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PARLIAMENT, THE EUROPEAN COUNCIL, THE COUNCIL, THE EUROPEAN
ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE
REGIONS**

**The principles of subsidiarity and proportionality: Strengthening their role in the EU's
policymaking**

{COM(2018) 490} - {COM(2018) 491}

The principles of subsidiarity and proportionality: Strengthening their role in the EU's policymaking

I want our Union to have a stronger focus on things that matter, building on the work this Commission has already undertaken. We should not meddle in the everyday lives of European citizens by regulating every aspect. We should be big on the big things. We should not march in with a stream of new initiatives or seek ever growing competences. We should give back competences to Member States where it makes sense.

President Jean-Claude Juncker's State of the Union Address 2017

1. INTRODUCTION

This Commission concentrates on the issues that matter. It has put evidence-based policymaking and better regulation at the heart of its actions. It has proposed lean work programmes focused on President Juncker's ten priorities. This Commission has emphasised the need to be big on the big things and modest elsewhere.

Subsidiarity and proportionality are core elements of the Commission's better regulation agenda which underpins how the Commission prepares its policy proposals. This Commission has invested heavily in better regulation and it is now becoming part of the Commission's DNA. The lessons learnt from past experience and the views of stakeholders and civil society have been firmly placed at the centre of the policy-shaping process before new legislation is proposed. The Commission's efforts have been recognised recently by the OECD which now ranks the Commission as a top performer¹ in terms of good regulatory practice. We do not rest on our laurels however. The Commission is taking stock of the package of reforms covering the entire policy cycle it introduced in May 2015. The aim of the reforms was to boost openness and transparency in the EU decision-making process, improve the quality of new laws through better impact assessments for draft legislation and amendments, and to promote constant and consistent review of existing EU laws. The stocktaking exercise will focus on refining and further improving our better regulation policy, including as regards the treatment of subsidiarity and proportionality.

This stocktaking takes place alongside the reflection that has been given to the future of Europe, on which subject the Commission presented a White Paper in March 2017. This presented five scenarios to illustrate how the Union might look in 2025 and launched a process with over 2000 public events aimed at allowing Europeans to have a say on the future of their Union. Commenting on this discussion in his State of the Union speech in 2017, President Juncker presented his vision of a more democratic Union based on freedom, equality and the rule of law. To take this work forward, President Juncker set up a Subsidiarity and Proportionality Task Force to take a critical look at all policy areas to make sure the Union acts only where it adds value and in particular to look more

¹ OECD Regulatory Policy Outlook 2018: <https://www.oecd.org/governance/oecd-regulatory-policy-outlook-2018-9789264303072-en.htm>

deeply at Scenario 4 “Doing Less More Efficiently”² according to which the Union would focus its limited resources on a smaller number of activities in order to tackle its priorities more efficiently.

The Commission has already made progress in finding ways to deliver the Union's policies more efficiently by doing less at Union level and more at national level. Today more than 97% of State aid measures are implemented directly at national, regional or local level, based on clearly defined criteria, without needing prior approval by the Commission. The empowerment of national competition authorities has also enabled them to take around 85% of antitrust enforcement decisions since 2004. The proposed simplification of the Common Agricultural Policy recognises the diversity of local conditions across the Union and gives back responsibility to national authorities to deliver effective and tailored solutions to support agriculture and the environment.

Looking ahead, the approach that has been developed over the course of this Commission should be further embedded in the Commission's activity. It should become part of an ongoing process of reflection on the extent to which it is for the EU to regulate or not citizens' daily lives. With this objective in mind, this Communication sets out how the role of the principles of subsidiarity and proportionality should be strengthened in the EU's policymaking. In particular, it sets in motion the Commission's follow-up to the recommendations of the Task Force, as well as the means of highlighting where others need to act. The Commission intends to fine-tune the details as part of the better regulation stocktaking exercise in the first half of 2019, having heard the views of all parties who have an interest in better regulation.

2. THE IMPORTANCE OF SUBSIDIARITY AND PROPORTIONALITY

The principle of subsidiarity goes to the heart of what the Union does. Under the Treaties, the Member States have conferred certain competences to the Union and the subsidiarity principle governs how they are used. In areas not falling within its exclusive competence, the Union shall only act if the objectives being pursued cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but by reason of the scale or the effects of the envisaged action, rather be better achieved at Union level.

The check on compliance with the principle is essentially a political question entrusted to the EU's political institutions and the national Parliaments. It was with this in mind that President Juncker underlined in his Political Guidelines³ the importance of strengthening the interaction with national Parliaments as a way also of bringing the Union closer to its citizens. Protocols No.1 and No. 2 of the Treaties set out the role of national Parliaments in the Union and empower them to check subsidiarity⁴. In particular, a Commission proposal for a legislative act must be transmitted to national Parliaments, which then have a period of eight weeks in which to submit a reasoned opinion and each national

² Scenario 4 of the White Paper is entitled “Doing Less More Efficiently: The EU27 focuses on delivering more and faster in selected policy areas, while doing less elsewhere”.; https://ec.europa.eu/commission/white-paper-future-europe_en

³ Political Guidelines for the next European Commission, by Candidate for the President of the European Commission Jean-Claude Juncker, Strasbourg, 15 July 2014.

