SVERIGES RIKSDAG
THE SWEDISH PARLIAMENT

RIKSDAG ADMINISTRATION
SECRETARY-GENERAL OF THE RIKSDAG

To the European Commission
sg-national-parliaments@ec.europa.eu

31 March 2011

The Swedish Parliament has referred the Commission's Report on subsidiarity and proportionality (17th report on Better Lawmaking covering the year 2009), COM(2010) 547, to the Committee on the Constitution for examination.

The Committee has reported to the Chamber on its examination of the report in statement 2010/ll:KU26. The statement was decided upon on 30 March 2011.

The statement is enclosed.

[signed]
Kathrin Flossing
Secretary-General of the Riksdag

Statement from the Committee on the Constitution 2010/11:KU26

Report from the Commission on subsidiarity and proportionality

Summary

This statement addresses the report from the European Commission on subsidiarity and proportionality, COM(2010) 547. This is the 17th report on the application of the principles of subsidiarity and proportionality (also known as the 17th report on better lawmaking). The report covers 2009 when the Nice Treaty was still in force, but also briefly explains the changes introduced by the Lisbon Treaty, which came into force on 1 December 2009. The report discusses legal and institutional issues, the application of these principles and key cases where subsidiarity concerns were raised.

The Committee notes that, without any subsidiarity arguments in the Commission's proposals for legislative acts, it is impossible for the Riksdag to meet its obligation under the Treaty to ensure that the subsidiarity principle is observed. The Committee assumes that the Commission will improve its administrative procedures with the aim of resolving some uncertainties revealed by the Secretariat of the Chamber, among others, as to which proposals for EU measures need to be examined from a subsidiarity perspective.

The Committee also wishes to stress the importance, in the light of the Interinstitutional Agreement of 1993, of the Government, in its dealings within the Council of Ministers, working to ensure that the Council complies with the Agreement and justifies amendments to Commission proposals in terms of the subsidiarity principle. In this connection, the Committee on the Constitution also highlights the options open to the Riksdag Committees and the Committee on European Union Affairs to draw attention to subsidiarity issues in the Council's amendments to Commission proposals.

Contents

The Committee's proposal for a decision by the Riksdag

Report from the Commission on subsidiarity and proportionality

The Committee proposes that the Riksdag take note of the Committee's statement 2010/11:KU26.

Stockholm, 8 March 2011

For the Committee on the Constitution

Peter Eriksson

The following Committee members participated in the decision: Peter Eriksson (Green Party), Per Bill (Moderate Party), Peter Hultqvist (Social Democratic Party), Andreas Norlén (Moderate Party), Helene Petersson i Stockaryd (Social Democratic Party), Lars Elinderson (Moderate Party), Billy Gustafsson (Social Democratic Party), Karl Sigfrid (Moderate Party), Phia Andersson (Social Democratic Party), Karin Granbom Ellison (Liberal Party), Hans Hoff (Social Democratic Party), Per-Ingvar Johnsson (Centre Party), Hans Ekström (Social Democratic Party), Kajsa Lunderquist (Moderate Party), Tuve Skånberg (Christian Democrats), Jonas Åkerlund (Sweden Democrats) and Mia Sydow Mölleby (Left Party).

Description of the matter

The matter and its preparation

This statement addresses the report from the European Commission on subsidiarity and proportionality, COM(2010) 547, which was adopted on 8 October 2010. This is the 17th report on the application of the principles of subsidiarity and proportionality (also known as the 17th report on better lawmaking).

The Swedish translation of the report was received by the Riksdag on 11 October 2010. On 3 November 2010, following a decision by the Speaker of the Riksdag (see Section 5 of protocol 2010:11:9), the Chamber referred the report to the Committee on the Constitution for examination in accordance with Chapter 10 Section 5 of the Riksdag Act.

Background

The Commission presents reports on better lawmaking to the European Council, the European Parliament, the Council and national Parliaments in line with the Protocol to the Treaty on these issues.[1]. These reports relate, among other things, to the application of the subsidiarity and proportionality principles.

Key contents of the report

The report covers 2009 when the Nice Treaty was still in force, but also briefly explains the changes introduced by the Lisbon Treaty, which came into force on 1 December 2009.

