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Task Force on Subsidiarity, Proportionality and ‘Doing Less More Efficiently’

Working Paper for the meeting on 23 February 2018

‘The involvement of the local and regional levels in the preparation and implementation of EU policies’

A. Preliminary remarks

On 14 November 2017, President Juncker of the European Commission set up the ‘Task Force on Subsidiarity, Proportionality and “Doing Less More Efficiently”’.

At a challenging time for the EU, this Task Force is a step in the right direction, as a strengthening of the EU and a simultaneous strengthening of the principles of subsidiarity and proportionality are not mutually exclusive. Only a strong and democratic EU can address current and future challenges.

The scenarios for the future development of the Union cannot be addressed by a single level or institution acting alone. Europe is our common task. Close cooperation between the European, national, regional and local levels is the necessary condition for successful further development of the European project and also for regaining citizens’ confidence. I regret, therefore, the decision of the European Parliament not to participate in this Task Force. This would have provided Parliament with the opportunity to share its ideas with its partners. National parliaments and the European Parliament are, in the context of the Treaty of Lisbon, the cornerstones of the EU’s democratic accountability and both are equally responsible for the democratic legitimacy of decisions taken at EU level. This responsibility is closely linked to the principles of subsidiarity and proportionality, and any discourse on these issues should necessarily involve both national parliaments and the European Parliament.

In Austria, the principles of subsidiarity and proportionality are taken very seriously at all levels and by all relevant stakeholders.

At the federal parliamentary level, the EU committees of both the *Nationalrat* and the *Bundesrat* (the lower and upper chambers respectively of the Austrian Parliament) are active players in relation to the monitoring of draft EU legislation and the preparation and

communication of opinions on the future development of the Union. Thus, in recent years, the *Bundesrat* has always been near the top of the subsidiarity monitoring rankings.

In addition, the Austrian *Bundesländer* (regions) are strongly involved in matters of subsidiarity and proportionality – both through regional governments and the regional parliaments – as are the Austrian social partners.

Subsidiarity is also a key priority of the Austrian Federal Government, which strongly supports further development of the Union under the motto ‘Doing Less More Efficiently’.

On the basis of this wide variety of experience from national practice, Austria is therefore in a position to make very tangible contributions to the objectives of the Task Force.

This working paper refers to numerous contributions received by me and to the opinions of the Austrian *Bundesländer*, the *Landtage* (regional parliaments), the Austrian Federation of Towns and Municipalities, and the social partners. On the issue of the involvement of the local and regional level in the preparation and implementation of EU policies, the intention is to offer a range of political tools without forming an exhaustive list of actions.

B. Proposals

1. Take greater account of the contributions of regions and regional parliaments:

An important step towards improving the participation of the regions would be to take greater account of the opinions of the regional governments and parliaments during the EU's legislative process, as well as to promote the exchange of representatives of these political levels with EU authorities.¹ In this context, it is important that in future regional entities are no longer classified as interest groups, as was the case in the Better Regulation package; this naturally applies to the local level too.²

The introduction of an individual assessment of the opinions of regional parliaments in consultation procedures and, commensurate with their democratic legitimacy and their power to shape society, due consideration and responsiveness when evaluating results would make a substantial contribution here. For this to happen, it is necessary to further develop the European Commission's consultations as a forum for participation that provides a genuine opportunity for legislative bodies at sub-national level to shape legislation.³

Regular meetings, exchange of experience and training between national administrative bodies and the European Commission can also help us to learn more from one other. Visits to the EU bodies in the Member States should therefore not be understood as constituting control, evaluation or monitoring, but as an opportunity to provide continuous training to the Brussels central authorities⁴.

The Austrian *Bundesrat* recently got involved by holding a parliamentary inquiry on 'The future of the EU from the perspective of federal states and regions' on 7 November 2017 and, together with the Committee of the Regions, a Conference on Subsidiarity on 4 December 2017, which resulted in practical proposals and contributions. It will continue to be active in the future.

¹ See also the opinion of the *Landtag* of Upper Austria on the 'White Paper on the Future of Europe', 9 November 2017, point II.4.

² See also the opinion of the Austrian Federation of Cities and Towns (*Österreichischer Städtebund*), 7 February 2018, p. 3.

³ See also the 'Brussels Declaration' of the Presidents of the German and Austrian regional parliaments and the parliament of South Tyrol, with the involvement of Belgium's German-speaking Community, dated 27 November 2017, point 7.

⁴ See also the opinion of the Austrian Chamber of Agriculture (*Landwirtschaftskammer Österreich*), 13 February 2018, p. 6.