⁴ See Article 12 TEU, Protocols No. 1 and No. 2 to the Treaty on European Union and the Treaty on the Functioning of the European Union.

Parliament is allotted two votes. If their combined votes exceed a certain threshold⁵ the Commission must review its proposal and explain why it maintains, changes or withdraws it. Where a simple majority of national Parliaments' votes exists for a proposal subject to the ordinary legislative procedure, the Commission must justify why it maintains its proposal (should it not withdraw or amend it) and the European Parliament and the Council must consider whether it is compatible with the subsidiarity principle. If a simple majority of members of the European Parliament, or 55% of Council members, finds that the proposal breaches the principle of subsidiarity, the proposal will not be considered further. The Court of Justice adjudicates on actions based on the infringement of subsidiarity brought by the Member States (or notified by them on behalf of their national Parliaments) or by the Committee of the Regions where it has a right to be consulted under the Treaty on the Functioning of the European Union.

In practice, subsidiarity is about identifying the best level of governance to make and implement policies. The Union should do so only where it is necessary and where it delivers clear benefits over and above measures taken at national, regional or local levels. The potential added value of EU action and the cost to the EU of not acting (often referred to as the “cost of non-Europe”) are closely related concepts⁶. The political assessment of whether a particular EU policy instrument can be considered as adding value may change over time, depending on the political priorities of the moment.

Subsidiarity is often characterised as a choice between EU action or no action at all. This is not correct. Subsidiarity means leaving room for the most appropriate level of governance to assume its responsibility to act. Member States are also free to act where the Union does not and action may be necessary at all governance levels for a given policy. Generally, the Commission's assessments will explore the EU dimension of the problems and impacts of each new initiative.

The principle of proportionality requires that the content and form of Union action must not exceed what is necessary to achieve the objectives being sought⁷. Protocol No. 2 sets out in more detail the proportionality requirements for draft legislation⁸. Any financial or administrative burdens which fall on the Union, national governments, local and regional authorities, and economic operators must be minimised and be commensurate with the objectives to be achieved. For the Commission, this means delivering our ambitious policies in the simplest, least costly way and avoiding unnecessary red-tape. It is about carefully matching the intensity of the proposed measure with what is to be achieved. Proportionality is a cornerstone of the Commission's better regulation policy and its Regulatory Fitness programme. The Court of Justice is the ultimate arbiter of proportionality and may strike down acts it finds to have breached the principle.

Given the importance of the correct application of both principles⁹, and in view of the Commission's close relationship with national Parliaments, the Commission publishes an annual report on both these matters. The 2017 annual report on relations between the

⁵ “Yellow- card” corresponds to one third of all votes or one quarter in the area of freedom, security and justice (Article 76 TFEU). An “orange card” corresponds to a simple majority of votes.

⁶ See for example "Mapping the cost of non-Europe 2014-2019"; [http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_STU\(2017\)603239](http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_STU(2017)603239)

⁷ Article 5 of the Treaty on European Union.

⁸ Article 5 of Protocol No. 2.

⁹ Article 9 of Protocol No. 2 requires the Commission to submit an annual report on the application of Article 5 of the Treaty on European Union.

European Commission and national Parliaments and the 2017 annual report on the application of the principles of subsidiarity and proportionality accompany this Communication.

3. SUBSIDIARITY & PROPORTIONALITY: KEY COMPONENTS OF BETTER REGULATION

Subsidiarity and proportionality are core elements of the Commission's approach to better regulation which is built on the three fundamental processes of evaluation, impact assessment and stakeholder consultation. This Commission has invested significant resources to improve its approach. These changes have also had a marked improvement on the assessment of subsidiarity and proportionality:

- The Commission has increased the transparency, legitimacy and accountability of its work. The “contribute to law-making” website allows stakeholders to participate fully in the Commission's work throughout the policy cycle¹⁰ from providing feedback on initial ideas to comments on the Commission's adopted proposals and draft delegated and implementing acts.
- Public consultations accompany major initiatives and the most important of these will be available in all official languages.
- The Commission prepared the first ever integrated guidelines on better regulation in May 2015 and completed a major update of them in 2017. These guidelines and tools guide the work of Commission staff across the entire policy cycle¹¹ and have revamped guidance on how to assess subsidiarity and proportionality. They are published with the aim to facilitate further engagement of the European Parliament, the Council and other interested parties in the Union's policymaking process.
- A new Regulatory Scrutiny Board¹² was established with three members recruited from outside the European institutions. This independent Board checks the quality of impact assessments and selected evaluations of existing legislation and makes public all its opinions. In principle, a positive opinion of the Board on the impact assessment is needed. Otherwise, the Commission needs to explain publicly why it has decided to proceed. Weaknesses in the analysis of subsidiarity and proportionality are among the most frequent causes of negative opinions¹³.
- The experts on the REFIT Platform¹⁴ assist the Commission with providing solutions to simplify existing legislation. The Platform has adopted over 80 opinions helped by a representative from the Committee of the Regions.