The report is divided into four sections which deal with the legal and institutional framework, the application of the subsidiarity and proportionality principles, key cases where subsidiarity concerns were raised, and conclusions.

The legal and institutional framework

The section on the legal and institutional framework describes the subsidiarity and proportionality principles and their application, along with amendments introduced by the Lisbon Treaty. Among other things, the section stresses that all institutions have to comply with both principles in exercising their powers, and that if the Council, for example, makes amendments that affect the scope of Union action (such as EU legislative proposals), this must be justified in terms of the subsidiarity principle. The section also states that, although Protocol (No 2) on the application of the subsidiarity and proportionality principles (the 'Subsidiarity Protocol'), unlike the previously applicable Protocol (No 30) on the application of the subsidiarity and proportionality principles, no longer contains any guidelines such as the 'necessity' and 'EU value-added' tests[2] for assessing whether Union actions conform to the

[1] Up to 30 November 2009, the reports were presented in accordance with the fourth indent under point 9 of Protocol (No 30) to the Treaty Establishing the European Community. Since 1 December 2009, reports have been presented in accordance with Article 9 of Protocol (No 2) to the Treaty on the Functioning of the European Union (TFEU).

[2] The 'necessity' criterion means that the Union should only act if the Member States cannot adequately achieve the same objectives. The 'value-added' criterion deals with how the objectives can be better achieved by the Union.

principles, the Commission will nevertheless continue to use these guidelines and recommend the other actors to do likewise.

Application of the subsidiarity and proportionality principles

The section on the application of the subsidiarity and proportionality principles describes the application of the principles by the Commission in particular but also by national parliaments and the Council.

With regard to the Commission's application of the principles, it states that checks are now applied at three key stages of the policy development process. A preliminary analysis should be carried out in roadmaps which are published for major initiatives when the Commission Work Programme is agreed. A second, fuller analysis of subsidiarity is included as part of the impact assessment process. A third round includes a justification in terms of subsidiarity and proportionality in the explanatory memorandum and recitals of each legal proposal. According to the report, the most detailed analyses of subsidiarity and proportionality are provided in impact assessments, which are in turn quality-controlled by an Impact Assessment Board.

When it comes to the application of the principles by national parliaments, it states that about 10 % of the 250 opinions received by the Commission in 2009 in accordance with the 'Barroso initiative'[3] contained comments on subsidiarity and/or proportionality, that the chambers with a particular interest in subsidiarity questions were the French Sénat, the Austrian Bundesrat, the German Bundesrat and the Dutch, Portuguese and Greek Parliaments, and that some opinions did not question the respect of subsidiarity as such, but indicated that the Commission's justification was not sufficient.

As for application by the Council, the report states that, under the Council's Rules of Procedure, the Committee of Permanent Representatives of each Member State (Coreper) ensures that the principles of legality, subsidiarity and proportionality are respected.

Cases where subsidiarity concerns were raised

This section gives an overview of the Commission proposals which gave rise to most discussion among the co-legislators and stakeholders on subsidiarity and proportionality. The proposals mentioned in the report are the Directive on Aviation Security Charges[4], the Directive on the Energy Performance of Buildings[5], the Directive on Equal Treatment outside Employment[6], the Directive on the Protection of Soil[7], the Directive on Cross-Border Healthcare[8], the Green Paper 'Towards a new culture for urban mobility'[9], the Directive on Standards of Human Organs Intended for Transplantation[10] and the Directive on Consumer Rights[11].

Conclusions of the report

In this section, the Commission states that the majority of its proposals were adopted by the co-legislators without significant discussions on

3 See COM(2006) 211, p. 9.
4 COM(2009) 217.
5 COM(2008) 780.
6 COM(2008) 426.
7 COM(2006) 232.
8 COM(2008) 414.
9 COM(2007) 551.
10 COM(2008) 818.
11 COM(2008) 614.

subsidiarity and proportionality. According to the Commission, for those proposals compliance with the principles of subsidiarity and proportionality has presumably not been an issue. However, where compliance is questioned, the actors involved in discussions hold a broad variety of views, it says.

The Commission also states that the debate on subsidiarity and proportionality will be further enriched by the role of national Parliaments introduced by the Lisbon Treaty. The Commission is also committed to strengthening further the relations with national Parliaments within the framework of the political dialogue developed since 2006. The subsidiarity control mechanism is a key element of this process, and an overview of how the mechanism is operating will be presented in the next subsidiarity report.

