom to provide services in the Union takes place under conditions that guarantee a level playing field for businesses and respect for the rights of workers. In that regard, the proposal introduces changes in three main areas: (i) remuneration of posted workers, including in situations of subcontracting, (ii) rules on temporary agency workers, and (iii) long-term posting. The proposal provides in particular that all mandatory rules on remuneration in the host Member State apply to workers posted to that Member State.

The Commission proposal elicited 14 reasoned opinions<sup>49</sup> from national Parliaments in 11 Member States. These reasoned opinions represent 22 out of a total of 56 votes, thereby triggering the procedure under Article 7(2) of Protocol No 2 to the Treaties (the so-called "yellow card" procedure).<sup>50</sup> In their reasoned opinions, the national Parliaments concerned stated in particular (i) that existing rules were sufficient and adequate, (ii) that the Union was not the adequate level of the action, (iii) that the proposal fails to recognise explicitly Member States' competences on remuneration and conditions of employment and (iv) that the proposal's justification with regard to the principle of subsidiarity was too succinct.

In line with this Commission's commitment to improve the interaction with national Parliaments, the Commission engaged directly with national Parliaments. At the Conference of Parliamentary Committees for Union Affairs (COSAC) of 13 June 2016, a preliminary exchange with the First Vice-President of the Commission, Frans Timmermans, focused on procedural aspects, and on 11 July 2016 a substantive discussion took place in the context of a broader debate with Commissioner Marianne Thyssen on the social dimension of the EU.

After careful analysis of the reasoned opinions, the Commission adopted a Communication on 20 July 2016 concluding that the proposal complies with the principle of subsidiarity and that the proposal should be maintained unchanged.<sup>51</sup> In its Communication, the Commission recalled that the proposal is based on an Internal Market legal basis, and that posting, by definition, is of a cross-border nature. It highlights that the proposal aims to facilitate the freedom to provide services, whilst ensuring a more level playing field between national and cross-border service providers and

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<sup>46</sup> *Poland v Parliament and Council*, paragraphs 78 to 104; *Philip Morris*, paragraphs 164 to 212; *Pillbox* 38, paragraphs 48 to 141.

<sup>47</sup> COM(2016) 128 final.

<sup>48</sup> Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, OJ L 18, 21.1.1997, p. 1.

<sup>49</sup> Bulgarian *Narodno sabranie*, Czech *Poslanecká sněmovna*, Czech *Senát*, Danish *Folketing*, Estonian *Riigikogu*, Croatian *Hrvatski sabor*, Latvian *Saeima*, Lithuanian *Seimas*, Hungarian *Országgyűlés*, Polish *Sejm*, Polish *Senat* (reasoned opinion and opinion), Romanian *Camera Deputaţilor* (reasoned opinion and opinion), Romanian *Senat* and Slovak *Národná rada*.

<sup>50</sup> The Commission also received nine opinions under the political dialogue. The opinions received are examined in the Annual Report 2016 on the Commission's relations with national Parliaments – COM(2017) 601 final.

<sup>51</sup> COM(2016) 505 final.

whilst ensuring that workers carrying out work at the same location are protected by the same mandatory rules, irrespective of whether they are local workers or posted workers. The Communication also explains why the rules in place are not sufficient and adequate to achieve that objective. The Communication furthermore confirms that the proposal fully respects the competences of the Member States to set remuneration and other terms and conditions of employment, in accordance with Member States' national laws and practice. The same goes for their competence to determine the terms and conditions that apply to temporary agency workers. Finally, the Communication addressed the question of justification of the proposal's compliance with the principle of subsidiarity, recalling the case law of the Court of Justice and referring to the explanatory memorandum and the Impact Assessment Report.



- *Proposal for a review of the Dublin Regulation*

The first package of legislative measures<sup>52</sup> aiming at making the Common European Asylum System<sup>53</sup> more fair and sustainable includes a proposal for a review of the Dublin Regulation.<sup>54</sup> The proposal, which was adopted on 4 May 2016, is part of the Commission's comprehensive response to the large-scale, disorderly arrival of migrants and asylum seekers in 2015 which exposed structural weaknesses in the design and implementation of the existing Dublin System. The proposal aims at achieving a fair sharing of responsibilities between Member States by introducing a new "corrective allocation mechanism", preventing abuses of the European Asylum System, as well as secondary movements.