¹⁰ “Contribute to law-making”: https://ec.europa.eu/info/law/contribute-law-making_en

¹¹ https://ec.europa.eu/info/better-regulation-guidelines-and-toolbox_en

¹² https://ec.europa.eu/info/law/law-making-process/regulatory-scrutiny-board_en

¹³ See p.20 of the 2017 annual report of the Regulatory Scrutiny Board; https://ec.europa.eu/info/publications/regulatory-scrutiny-board-annual-report-2017_en

¹⁴ Set up in 2015, the Platform supports the simplification of EU law and reducing unnecessary regulatory burdens for the benefit of civil society, business and public authorities. It makes recommendations to the Commission taking into account suggestions from interested parties.

- In April 2016, the European Parliament, the Council and the European Commission signed a new Interinstitutional Agreement on Better Law-Making¹⁵. This covers all aspects of better regulation including subsidiarity and proportionality, transparency of the legislative procedure, the use of delegated acts and annual and multi-annual programming of political priorities.

The application of these better regulation tools has promoted more proportionate legislative proposals¹⁶. The effective application of EU law is also essential so that its intended benefits are delivered in practice. Impact assessment and evaluation help ensure effective implementation. They are complemented by a more strategic approach¹⁷ to the implementation and enforcement of EU law, including through helping Member States to implement EU law correctly and by focusing infringement procedures on systemic problems where the Commission's enforcement action can make a real difference.

The Commission is currently taking stock of how this better regulation policy is working and is actively seeking the views of all interested parties¹⁸. The stocktaking exercise will aim to identify whether and how our better regulation tools can be used more effectively and efficiently, including strengthening the role of subsidiarity and proportionality in our policymaking.

The Report of the Task Force on Subsidiarity, Proportionality and “Doing Less More Efficiently”

The Task Force comprised members from the Committee of the Regions and national Parliaments. It looked at the role of subsidiarity and proportionality in the work of the institutions, the role of local and regional authorities in the EU's policymaking and whether responsibility for policy areas or competences could be left or returned to the Member States. In just over six months the Task Force compiled a comprehensive and focused response to these questions drawing on the contributions of many stakeholders in the process.¹⁹

The Task Force's report presents nine recommendations together with a number of actions to help implement them. They cover the Commission's policy preparation processes, the role of national Parliaments in scrutinising Commission proposals and the legislative procedure.

The key findings are:

- A new way of working is needed to make better laws based on a common understanding of subsidiarity and proportionality across the policy cycle.

https://ec.europa.eu/info/law/law-making-process/evaluating-and-improving-existing-laws/refit-making-eu-law-simpler-and-less-costly/refit-platform_en

¹⁵ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:L:2016:123:TOC>

¹⁶ For example, see Box 1 of Communication COM(2017) 651 final; *Completing the Better Regulation Agenda: Better solutions for better results*; https://ec.europa.eu/info/sites/info/files/completing-the-better-regulation-agenda-better-solutions-for-better-results_en.pdf

¹⁷ [C\(2016\) 8600](#), EU Law: Better Results through Better Application; of 21.12.2016.

¹⁸ https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2018-2332204_en

¹⁹ https://ec.europa.eu/commission/priorities/democratic-change/better-regulation/task-force-subsidiarity-proportionality-and-doing-less-more-efficiently_en#report

- More “active subsidiarity”²⁰ is needed which gives a stronger voice to the local and regional authorities and national Parliaments and which promotes ownership of what the Union does.
- The Union should use its resources more efficiently and prioritise its actions but there are no reasons to re-delegate Treaty competences or entire policy areas back to the Member States.

The Task Force’s recommendations are set out in the Annex to this Communication. Many of the recommendations touch upon the practical application of better regulation. The Commission supports the analysis put forward by the Task Force on the need to strengthen the application of the subsidiarity and proportionality principles in the EU’s policymaking as part of the wider better regulation agenda. It is essential that the 41 national Parliament chambers, 74 regional legislative assemblies, the 280 regions and the 80 000 local authorities, who are at the forefront of implementing EU laws, are more fully engaged in the policy process. Active subsidiarity and a new way of working with these entities will help deliver policies that work while strengthening the understanding and ownership of what the Union does.

4. ACTIONS TO STRENGTHEN THE ROLE OF SUBSIDIARITY AND PROPORTIONALITY

The Commission has considered carefully the Task Force’s report and highlights the areas below where action is necessary.

4.1. Promoting a common understanding of subsidiarity and proportionality

While all actors involved in the EU’s policymaking must respect the principles of subsidiarity and proportionality, there is no common definition to support each institution’s work. Protocol No. 2 of the Treaties on subsidiarity and proportionality no longer contains the illustrative criteria that once were a part of a similar protocol annexed to the Amsterdam Treaty.

The Commission published the first ever integrated guidance on how it would implement better regulation in May 2015. This guidance covers the entire policy cycle including the assessment of subsidiarity and proportionality²¹. This guidance already incorporates the criteria originally contained in the Amsterdam Treaty. The Task Force advocated a tool to make assessments of subsidiarity and proportionality and to present the results in a structured way (the “grid”)²². The tool is annexed to this Communication. The Commission does not currently present the results of its assessments in the form of the “grid” but, in the future, the Commission intends to integrate the grid into its better regulation guidance and to use it as part of the impact assessments, evaluations and explanatory memoranda that accompany its legislative proposals. These proposals are

²⁰ The term “active subsidiarity” was used by the Task Force to denote an improved engagement with all stakeholders and local and regional authorities throughout the entire policy cycle. See pages 8-9 of the Task Force’s report.