The Committee's examination

Explanatory memorandum

No explanatory memorandum has been produced by the Government in relation to the report from the Commission.

Applicable law etc.

Riksdag Act [Riksdagsordningen]

According to Chapter 10, Article 6, first paragraph of the Riksdag Act, the Riksdag shall examine whether draft legislative acts conflict with the principle of subsidiarity.

According to the third paragraph, within two weeks from the day when the Committee so requests, the Government shall inform the Committee of its assessment regarding the application of the principle of subsidiarity to the current draft.

The fourth paragraph states that, if the Committee considers that the draft conflicts with the principle of subsidiarity, the Committee shall deliver a statement to the Chamber with a proposal that the Riksdag should send a reasoned opinion to the Presidents of the European Parliament, the Council and the Commission. The Committee shall also deliver a statement to the Chamber if so requested by at least five members of the committee. The fourth paragraph also states that otherwise the Committee shall report to the Chamber by means of an extract from the minutes that the draft legislative act does not conflict with the principle of subsidiarity.

The eighth paragraph says that the Committee on the Constitution shall monitor the application of the principle of subsidiarity and shall inform the Chamber annually of its observations.

The EU Treaty

According to Article 5(3), first paragraph of the Treaty on European Union (the EU Treaty), under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level..

The second paragraph of this subsection goes on to say that the institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality, while national Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol.

The TFEU

According to Article 3(1) of the Treaty on the Functioning of the European Union (TFEU), the Union shall have exclusive competence in the following areas: customs union; the establishing of the competition

rules necessary for the functioning of the internal market; monetary policy for the Member States whose currency is the euro; the conservation of marine biological resources under the common fisheries policy; and common commercial policy.

Article 4(2) states that shared competence between the Union and the Member States applies, *inter alia*, in the area of freedom, security and justice. The TFEU indicates that this area includes Articles 67–100 of the Treaty, covering questions of border control, asylum and immigration, cooperation between civil and judicial authorities and the police, and transport.

Subsidiarity Protocol

Article 1 of the Protocol states that each institution shall ensure constant respect for the principles of subsidiarity and proportionality, as laid down in Article 5 of the Treaty on European Union. According to Article 4, the Commission shall forward its draft legislative acts and its amended drafts to national Parliaments at the same time as to the Union legislator (i.e. in most cases, the Council and the European Parliament).

Article 5 states that draft legislative acts shall be justified with regard to the principles of subsidiarity and proportionality. It goes on to say that any draft legislative act should contain a detailed statement making it possible to appraise compliance with the principles of subsidiarity and proportionality, with some assessment of the proposal's financial impact and, in the case of a directive, of its implications for the rules to be put in place by Member States. The Article also states that the reasons for concluding that a Union objective can be better achieved at Union level shall be substantiated by qualitative and, wherever possible, quantitative indicators.

Any national Parliament or any chamber of a national Parliament may, within eight weeks from the date of transmission of a draft legislative act in the official languages of the Union, send to the Presidents of the European Parliament, the Council and the Commission a reasoned opinion stating why it considers that the draft in question does not comply with the principle of subsidiarity.

Article 9 says that the Commission shall submit each year to the national Parliaments and others a report on the application of Article 5 of the Treaty on European Union.

The Council's Rules of Procedure

The Protocol on the Role of national Parliaments in the European Union and the Subsidiarity Protocol stipulate that an eight-week period shall elapse between a draft European legislative act being made available to national Parliaments in the official languages of the Union and the date when it is placed on a provisional agenda for the Council for its adoption. Article 3(3), first paragraph of the Rules of Procedure[1] states that, in cases in which this period is applicable, items relating to the adoption of a legislative act shall not be placed on the provisional agenda for a decision until that period has elapsed. The second paragraph of the same subsection says that the Council may derogate from the eight-week period in some cases.

Article 19(1) states, among other things, that Coreper (the Committee of Permanent Representatives) shall be responsible for preparing the work of all the meetings of the Council and for carrying out the tasks

[1] OJ L 325, 11.12.2009, pp. 35-61.

assigned to it by the Council, and that it shall in any case ensure consistency of the European Union's policies and actions and see to it that the principles of legality, subsidiarity, proportionality and providing reasons for acts are observed.