National Parliaments issued eight reasoned opinions<sup>55</sup> on the proposal, arguing in particular that it does not comply with the subsidiarity principle as the corrective allocation mechanism is too far reaching and that decisions about relocation should remain under Member States' exclusive competence.

In response, the Commission stated that the proposal was necessary and proportionate to ensure a sustainable and fair Common European Asylum system. The Commission also stressed that ensuring the correct application of the Dublin system in times of crisis and tackling secondary movements of third country nationals between Member States were cross-border issues which could not be solved by actions taken individually or bilaterally by Member States. The Commission therefore considered that the proposal was in line with the principle of subsidiarity. The Commission also explained that the proposal would provide a more fair, efficient and sustainable system to determine the Member State responsible for examining asylum applications, while maintaining the principle that the asylum seekers should, unless they have family elsewhere, apply for asylum in the country of first entry. The new fairness mechanism would ensure solidarity, a fair sharing of responsibility within the Union and the elimination of disproportionate pressure on the asylum systems of frontline Member States.

- *Proposals for the establishment of a Common Consolidated Corporate Tax Base*

The purpose of setting up a Common Consolidated Corporate Tax Base is to give companies a single rulebook for calculating their taxable profits throughout the European Union. Tabled in 2011, the first proposal for a Directive establishing a Common Consolidated Corporate Tax Base<sup>56</sup> was designed to strengthen the Single Market for businesses. While Member States made progress in the Council on many elements of the proposal, they were unable to reach a final agreement. In its Work Programme for 2016, the Commission announced that it would withdraw the proposal and re-launch the work with a new staged approach.<sup>57</sup>

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<sup>52</sup> COM(2016) 270 final, COM(2016) 271 final and COM(2016) 272 final.

<sup>53</sup> *Communication 'Towards a reform of the Common European Asylum System and enhancing legal avenues to Europe'* COM(2016) 197 final.

<sup>54</sup> COM(2016) 270 final.

<sup>55</sup> *Czech Poslanecká sněmovna, Czech Senát, Italian Senato della Repubblica, Hungarian Országgyűlés, Polish Sejm, Polish Senat, Romanian Camera Deputaţilor and Slovak Národná rada.*

<sup>56</sup> COM(2011) 121 final.

<sup>57</sup> Annex 4 to the Commission Work Programme 2016 – COM(2015) 610 final.

On 25 October 2016, the Commission re-launched its initiative for a Common Consolidated Corporate Tax Base, adopting two new legislative proposals.<sup>58</sup> With the proposals the Commission intends to bolster the pro-business elements of the proposal from 2011 to help cross-border companies cut costs, red tape and to support innovation. At the same time, the Commission wishes to strengthen the Common Consolidated Corporate Tax Base's potential as an anti-tax avoidance tool. Corporate tax rates are not covered by the proposals, as these remain an area of national sovereignty.

The Commission received eight reasoned opinions<sup>59</sup> in response to the two new proposals.<sup>60</sup> The reasoned opinions were marked by concerns that Member States would lose control of their corporate taxation systems. The national Parliaments argued that the proposals were unnecessary, and that they might even prove ineffective in tackling tax avoidance and that the existing Anti-Tax Avoidance Directive<sup>61</sup>, combined with agreed action in the framework of the Organisation for Economic Co-operation and Development (OECD), was sufficient in this regard.

In its replies to the national Parliaments, the Commission emphasised that the proposals do not deal with the levels at which tax rates should be set at the national level but rather harmonise the corporate tax base, a prerequisite for rectifying identified distortions in the internal market. In that regard, the Anti-Tax Avoidance Directive would be an immediate action to deal with urgent needs. Its rules offer options, in the form of a minimum standard, to fill in gaps in the existing 28 national tax systems. The Common Consolidated Corporate Tax Base would be a fully-fledged corporate tax system with a cross-border dimension and objectives reaching beyond anti-tax avoidance action. The Commission also recalled that the OECD does not consider the specific features which are relevant to a single market, such as that of the European Union. The Commission made clear that it retains the authority to propose legislation – within the limits of its Treaty-based competence – in order to ensure a better functioning of the internal market. Yet, the Commission confirmed that the transfer pricing principles agreed at the OECD would continue to apply to transactions with associated enterprises outside the tax consolidated group within the EU and in third countries.