²¹ See Tool #5 on Legal base, subsidiarity and proportionality: https://ec.europa.eu/info/files/better-regulation-toolbox-5_en

²² The “grid” contains a series of questions and issues to guide the analysis of subsidiarity and proportionality. It would be used by the Commission in a balanced way as part of the Commission’s better regulation agenda building on the need to undertake analyses which are proportionate to the specific proposal in question.

transmitted to the European Parliament, the Council, the national Parliaments and (where relevant) the consultative committees at the start of each legislative procedure.

The Commission notes that the European Parliament and the Council both recognise the importance of subsidiarity in their rules of procedure and that both are committed to take full account of the Commission's impact assessment during the legislative procedure²³. The full benefit of the assessment grid can only be realised if it is used by all parties in the decision-making process. It is now for the European Parliament and the Council to decide whether additional, specific and systematic consideration should be given to the issues of subsidiarity and proportionality during the legislative procedure. In particular, the co-legislators often introduce substantial amendments to the Commission's proposals, but the impacts of these amendments and concerns about subsidiarity and proportionality are infrequently assessed. The Commission calls on the co-legislators to implement more effectively their commitment to prepare impact assessments of their substantial amendments²⁴. The Commission also considers that the national Parliaments should use the assessment grid presented above and adapted to their purposes if necessary. The Commission believes that this will give greater impact to their reasoned opinions but will not prevent them from expressing other concerns in their opinions not related to subsidiarity and proportionality.

It is the Commission's view that there is scope in many cases for the views of national and regional Parliaments and those of local and regional authorities to be reflected better by each Member State during the legislative procedure. These administrative levels are closest to the actual implementation of legislation and have a wealth of experience to share. While it is for the co-legislators to decide whether it is appropriate to involve representatives of local and regional authorities during the legislative procedure, the Commission considers that increased transparency of the legislative procedure would enable greater awareness and engagement of local and regional authorities and the public generally. The Commission supports the ongoing efforts to make the legislative procedure more transparent and accessible via improvements to EUR-Lex²⁵ and pursuant to the Interinstitutional Agreement on Better Law-Making (such as the joint legislative database). Follow-up of the recent case law of the Court of Justice²⁶ and the findings of the Ombudsman on the transparency of trilogues will improve transparency and help all interested parties to participate in the democratic decision-making process. The Commission stands ready to participate constructively in this work.

In any event, the Commission will continue to make the co-legislators aware of the feedback it receives about its proposals, including from local and regional authorities, in fulfilment of its commitment under the Interinstitutional Agreement on Better Law-Making.

²³ §14 of the Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making; OJ L 123, 16 April 2016, p.1-14. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2016.123.01.0001.01.ENG

²⁴ §15 of the in the Interinstitutional Agreement on Better Law-Making.

²⁵ EUR-Lex is a website which offers easy access to EU law. Available in 24 languages, it includes treaties, legislation, international agreements, preparatory acts, legislative procedures, case law, parliamentary questions and many other types of documents; <https://eur-lex.europa.eu/homepage.html>.

²⁶ T-540/15 *De Capitani v Parliament*; <http://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d2dc30ddfb6ef4af4df246c6a5689c7889c65e8f.e34KaxiLc3qMb40Rch0SaxyNchb0?text=&docid=200551&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=100299>

The Commission intends to:

- **Incorporate the grid for assessing subsidiarity and proportionality in its better regulation guidance and use the grid to present its findings in impact assessments, evaluations and explanatory memoranda.**
- **Use the grid as guidance in its communication with national Parliaments.**
- **Make more visible the feedback it receives about its proposals from local and regional authorities to the European Parliament and the Council in each legislative procedure.**

4.2. Enabling national Parliaments to scrutinise more effectively

National Parliaments have the right to raise concerns related to subsidiarity during a period of eight weeks following receipt of the Commission's proposal²⁷. The Commission already excludes the month of August when determining the eight-week deadline. The Commission believes that the period over Christmas and the New Year should also be excluded but cannot decide this unilaterally as any extension also affects the work of the European Parliament and the Council. The Commission invites the views of the co-legislators on this with a view to accommodate the wish of national Parliaments in a pragmatic way that does not affect relevant Treaty provisions.

In its annual report on subsidiarity and proportionality, the Commission presents those legislative proposals which have received the greatest number of reasoned opinions. However, the Commission agrees with the Task Force that it should give greater visibility to the views of national Parliaments. The Commission intends to prepare an aggregated response where a significant number of national Parliaments have raised similar concerns even where the threshold for a "yellow card" is not attained. The opinions of regional Parliaments with legislative powers sent directly to the Commission could also be reflected without affecting the primary role of national Parliaments in the operation of the subsidiarity control mechanism. The aggregated response would set out the Commission's position on the issues raised and be transmitted to the European Parliament and the Council as rapidly as possible given the desire not to delay the legislative procedure.

The Commission encourages national Parliaments to consult regional Parliaments and to cooperate on EU matters. This may help give greater visibility to the concerns of regional Parliaments and to improve the assessment of subsidiarity-related issues, but the Commission recognises that such cooperation remains wholly a matter for the Parliaments in question.