Interinstitutional Agreement

Article II(3) of the Agreement[2] stipulates that any amendment which may be made to the Commission's text, whether by the European Parliament or the Council, must, if it entails more extensive or intensive intervention by the Community, be accompanied by a justification under the principle of subsidiarity.

The Commission's Impact Assessment Guidelines

On 15 January 2009, the Commission adopted updated Impact Assessment Guidelines, SEC(2009) 92.[3] The Guidelines are for Commission staff preparing impact assessments when Commission proposals are drawn up. The Guidelines explain that the subsidiarity principle requires two aspects to be analysed when examining whether Community actions, whether legislative or not, are justified: the 'necessity' and 'EU value-added' tests. The Guidelines state (p. 22) that, in order to assess 'necessity', one needs to answer the question why the objectives of the proposed action cannot be achieved sufficiently by Member States, and if they cannot, whether the objectives can be better achieved by action by the Community. If these two criteria are satisfied, the Guidelines recommend that the impact assessment should answer further questions to justify the Commission proposal in terms of the subsidiarity principle. These questions (see below) should not be answered yes or no, but rather used to identify the relevant arguments relating to subsidiarity so these can be elaborated on in the impact assessment. According to the Guidelines, these points should be substantiated with qualitative and, where possible, quantitative indicators. The following questions are set out in the Guidelines (p. 23):

- Does the issue being addressed have transnational aspects which cannot be dealt with satisfactorily by action by Member States? (e.g. reduction of CO_2 emissions in the atmosphere)
- Would actions by Member States alone, or the lack of Community action, conflict with the requirements of the Treaty? (e.g. discriminatory treatment of a stakeholder group)
- Would actions by Member States alone, or the lack of Community action, significantly damage the interests of Member States? (e.g. action restricting the free circulation of goods)
- Would action at Community level produce clear benefits compared with action at the level of Member States by reason of its scale?
- Would action at Community level produce clear benefits compared with action at the level of Member States by reason of its effectiveness?

[2] OJ C 329, 6.12.1993, p. 132. The Swedish version is not available. The relevant Article in the English version reads as follows: Any amendment which may be made to the Commission's text, whether by the European Parliament or the Council, must, if it entails more extensive or intensive intervention by the Community, be accompanied by a justification under the principle of subsidiarity and Article 3b.

[3] The document is only available in English, French and German.

The Guidelines go on to say that the answers to these questions may not be the same for each policy option to be examined, and that this should be taken into account in the impact assessment; it should also be borne in mind that in some cases the appropriate level for action may be international, rather than European or national.

Any assessment of subsidiarity will also evolve over time, which has two implications. First, it means that Community action may be scaled back or discontinued if it is no longer justified because circumstances have changed. It is important to bear this in mind when reviewing existing Community activities, for example in the context of the Commission's better regulation and simplification agenda. For this type of initiative, the impact analysis should demonstrate that EU action is still in conformity with the subsidiarity principle. The Guidelines explicitly state that one should not rely exclusively on a subsidiarity analysis that was made in the past. Secondly, it means that Community action, in line with the provisions of the Treaty, may be expanded where circumstances so require; this may include areas where there has been no, or only limited, Community action before. Given the potential political sensitivity of such new activities, the clearest possible justification on the basis of the above questions is essential. Reference to similar activities already carried out at Community level may be useful (p. 23).

Impact Assessment Board

The Impact Assessment Board was established by the President of the Commission in 2006. It provides independent quality control for Commission impact assessments. It chiefly does this by quality-checking draft Impact Assessment (IA) reports. Based on these reviews, the Board may make recommendations for improvements to these drafts. Its opinions are published.

In January 2011, the Board's report for 2010 was published, SEC(2011) 126. The report states (p. 3) that, overall, the Board believes that the Commission has continued to make progress towards an evidence-informed approach, and that the European Court of Auditors has found, in a separate report,[4] that the quality of Commission IA reports is raised by the work of the Board. However, the Board emphasises that there is no room for complacency, as the quality of IA reports submitted to it remains inconsistent. The report also shows (p. 16) that the number of recommendations on subsidiarity and proportionality increased in 2010 as a result of greater Board focus on EU value-added. In 2010, there were recommendations on subsidiarity and proportionality in 50 % of the Board's opinions (compared to the years 2007–2009, when the number of such recommendations was around 30 %). In the report (p. 24), the Board states that it pays close attention to how subsidiarity and value-added are handled in IA reports, and aims to ensure that the Commission services produce a well-substantiated case for EU action, fit for scrutiny by national Parliaments. It stresses that a robust and evidence-based justification for EU action and assessment of its 'value-added' should be given in all IA reports (p. 3 and 24).