#### 4. CONCLUSION

As confirmed by the signature of the Interinstitutional Agreement on Better Law-Making in 2016, the European Parliament, the Council and the Commission have jointly committed to ensuring that the principles of subsidiarity and proportionality remain at the heart of European decision-making and that these principles are fully respected throughout the legislative process.

In 2016, the European Parliament continued its scrutiny of legislative proposals' compliance with subsidiarity and proportionality by the relevant parliamentary committees as well as by the Committee on Legal Affairs which has horizontal responsibility for ensuring respect for the principle of subsidiarity.

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<sup>58</sup> COM(2016) 683 final and COM(2016) 685 final.

<sup>59</sup> Danish *Folketing*, Irish *Dáil Éireann*, Irish *Seanad Éireann*, Luxembourg's *Chambre des Députés*, Maltese *Kamra tad-Deputati*, Dutch *Eerste Kamer*, Dutch *Tweede Kamer* and Swedish *Riksdag*. The Commission also received an opinion from the British House of Commons raising subsidiarity concerns. This Opinion was however received after the expiry of the eight-week deadline for submitting reasoned opinions.

<sup>60</sup> The Commission also received four opinions in the context of the political dialogue, namely from the German *Bundesrat*, the Spanish *Cortes Generales*, the Austrian *Bundesrat* (received in 2017) and the Portuguese *Assembleia da República*.

<sup>61</sup> Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market, OJ L 193, 19.7.2016, p. 1.

The Committee of the Regions also continued its work on monitoring the principle of subsidiarity, in particular by adopting and implementing its Subsidiarity Work Programme 2016, including consultations of the Subsidiarity Expert Group. In its opinions, the Committee of the Regions took account of subsidiarity concerns expressed by parliaments and authorities of regions with legislative powers. In 2016, the Committee organised a Conference in Rome on Subsidiarity, Better Regulation and Political Dialogue, in cooperation with regional parliaments and the Italian *Senato della Repubblica*.

In 2016, the Commission continued implementing its reinforced Better Regulation agenda from 2015, which includes strengthened guidance on how to assess subsidiarity and proportionality in the policy-making process. In 2016, the Regulatory Scrutiny Board screened 60 impact assessments and, in a number of cases, requested improvements of the argumentation on the principles of subsidiarity and proportionality.

National Parliaments expressed an increased interest in European decision-making in 2016, in particular as regards the subsidiarity control mechanism, with the number of reasoned opinions increasing from 8 in 2015 to a total of 65 in 2016. Of these, 14 reasoned opinions related to the proposal for a targeted revision of the posting of workers Directive, triggering for the third time the procedure under Article 7(2) of Protocol No 2 to the Treaties. In line with the commitment made by the Juncker Commission to engage in a dialogue with national Parliaments in the event of the above-mentioned procedure, the arguments put forward by the national Parliaments were widely debated including at meetings of the Conference of Parliamentary Committees for Union Affairs (COSAC) and in the European Parliament's Committee on Legal Affairs and Committee on Employment and Social Affairs. Although the Commission ultimately decided after these discussions and a thorough review of all the opinions received to maintain its initial proposal, it recognises that a number of national Parliaments remain unconvinced of its merits. The proposal is still under discussion by the European Parliament and the Council. Both co-legislators, like the Commission, are committed to keeping in mind the comments from the national Parliaments throughout the legislative process.

As the European Union seeks to define a vision for its future, the Rome Declaration, signed by the leaders of 27 Member States, the European Parliament, the European Council and the Commission on 25 March 2017 to mark the 60th anniversary of the Treaties of Rome, reconfirms that the principles of subsidiarity and proportionality will continue to underpin and shape European decision-making in the years to come.