The Commission intends to:

- **Continue to discount the month of August when determining the 8-week period for national Parliaments to submit reasoned opinions.**
- **Explore with the European Parliament and the Council whether the Christmas/New Year period could also be discounted as requested repeatedly by national Parliaments.**
- **Give greater visibility to the views of national Parliaments reasoned opinions by providing aggregated responses, where relevant, and targeting their concerns and identifying proposals raising most comments in its annual reports on subsidiarity and**

²⁷ Protocol No. 2 of the Treaties; <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12008E%2FPRO%2F02>

4.3. More active involvement of local and regional authorities

This Commission has opened up its policymaking processes to outside involvement in addition to its proactive engagement with socio-economic partners on developing and implementing legislation in the social and regional policy fields. The Commission is already actively consulting social partners including the Treaty-based two stage consultation in the social policy field. Roadmaps are published at the outset of each new initiative that explain what the Commission intends to do. These invite feedback and allow all interested parties to prepare for the various consultation activities that follow. Public consultations now accompany each major initiative and the questionnaires are translated into all official languages for those in the annual work programme. Draft delegated acts and implementing acts are also published online before they are finalised. The Commission also transmits to the co-legislators the feedback it receives from all stakeholders (including local and regional authorities) on its proposals at the start of the legislative process²⁸.

Despite these advances, the important voice of local and regional authorities is often unheard in the early phases of policymaking. Local and regional authorities and regional assemblies are different to other stakeholders because they are at the forefront of implementing Union law. As such, greater efforts are needed by all to ensure that their experience and views are captured better in the policymaking process. In the context of the ongoing better regulation stocktaking exercise, the Commission will examine how to revise its questionnaires so that space can be dedicated to the issues of concern to local and regional authorities. The Commission will also improve how it reports on the views of local and regional authorities in its impact assessments, evaluations and explanatory memoranda. For its part, the Commission encourages local and regional authorities to sign-up to the Commission's web portal²⁹ where all interested parties can contribute to policymaking. It will also publicise important initiatives on social media but organisations representing local and regional authorities should consider how they can promote the engagement of local and regional authorities.

The Commission intends to:

- **Amend its better regulation guidance to highlight the importance of capturing the views and experience of local and regional authorities.**
- **Revise its public consultation questionnaires to include questions about issues relevant for local and regional authorities including regional assemblies.**

4.4. Improving assessment and presentation of relevant impacts

Union legislation may have particularly significant effects at local and regional levels and for public authorities. The Commission has developed methodologies for territorial impact assessments³⁰ which have been tested on a number of legislative proposals since

²⁸ Pursuant to §33 of the Interinstitutional Agreement on Better Law-Making.

²⁹ https://ec.europa.eu/info/law/contribute-law-making_en

³⁰ https://ec.europa.eu/info/files/better-regulation-toolbox-33_en

2016. The Commission's approach is to assess these impacts when they are relevant for the decision-making process and it is proportionate to do so (for example, if there are large variations between regions). The Commission intends to raise the importance of this issue in its guidance to its staff and, as indicated earlier, will present more clearly its assessments of subsidiarity (including EU added value) and proportionality in its impact assessments, evaluations and explanatory memoranda. However, it is not always obvious that such effects are likely or that the raw data exists to allow a detailed assessment to be made. The more active engagement of local and regional authorities in consultation processes is an essential element of improving the quality of assessments of territorial impacts.

The Commission intends to:

- **Amend its better regulation guidance to highlight the importance of screening and assessing territorial impacts.**
- **Present more clearly its assessments of subsidiarity, proportionality and information about who is affected (and how) in its impact assessments, evaluations and explanatory memoranda.**

4.5. Evaluating existing legislation from the perspective of subsidiarity

The mission of the Commission's Regulatory Fitness Programme (REFIT) is to keep Union legislation fit for purpose and to simplify it wherever possible without weakening its intended objectives³¹. The REFIT Platform assists the Commission in this task. The Commission maintains a five-year rolling plan of all evaluations of existing legislation and each of these should assess the ongoing relevance, economic efficiency, potential to simplify and the EU added value of the legislation. The most important evaluations are also annexed to the Commission's annual work programme.

The Platform's work will continue until the end of this Commission. We will listen to the views of the Platform members and assess carefully the results of stakeholder consultation we launched on better regulation. However, we believe that there is already a convincing case to reshape the Platform to address in a more focused way the issues raised by the Task Force. For example, widening the focus of the Platform to address subsidiarity, proportionality, legislative density³² and the role of local and regional authorities in implementing EU law in addition to its usual focus on simplification. We think that the composition will also need to change to include a greater presence from local and regional authorities by for example, replacing the experts from the Member States. Stronger links to the work and networks of the Committee of the Regions could also be considered. The establishment of a new Platform will, however, be for the next Commission to decide. In the meantime, the Commission welcomes the intention of the

³¹ COM(2017) 651 final; Completing the Better Regulation Agenda: Better solutions for better results; https://ec.europa.eu/info/sites/info/files/completing-the-better-regulation-agenda-better-solutions-for-better-results_en.pdf

³² In respect of legislation, "density" relates to the detailed technical prescriptions agreed by the Legislator on how the objectives are to be attained which may influence the degree of discretion for national, regional and local authorities when implementing the legislation (see the paper from Professor Dougan presented to the Task Force meeting of 15 March 2018): https://ec.europa.eu/commission/sites/beta-political/files/dougan-notes-for-task-force-march-2018_en.pdf

Committee of the Regions to establish a network of regional hubs to channel information from local and regional authorities into the policymaking process and looks forward to the results of the pilot project involving twenty regions.