[4] This report (no 3/2010) was adopted in accordance with Article 287(4), second paragraph TFEU, and is entitled *Impact assessments in the EU institutions: do they support decision-making?*

Cases where subsidiarity concerns were raised

The Commission report comments on the Commission proposals which gave rise to most discussion among the co-legislators and stakeholders on subsidiarity and proportionality. The treatment of these proposals by the Government and, where applicable, by the Riksdag, is described below.

Directive on Aviation Security Charges

On 22 June 2009, the Government produced an explanatory memorandum on aviation security charges (2008/09:FPM132), which was passed on to the Committee on Transport and Communications. The memorandum states that the Government had no objections to the principles behind the proposal. The Government's overview of activity within the European Union in 2009 (doc-no 2009/10:150) comments, among other things, that the proposal had proved to be controversial among the Member States and that the Government had consulted the Committee on European Union Affairs on 11 December 2009 (p. 214).

Directive on the Energy Performance of Buildings

On 9 January 2009, the Government produced an explanatory memorandum on the revision of the Directive on the Energy Performance of Buildings (2008/09:FPM57), which was passed on to the Committee on Civil Affairs. The memorandum states that a detailed analysis of the implications of the proposed amendments remains to be carried out, but that the Directive generally appears to strike a reasonable balance between harmonisation and subsidiarity. The Government also points out in this memorandum that it is important for Member States to have sufficient freedom to define national rules and systems to achieve the aims of the Directive in a cost-effective manner based on national conditions. Member States' freedom of action should also cover monitoring the definition of rules at the EU level as well as in Swedish national law, so that these do not increase the administrative burden on undertakings.

The Government's overview of activity within the European Union in 2009 (doc-no 2009/10:150) comments, among other things, that the proposal (and others in the energy efficiency field) was the subject of consultation in the Committee on European Union Affairs on 5 June and 4 December 2009 (p. 226)..

On 11 February 2010, a representative of the Ministry of Industry, Employment and Communications [*Näringsdepartementet*] informed the Committee on Civil Affairs of the proposal. Based on this information, the Committee decided to instruct its secretariat to write to the Ministry to protest that the Committee had not been kept informed of the negotiations on the Directive.

Anti-Discrimination Directive

On 11 August 2008, the Government produced an explanatory memorandum on a new EU Directive against discrimination (2007/08:FPM127), which was passed on to the Committee on the Labour Market. The memorandum states that, in its proposal for this Directive, the Commission suggests that action is needed at the Community level to establish a uniform minimum level of protection within the European Union for people who have suffered discrimination on the basis of religion or belief, disability, age or sexual orientation. The memorandum goes on to say that Community law lays down rights and obligations for both economic operators and citizens, including people

who move between Member States, and that the proposal does not go further than necessary to achieve the aim of the Directive.

The proposal for an Anti-Discrimination Directive was discussed in a meeting of the Committee on the Labour Market on 17 September 2008 (and at a briefing event on 13 October 2009). The deliberations were based, among other things, on a memorandum dated 12 September 2008 (ref. RD-2007/08:3716) and the explanatory memorandum. The then Minister for Integration and Gender Equality referred to the Government's proposal for a Swedish opinion in accordance with the explanatory memorandum, and to additional information in the other memorandum. The minutes of the Committee on the Labour Market indicate that views were expressed at the meeting by members of the Committee on the effect of the Directive on the opportunity to take active measures to counter discrimination, on whatever grounds, which were previously supported by the Equal Opportunities Act [*Jämställdhetslagen*]. The chairman of the Committee concluded that there was support for the Government's views as then stated. The Committee on the Labour Market also carried out a subsidiarity analysis of the proposal as part of testing the subsidiarity check mechanism organised by COSAC. The Committee found (cf. 2008/09:URF2, p. 39) in its 'test report' that the Commission's justification for the compatibility of the proposed Directive with the subsidiarity principle was not sufficiently detailed.