2. Take greater account of the contributions of towns and municipalities:

Towns and municipalities are indispensable for achieving and implementing many of the European Union's objectives. However, in Europe we talk a lot about local communities, but rarely to them. Decisions that have a major impact on local communities must be significantly influenced by the local authorities and, in particular, the actual affordability of implementation in local communities must be examined carefully at the outset.⁵

If local positions are to be reflected more closely by EU institutions, this requires above all that the problems be made visible. However, this is not an obligation to be fulfilled only by those representing interests at local level but also a duty on the responsible legislators. Even just on the basis of their mandate, they must take greater account of the level closest to the citizens. Before any regulatory impact assessment, therefore, the effect on these self-governing bodies, which are close to citizens and legitimised by their confidence, must be known in detail. Increased contact by the European Commission with the local authority associations in each Member State is therefore desirable.⁶

3. Improve how contributions on the subject of subsidiarity are dealt with:

The Committee of the Regions (CoR) prepares Outlook Opinions on future European legislative proposals, political measures and impact assessments that are often critically lacking from a subsidiarity perspective (for example, because the regional and local levels are not involved enough and little account is taken of the consequences for these levels). As they are submitted at an early stage and usually involve feedback from many stakeholders, the Council (in its various configurations) should discuss them in greater detail and take them into account in its policy-making. This could possibly become a separate regularly reserved segment during Council meetings and specific provision could be made for them in Council conclusions.

In order to raise the profile of all contributions from local and regional authorities, the European Commission should, after the expiry of the eight-week period referred to in Article 6 of Protocol No 2, give an overview of the officially received opinions of public authorities and communicate the issues raised therein to both the European Parliament and the Council. This overview should also be forwarded to the Member

⁵ See also the opinion of the Austrian Federation of Cities and Towns, 7 February 2018, p. 2.

⁶ See also the opinion of the Austrian Federation of Municipalities (*Österreichischer Gemeindebund*), 16 February 2018, p. 3.

States. This step would make it easier for the Members of the European Parliament, as well as Member States' representatives in the Council working groups, to identify any sensitive points in Commission proposals at an early stage and to form an opinion thereon.⁷

The annual reports of the European Commission on the application of subsidiarity and proportionality should also examine reasoned opinions on subsidiarity in detail and, following the example of the Austrian *Bundesrat*, cite in the reports those regions that put 'reasoned opinions' or 'communications' from the national parliaments to the European Commission. The existing multilevel system between the European institutions, the Member States and the regions requires, in the interests of clarity in practice, clearer communication and identification of the relevant stakeholders.⁸

4. Adhere to responsibilities for legislation:

The Commission should propose EU rules only where there is a clear EU competence and under that legal basis and only where there is clear European added value.⁹ Moreover, in future the Commission should refrain from publishing non-binding recommendations and communications on the matter at issue where there is no appropriate legal basis. To ensure only the necessary legislation is passed, the EU must be guided by the principles of better legislation and reduced red tape.¹⁰

5. Better use of directives and realistic scrutiny of the implementation of EU legal acts:

In future, directives should be understood as a contribution to respect for regional and national competences as well as an opportunity for deregulation, to the extent that they merely set out the objectives to be achieved and leave the choice of the means to achieve them increasingly to the Member States and regions.¹¹

⁷ See also the letter from the President of the *Landtag* of Upper Austria at the second meeting of the Task Force, February 2018.

⁸ See also the opinion of the *Landtag* of Lower Austria on the 'White Paper on the Future of Europe', 16 November 2017, p. 4.

⁹ See also the recommendations of the Austrian Chamber of Commerce (*Wirtschaftskammer Österreich*) for the Task Force on Subsidiarity, Proportionality and 'Doing less more efficiently', January 2018, p. 2.

¹⁰ See also the Statement by the Governors of the Austrian *Länder*, 10 November 2017, point 10.

¹¹ See also the opinion of the *Landtag* of Lower Austria on the 'White Paper on the Future of Europe', 16 November 2017, p. 3.

Even though the Treaties specify that directives are binding only with respect to the objective to be achieved, and that the choice of form and means is left to the national authorities, as a rule directives are highly detailed legislative acts, which means that their substance can often no longer be transposed by the Member States. Instead, they have to be taken over almost verbatim, with no consideration given to the Member States' legislation. A return to using the legal form of a directive in accordance with its actual purpose — limited to setting the objectives to be achieved — would allow the regions greater ability to shape their legal environment.

The level of detail in EU rules is often compounded by a formalistic assessment criterion applied by the EU when monitoring national implementation, which in some cases merely comes down to questions about drafting. This results in it becoming increasingly rare to be able to integrate EU legislative acts into national legal systems harmoniously, which reduces the legislative quality of the rules and hampers national efforts to improve legislation.¹²

6. More restrictive use of delegated acts:

The growing number of delegated acts is an example of the erosion of powers at the expense of the Member States and regions. Delegated acts are based on underlying legislation of the Council and Parliament and grant the Commission de facto legislative rights. The Member States hardly have the ability to shape legislation any longer. The growing number of EU legal acts which provide that rules are to be developed in the framework of delegated legal acts – or implementing acts – delegates a considerable number of powers to the Commission.¹³

7. Extend the 8-week deadline for subsidiarity checks to 12 weeks:

The deadline of 8 weeks laid down in Protocol No 2 for the submission of reasoned opinions does not allow enough scope for scrutiny and agreement, for example with regional parliaments or other national parliaments, and is regarded by the parliaments as being too short. As an alternative to amending the Protocol, the Commission could state its willingness to examine positions which it receives up to 12 weeks after the

¹² See also the Statement by the Governors of the Austrian *Länder*, 10 November 2017, points 31-33.