The Task Force raised concerns about the use of delegated and implementing acts where the Commission is empowered by the European Parliament and the Council to adopt specific rules to implement EU law in a timely manner. While these acts are not scrutinised by national Parliaments as part of the operation of Protocol No. 2 of the Treaties, this Commission has significantly improved the transparency around delegated acts and implementing acts³³. The draft legal text is placed online for four weeks before finalisation. All interested parties now have an opportunity to engage meaningfully with the Commission on the content of each draft act. When evaluating existing legislative acts, the Commission will in the future ensure that the REFIT programme looks more closely at the related delegated and implementing acts.

The Commission intends to:

- **Ensure that when evaluating the existing stock of legislation, evaluations look more closely at subsidiarity, proportionality, legislative density and the role of local and regional authorities.**
- **Set out the changes in scope and composition of the REFIT Platform in order to reshape it and to address these issues in the stocktaking of better regulation.**
- **Ensure that relevant delegated and implementing acts are addressed systematically as part of evaluations.**

5. CONCLUSIONS AND NEXT STEPS: THE CONFERENCE IN BREGENZ

This Commission has delivered a focused and prioritised programme of political initiatives. It has acted where necessary on the issues that really matter. It welcomes the Task Force's important conclusion that the Union adds value in *all* areas where it acts. At some point, however, we – the institutions and the Member States – will have to confront the fact that we cannot continue to do more to tackle the growing challenges we face with the resources we currently have available. The Commission agrees, therefore, with the Task Force that activities will have to be prioritised and resources used more efficiently. One aspect is the early adoption of the Commission's proposals for the next Multiannual Financial Framework that is essential to equip the Union with the resources it needs.

The Task Force has also proposed a new way of working based on active subsidiarity and a more dynamic engagement of all stakeholders and all government levels throughout the policy cycle. This would mark an important change in the European Union's policy process bringing greater quality and legitimacy to the laws it adopts. The Commission has set out the changes it intends to make in response to the Task Force and now invites the European Parliament, the European Council, the Council, national Parliaments, national governments and local and regional authorities to consider how they will respond.

³³ Register for delegated acts: <https://webgate.ec.europa.eu/regdel/#/home> ; Contribute to law-making web site: https://ec.europa.eu/info/law/contribute-law-making_en

The Austrian Presidency will host a conference on 15-16 November in Bregenz, Austria entitled “*Subsidiarity as a building principle of the European Union*”. This conference will provide an opportunity for a meaningful dialogue on strengthening the role of the principles of subsidiarity and proportionality in the EU’s policymaking³⁴. It could also provide a valuable input to the Leaders’ summit in Sibiu next year.

Issues for the conference in Bregenz

- All relevant institutions and bodies should clarify whether they will use the common assessment grid adapted to their needs to examine the subsidiarity and proportionality dimensions of Commission proposals.
- The Committee of the Regions representing local and regional authorities should consider how they can raise awareness amongst their members about the many opportunities to contribute directly to the EU’s policymaking. Other organisations representing local and regional authorities could also intensify their awareness-raising activities.
- The Committee of the Regions should establish the “regional hubs” to channel the experience of local and regional authorities more effectively into the EU’s policymaking.
- The European Parliament and the Council should examine the impacts and subsidiarity and proportionality dimensions of their substantial amendments.
- As requested repeatedly by national Parliaments, the European Parliament and the Council should agree to discount the Christmas/New Year period from the 8-weeks allotted to national Parliaments to submit their reasoned opinions.
- The European Parliament and the Council should follow-up on the recommendations of the Ombudsman and recent case law in order to improve the transparency of their proceedings and consider involving local and regional authorities during the legislative procedure.
- The European Parliament and the Council should step up efforts with the Commission to create a joint interinstitutional database to improve the traceability of the legislative procedure.
- National authorities should examine how to involve local and regional authorities more effectively during the legislative procedure.

Following the upcoming European elections and the appointment of the next Commission, the European Parliament, Council and the Commission will exchange views and conclude on policy objectives and priorities³⁵. The Commission looks forward to discussing the modalities for this exchange of views in due course as part of the three institutions’ implementation of the Interinstitutional Agreement on Better Law-Making.

³⁴ <https://www.eu2018.at/calendar-events/political-events/BKA-2018-11-16-Subsidiarity-Conf..html>.

³⁵ Initiated by the Commission pursuant to §5 of the Interinstitutional Agreement on Better Law-Making.