Information was also provided to the Committee on the Constitution on two occasions (16 March 2010 and 1 February 2011) on the possible impact of this proposed Directive on the freedom of the press under the Swedish Constitution, based on circumstances raised by the Swedish Media Association [*Tidningsutgivarna* - TU] and communicated in a letter to the Ministry of Integration and Gender Equality. TU pointed to the need for media and advertising content to be explicitly excluded from the Directive based on the absolute right enjoyed by publishers under the Swedish Constitution to decide what material should be published. At the meeting of the Committee on the Constitution on 1 January 2011, the Minister for Integration and officials from the Ministry of Employment provided details of the proposed Directive. These indicated that the Government does not consider an exclusion as requested by TU to be needed given that the proposed Directive does not affect freedom of the press and freedom of expression in Sweden.

The Government's overview of activity within the European Union in 2008 (doc-no 2008/09:85) also notes that the proposal was discussed by the Committee on European Union Affairs on 26 September and 12 December 2008 (p. 133).

Directive on the Protection of Soil

On 8 February 2007, the Government produced an explanatory memorandum on a Framework Directive on the Protection of Soil (2006/07:FPM45), which was passed on to the Committee on Environment and Agriculture. The explanatory memorandum states that the Government supported the strategy for the protection of soil, but expressed doubts as to whether so much of the issue could be addressed by a Framework Directive. The explanatory memorandum states that better use could have been made of the opportunity to strengthen national law at the same time as strengthening the soil protection aspects of other Community legislation, and that the impact of any new regulations on Swedish administration should be kept to a minimum, because Swedish

law on the protection of soil, particularly in the Environmental Code [*Miljöbalken*], is generally fit for purpose. Given that every requirement has to be assessed in relation to EU value-added and the subsidiarity and proportionality principles, the Government is opposed to Community financing of measures that do not deliver clear value-added. The Government believes that costs should be contained within existing budgets. The explanatory memorandum goes on to say that a more developed Swedish view will be presented when the responses to the circulation for comment have been compiled and an analysis of the implications and effects of the proposal has been carried out.

On 27 March 2007, the Government passed the matter to the Committee on Environment and Agriculture. The supporting documentation included memoranda from the Ministry of the Environment (ref. 170-2278-06/07). In the deliberations, there was support for the Government's position in the continuing negotiations. The Government's overview of activity within the European Union in 2007 (doc-no 2007/08:85) states that the Government consulted and informed the Committee on European Union Affairs and the Committee on Environment and Agriculture before the Council meeting in December (pp. 215-216).

Patient Mobility Directive

On 19 August 2008, the Government produced an explanatory memorandum on the Patient Mobility Directive (2007/08:FPM134), which was passed on to the Committee on Health and Welfare. In the explanatory memorandum, the Government notes that the Commission's impact analysis is based on quite rough estimates and that the cost calculations for the various alternatives are therefore certainly open to question, but that the alternative chosen by the Commission does seem the most reasonable for other reasons. The Government feels that simply adopting recommendations and notes on interpretation is unlikely to create the legal clarity that is a major aim of the initiative, while any detailed legislation is hard to justify based on the subsidiarity and proportionality principles and Member States' responsibility for organising their own health care.

According to the explanatory memorandum from the Government, the general aim of the proposal is to lay down clear provisions for cross-border care within the EU, so as to create sufficient legal clarity on rights to compensation and how these rights should be applied in practice; such a clear framework cannot be created by the Member States themselves. The memorandum states that the Commission nevertheless considers that the proposal completely respects Member States' responsibility for organising, financing and providing health care, and their right to decide for themselves what levels of sickness benefits their citizens should receive, and that the proposal is thus compatible with the subsidiarity and proportionality principles.

In 2008, the Government informed the Committee on Health and Welfare of the proposed Directive, first on 17 September, then on 4 December. The Government consulted the Committee on European Union Affairs on 12 December 2008. The Government's overview of activity within the European Union in 2009 (doc-no 2009/10:150) states that the Government consulted the Committee on Health and Welfare on 19 May and 24 November 2009, informed the Committee on Health and Welfare on 1 October 2009, and consulted the Committee on European Union Affairs on 5 June and 26 November 2009 (p. 2009).