¹³ See also the opinion of the *Landtag* of Upper Austria on the 'White Paper on the Future of Europe', 9 November 2017, point III.3; Communication by the Austrian *Bundesrat*, to the European Parliament and the Council of 4 February 2015; See also the Statement by the Governors of the Austrian *Länder*, 10 November 2017, point 10.

submission of the legislative proposal. An agreement could also be reached whereby the Commission extends the deadline once a certain minimum number of national positions has been submitted.¹⁴

8. Reduce the threshold for the ‘yellow card’ and the ‘orange card’:

At present, Protocol No 2 provides that, where there are objections on grounds of subsidiarity from the national parliaments representing one third of the votes allocated to national parliaments (one vote per chamber in a bicameral parliamentary system and two votes for a single-chamber system) the draft legislation must be reviewed (‘yellow card’). This threshold is lower for draft legislative acts relating to freedom, justice, and security (one quarter of the votes). Under the ordinary legislative procedure, if a simple majority of the votes allocated to national parliaments rejects the draft because it does not comply with the principle of subsidiarity, and the Commission maintains its proposal, the decision is presented to the legislator (European Parliament and Council). If the legislator considers that a draft legislative act does not comply with the subsidiarity principle, it may return it by a majority of 55 % of the members of the Council or a majority of the votes in the European Parliament (‘orange card’).

To date, the ‘yellow card’ procedure has been triggered only three times. It is therefore clear that the thresholds in the current legal framework are too high. This is also very relevant for the regional and local levels, which are very actively involved in monitoring subsidiarity through their national parliaments. The required threshold for the ‘yellow card’ could therefore be reduced from one third to one quarter, and the threshold for the ‘orange card’ could be reduced from a simple majority to one third.¹⁵

9. Take greater account of the experiences of and data from the local and regional level in the assessment and revision of EU law

The practical implementation of the requirements of EU law can sometimes give rise to major difficulties, which in turn may be the starting point for an evaluation and revision of such EU legal acts, provided that the Commission has the requisite

¹⁴ See also the opinion of the *Landtag* of Upper Austria on the ‘White Paper on the Future of Europe’, 9 November 2017, point II.3; the opinion of the *Landtag* of Lower Austria on the ‘White Paper on the Future of Europe’, 16 November 2017, p. 3.

¹⁵ See also the opinion of the *Landtag* of Lower Austria on the ‘White Paper on the Future of Europe’, 16 November 2017, p. 4.

knowledge. However, a precondition here is the possibility of rapid and clear communication, enabling the authorities of the Member States, including local and regional authorities, to contact the European Commission in order to be able to communicate such practical experience in a targeted way. Public authorities at national, regional and local level, which deal on a daily basis with the implementation and enforcement of EU law, must have the certainty that their views are taken seriously and actually considered by the Commission. A first step in this direction would be providing a serious reply to such opinions from the Member States, amounting to something more than formulaic standard replies, as has sometimes been the case in the past.¹⁶

10. Improve the inclusion of the regional level, cities, towns and municipalities in consultations and impact assessments:

Public authorities at local and regional level cannot be treated the same way as lobbyists, pressure groups or the general public. They are, just like the national governments, democratically legitimate local and regional bodies. Thus, the principle of local self-government is a constitutional principle in all EU-27 Member States. Any consultation or impact assessment must therefore be designed in such a way that the competences in the individual Member States are respected, rather than treating them as 'black boxes'. The current practice of outsourcing impact assessments and letting external consultants choose randomly which regions or local authorities to involve, should also be rejected. Instead, the Commission should cooperate closely with the national associations of regions, cities and towns, and local authorities when preparing and evaluating such consultations.¹⁷

One of the causes of the current low level of inclusion of local and regional levels in European Commission consultations is the fact that consultations are often relatively superficial. For the most part, a more detailed discussion of specific problems arising from the enforcement of EU law or national law based on EU law is not possible. In particular, the specific situation of regions that are active in implementing or enforcing EU law is not really reflected. Justice is not done to the importance of local and regional authorities (especially with legislative powers, such as in Austria) when the expertise they offer is part of a swirl of contributions of very varying quality from

¹⁶ See also the letter from the President of the *Landtag* of Upper Austria at the second meeting of the Task Force, February 2018.

¹⁷ See also the opinion of the Austrian Federation of Cities and Towns, 7 February 2018, p. 3.

NGOs, lobbyists and private individuals. Moreover, only in the rarest of cases is there any perceptible influence from the regional or local level on the legal instrument ultimately presented by the European Commission. There is clearly substantial room for improvement here.¹⁸

¹⁸ See also the opinion from the Office of the Regional Government of Vorarlberg on the second meeting of the Task Force, 16 February 2018.