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ANNEXES 1 to 2

ANNEXES

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**COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN
PARLIAMENT, THE EUROPEAN COUNCIL, THE COUNCIL, THE ECONOMIC
AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS**

**The principles of subsidiarity and proportionality: Strengthening their role in the EU's
policymaking**

{COM(2018) 490} - {COM(2018) 491}

ANNEX I

The Task Force's nine Recommendations

<i>Task Force Recommendation 1</i>
<p>A common method (“assessment grid”) should be used by the Union’s institutions and bodies and by national and regional Parliaments to assess issues linked to the principles of subsidiarity (including EU added value), proportionality and the legal basis of new and existing legislation.</p> <p>This assessment method should capture the criteria contained in the Protocol on subsidiarity and proportionality originally attached to the Amsterdam Treaty and relevant jurisprudence of the European Court of Justice. A proposed model assessment grid is annexed to this report.</p> <p>During the legislative process, the European Parliament and the Council should systematically review the subsidiarity and proportionality of draft legislation and the amendments they make using the common method. They should take full account of the Commission's assessment presented in its proposals as well as the (reasoned) opinions of national Parliaments and the European Committee of the Regions.</p>
<i>Task Force Recommendation 2</i>
<p>The Commission should apply flexibly the Treaty-based 8 weeks deadline for national Parliaments to submit their reasoned opinions.</p> <p>This flexibility should take account of common holiday periods and recess periods, while allowing the Commission to respond as far as possible, within 8 weeks of receiving each opinion.</p> <p>The Commission should reflect in an appropriate way the reasoned opinions it receives from national Parliaments and feed-back it receives from regional Parliaments with legislative powers in its annual report on subsidiarity and proportionality. It should also make available to the co-legislators, in a comprehensive and timely manner, information about proposals where significant concerns have been raised in respect of subsidiarity.</p>
<i>Task Force Recommendation 3</i>
<p>Protocol No. 2 TEU/TFEU should be revised when the opportunity arises to allow national Parliaments 12 weeks to prepare and submit their reasoned opinions and to express fully their views about subsidiarity, proportionality and the legal basis (conferral) of the proposed legislation. National Parliaments should consult regional Parliaments with legislative powers where their competences under national law are concerned by the proposal for EU legislation.</p>
<i>Task Force Recommendation 4</i>
<p>Together with national Parliaments and the European Committee of the Regions, the Commission should raise the awareness of national, local and regional authorities of the opportunities they have to contribute to policymaking at an early stage.</p> <p>The Commission should involve local and regional authorities fully in its consultation processes taking into account their specific role in implementing Union legislation. It should promote the participation of local and regional authorities by appropriate design of questionnaires and providing greater feedback and visibility to the views of local and regional authorities in its impact assessments, proposals and feedback transmitted to the co-legislators.</p> <p>Member States should follow the European Commission's guidance and engage meaningfully with local and regional authorities when preparing their national reform programmes and designing and implementing structural reforms as part of the European Semester to improve ownership and implementation of these reforms.</p>
<i>Task Force Recommendation 5</i>
<p>The Commission should ensure that its impact assessments and evaluations systematically consider territorial impacts and assess them where they are significant for local and regional authorities. Local and regional authorities should help to identify such potential impacts in their consultation responses and feedback on roadmaps.</p> <p>The Commission should revise its Better Regulation Guidelines and Toolbox accordingly and address issues linked to the implementation and EU added value of legislation, and to ensure greater visibility of the Commission's assessments of subsidiarity, proportionality and relevant territorial impacts in its proposals and accompanying explanatory memoranda.</p>

Task Force Recommendation 6

The European Parliament and the Council should use consistently the subsidiarity grid during their negotiations to promote a culture of better awareness of issues relevant for local and regional authorities.

The Commission should highlight to the co-legislators any views it receives from local and regional authorities in the scrutiny period following adoption of its proposals.

Member States' governments and national Parliaments should call on the views and expertise of local and regional authorities at the start of the legislative procedure. The Task Force invites the EU's co-legislators to consider inviting representatives of local and regional authorities to their meetings or hosting hearings and events where this is appropriate.

Task Force Recommendation 7

Regional and national Parliaments should explore how to link more effectively their respective platforms for sharing information (REGPEX and IPEX) to ensure that the legislative procedure and the subsidiarity control mechanism reflect better their concerns.

Task Force Recommendation 8

The Commission should develop a mechanism to identify and evaluate legislation from the perspective of subsidiarity, proportionality, simplification, legislative density and the role of local and regional authorities. This could build on the REFIT Programme and Platform.

In general, the experiences of local and regional authorities and their networks should be fully taken into account when EU legislation is monitored and evaluated. The Committee of the Regions should implement a new pilot network of regional hubs to support reviews of policy implementation.

Task Force Recommendation 9

The next Commission, with the European Parliament and the Council, should reflect on rebalancing its work in some policy areas towards delivering more effective implementation rather than initiating new legislation in areas where the existing body of legislation is mature and/or has recently been substantially revised.

ANNEX II

Model grid to assess subsidiarity and proportionality throughout the policy cycle (taken from the report of the Task Force on Subsidiarity, Proportionality and “Doing Less More Efficiently”)

Institution*	
Title of the proposal or initiative	
Institutional Reference(s)	

Purpose and explanation of this assessment grid

This grid aims to provide a shared and consistent approach to assess conformity of a given proposal or initiative with the Treaty-based principles of subsidiarity and proportionality. It is intended to be used by the European Commission when initiating its proposals, the national Parliaments when preparing their reasoned opinions pursuant to Protocol No. 2 of the Treaty on the Functioning of the European Union (TFEU) as well as the European Parliament and the Council as the EU’s legislators. The grid is also intended to be used for initiatives from a group of Member States, requests from the Court of Justice, recommendations from the European Central Bank and requests from the European Investment Bank for the adoption of legislative acts (Article 3 of Protocol No. 2)

The subsidiarity principle helps determine whether it is justified for the Union to act within the shared or supporting competences it has been given under the Treaties or whether it is more appropriate that Member States act at the appropriate national, regional or local levels. The two cumulative aspects of EU necessity and EU added value should both be satisfied if the subsidiarity test is to be fulfilled. These are explained further below.