In the deliberations held on 19 May 2009, there was a majority in favour of the Government's position as stated at that time. A shared dissenting view (Social Democratic, Left and Green Parties) was tabled in which the dissenters stressed the importance of the Directive being drawn up in recognition of the fact that health care is a national matter and not covered by common EU policies. In the deliberations held on 19 May 2009, there was a majority in favour of the Government's position as stated at that time, and a dissenting view (Left Party) was tabled in which the member felt that the position of the Swedish Government should rather be to strive for national decision-making powers in this area.

Green Paper on Urban Transport

On 13 November 2007, the Government produced an explanatory memorandum on the Green Paper 'Towards a new culture for urban mobility' (2007/08:FPM21), which was passed on to the Committee on Transport and Communications. In the explanatory memorandum, the Government stated that no final Swedish position had yet been formulated. The preliminary position set out in the memorandum was that the Green Paper dealt with important future issues and that Sweden therefore welcomed the Commission's initiative. The explanatory memorandum goes on to say that Member States bear the main responsibility for resolving the problems and challenges discussed in the Green Paper, and that as a consequence of applying the subsidiarity principle, the role of the Commission should be restricted to instigating and supporting the growth of knowledge and exchange of experience, developing a basis for visions, policies and strategies, and supporting and working with existing networks of organisations working to bring about the sustainable development of Europe's cities.

The Green Paper was reviewed in a statement (ref. 2007/08:TU5) in which the Committee on Transport and Communications found that a series of strategic initiatives based on a broad consensus was needed to turn urban transport into an environmentally sustainable transport system. However, the Committee did not consider it appropriate, as a consequence of the subsidiarity principle and Swedish transport policy, for the EU to engage with various implementation issues relating to how urban transport should be designed in Europe's cities. According to the Committee, such matters can be more suitably addressed within the Member States, in the light of existing divisions of responsibility and the importance of transport decisions being taken at the most local level possible (p. 15). The Committee also considered that the Union should rather promote transport issues that have a clearer Community dimension, such as the development of objectives and forums for the exchange and dissemination of knowledge, and methods development in relation to the importance of social planning to an effective transport system of which public transport is an integral part. The Committee, which therefore considered that any Union-level initiative should play a supporting rather than a driving role, and should foster an appropriate division of responsibilities between the EU and its Member States, was prepared for its part to actively promote such an exchange of knowledge at the parliamentary level. The Committee on Transport and Communications returned to this issue in its statement (2009/10:TU4) on sustainable future transport, and restated its earlier position there.

Organ Donation and Transplantation Directive

On 13 January 2009, the Government produced an explanatory memorandum on the Organ Donation and Transplantation Directive (2008/09:FPM60), which was passed on to the Committee on Health and Welfare. The explanatory memorandum notes that the Commission considers that the aims of the directive (to lay down quality and safety standards for human organs intended for transplantation) are not adequately met by Member States themselves, but should rather be implemented at Community level in view of the scope of the measure.

The Committee on Health and Welfare carried out a subsidiarity analysis of the proposal in December 2008 and January 2009 as part of testing the subsidiarity check mechanism organised by COSAC. In its 'test report', the Committee considered that the proposed directive was compatible with the subsidiarity principle and that the justification from the Commission was sufficient.

Directive on consumer rights

On 25 November 2008, the Government produced an explanatory memorandum on consumer rights (2008/09:FPM35), which was passed on to the Committee on Civil Affairs. The explanatory memorandum states, in relation to the subsidiarity principle, that the Commission believed that there was a problem with the consumer protection rules in force at that time, namely the fragmentation that resulted where minimal harmonisation opened the way for widely differing national rules. The Commission considers that only a coordinated Community measure can help to resolve this problem. The proposed directive is an element of the work to review the EU's consumer rules, and the Commission previously presented a 'Green Paper on the Review of the Consumer Acquis' which was examined in a statement (2006/07:CU30).

The Government had regular meetings on the subject with the Committee on Civil Affairs (on 16 December 2008, 20 April and 30 November 2010). The basis for the most recent deliberations included a memorandum from the Ministry of Justice and the Ministry of Integration and Gender Equality (ref. 090-1010-2010/11) setting out the Government's position ahead of the continuing work. In these deliberations, a majority of the Committee shared the Government's position, and a dissenting view (Left Party) was tabled in which the member recommended that the Swedish position should make it clear that every Member State should retain the option of having tighter consumer protection rules in its national law.