The proportionality principle helps ensure that the intensity of the legislative obligations or policy approach match the intended objectives of the policy or legislation. This means that the content and form of Union action must not go beyond what is necessary to achieve the intended objectives.

Impact assessments prepared by the European Commission to support its proposals will include an assessment of subsidiarity and proportionality. In addition, each Commission proposal will be accompanied by an explanatory memorandum which also presents the Commission’s assessment of subsidiarity and proportionality as this is a requirement of Protocol No. 2 of the TFEU together with the requirements to consult widely before proposing a legislative act and to take into account the local and regional dimension of an envisaged action.

While this assessment grid only addresses subsidiarity and proportionality, each institution using it is free to add elements which are useful for their own internal processes and priorities. For example, the grid could be adapted to include an assessment of the Commission's use of better regulation instruments or political aspects of the Commission's proposals.

** Not all questions in this model assessment grid are relevant for all institutions.*

1. Can the Union act? What is the legal basis and competence of the Union's intended action?
1.1 Which article(s) of the Treaty are used to support the legislative proposal or policy initiative?
1.2 Is the Union competence represented by this Treaty article exclusive, shared or supporting in nature?
<i>Subsidiarity does not apply to policy areas where the Union has <u>exclusive</u> competence as defined in Article 3 TFEU. It is the specific legal basis which determines whether the proposal falls under the subsidiarity control mechanism. Article 4 TFEU sets out the areas where competence is shared between the Union and the Member States and Article 6 TFEU sets out the areas for which the Union has competence only to support the actions of the Member States.</i>

2. Subsidiarity Principle: Why should the EU act?	
2.1 Does the proposal fulfil the procedural requirements of Protocol No. 2:	
<ul style="list-style-type: none"> – Has there been a wide consultation before proposing the act? – Is there a detailed statement with qualitative and, where possible, quantitative indicators allowing an appraisal of whether the action can best be achieved at Union level? 	
2.2 Does the explanatory memorandum (and any impact assessment) accompanying the Commission's proposal contain an adequate justification regarding conformity with the principle of subsidiarity?	
2.3. Based on the answers to the questions below, can the objectives of the proposed action be achieved sufficiently by the Member States acting alone (necessity for EU action)?	
(a)	Are there significant/appreciable transnational/cross-border aspects to the problems being tackled? Have these been quantified?
(b)	Would national action or the absence of EU level action conflict with core objectives of the Treaty or significantly damage the interests of other Member States?
(c)	To what extent do Member States have the ability or possibility to enact appropriate measures?

(d)	How does the problem and its causes (e.g. negative externalities, spill over effects) vary across the national, regional and local levels of the EU?
(e)	Is the problem widespread across the EU or limited to a few Member States?
(f)	Are Member States overstretched in achieving the objectives of the planned measure?
(g)	How do the views/preferred courses of action of national, regional and local authorities differ across the EU?
2.4 Based on the answers to the questions below, can the objectives of the proposed action be better achieved at Union level by reason of the scale or effects of that action (EU added value)?	
(a)	Are there clear benefits from EU level action?
(b)	Are there economies of scale? Can the objectives be met more efficiently at EU level (larger benefits per unit cost)? Will the functioning of the internal market be improved?
(c)	What are the benefits in replacing different national policies and rules with a more homogenous policy approach?
(d)	Do the benefits of EU-level action outweigh the loss of competence of the Member States and the local and regional authorities (beyond the costs and benefits of acting at national, local and regional levels)?
(e)	Will there be improved legal clarity for those having to implement the legislation?

3. Proportionality: How the EU should act

3.1. Does the explanatory memorandum (and any impact assessment) accompanying the Commission's proposal contain an adequate justification regarding the proportionality of the proposal and a statement allowing appraisal of the compliance of the proposal with the principle of proportionality?

3.2 Based on the answers to the questions below and information available from any impact assessment, the explanatory memorandum or other sources, is the proposed action an appropriate way to achieve the intended objectives?

(a)	Is the initiative limited to those aspects that Member States cannot achieve satisfactorily on their own, and where the Union can do better?
(b)	Is the form of Union action (choice of instrument) justified, as simple as possible, and coherent with the satisfactory achievement of, and ensuring compliance with, the objectives pursued (e.g. choice between regulation, (framework) directive, recommendation, or alternative regulatory methods such as co-regulation, etc.)?
(c)	Does the Union action leave as much scope for national decision as possible while achieving satisfactorily the objectives set? (e.g. is it possible to limit European action to minimum standards or use a less stringent policy instrument or approach?).
(d)	Does the initiative create financial or administrative cost for the Union, national governments, regional or local authorities, economic operators or citizens? Are these costs commensurate with the objective to be achieved?
(e)	While respecting Union law, have special circumstances applying in individual Member States been taken into account?