Follow-up by the Committee on the Constitution

The first annual follow-up by the Committee on the Constitution of the application of the subsidiarity principle (2010/11:KU 18) was conducted in the autumn of 2010 and presented to the Riksdag on 14 December 2010. The follow-up covered the period from 1 December 2009 to 30 June 2010 and the 20 Commission proposals and 2 initiatives from Member States put forward during this period.

General observations

In the follow-up report, the Committee made some observations concerning the application of the subsidiarity principle (subsidiarity aspects) in the 22 proposals and initiatives mentioned (p. 25 ff.). With regard to the initiatives by Member States, the Committee found that, in both cases, the proponents justified their proposals in terms of the subsidiarity principle. In relation to the subsidiarity aspects of the Commission proposal, the Committee found, first of all, that these were completely absent in seven (i.e. just over a third) of the cases reviewed, and two others displayed deficiencies (see next section). The Committee emphasised that this was a problem, because the subsidiarity principle means that proposed actions should be assessed against the objectives to be achieved. With inadequate supporting arguments, or none at all, the Committee for the Constitution finds it harder to meet its obligation under the Treaty and the Riksdag Act to ensure that the subsidiarity principle is observed in accordance with the procedure laid down in the Subsidiarity Protocol and to assess whether an action should be taken at EU level or not (pp. 30-31).

In this connection, the Committee on the Constitution mentioned that it saw no constitutional barriers to the Committee contacting the Commission directly if the latter subsequently failed to meet the requirements of the Subsidiarity Protocol to justify any proposal in terms of the subsidiarity and proportionality principles. However, the Committee on the Constitution considered that the option to make contact in this way had a bearing on a number of issues and that obtaining information from the Commission could compromise the eight-week time limit, which might suggest that this option should only be taken in exceptional cases (p. 31).

The Committee also considered that it was worth continuing to bear in mind the possibility of direct contact between the Riksdag Committees and the Commission and returning to it in subsequent follow-ups, and that there was even greater reason to return to the question if it should turn out that inadequate supporting arguments from the Commission are not a temporary problem. The Committee pointed out that a possible way of dealing with the Commission's supporting arguments is also to be found in connection with the Committee's handling of the Commission communication on better lawmaking (p. 32).

Findings in one specific case

One of the two cases where the Committee found that the Commission's subsidiarity arguments were inadequate is discussed in more detail below; this is the proposal[5] to amend the Visa Regulation. In the proposal, which entails a decision to modify a list in the Visa Regulation (the 'visa list'), it is stated that the legal basis is Article 77(2)(a) TFEU, and that the decision falls within the exclusive competence of the Community.

From the observations by the Committee on the Constitution (2010/11:KU18 p. 28 ff.) and the opinion of the Committee on Social Insurance (p. 58 ff.), we find that the Commission initiated a 'subsidiarity procedure' (sending a draft legislative act to the national parliaments for them to review the application of the subsidiarity principle), only to assert later that this procedure should not have been initiated in this specific case. In response to enquiries from the Secretariat of the Chamber, the

[5] COM(2010) 256.

Commission indicated that the decision to initiate a subsidiarity procedure in relation to the case in question was a mistake and that the legal basis in the period preceding the Regulation stipulated that a 'visa list' should be produced. According to the Commission, it is obvious that the Article indicated that a list must be established at EU level and that this only made sense if the list was established by the EU. In its opinion, the Committee on Social Insurance states that, when it comes to amendments to the Visa Regulation, the Committee completely agrees that a visa list must logically be established at EU level. In principle, however, the Committee on Social Insurance considers that the question may be asked whether the matter falls within the exclusive competence of the Community because this competence is supported by earlier Treaties (or the EU exercised its powers before the regulation was adopted). The Committee on Social Insurance also questioned whether proposed amendments to a legislative act adopted on the basis of the EU's exclusive competence should not be subject to a subsidiarity review even though the legal basis given for the proposed amendment was explicitly covered by an area of shared competence under the applicable Treaty.

Findings of the Secretariat of the Chamber

According to information provided by the Secretariat of the Chamber, the central office of the Secretariat highlighted a number of demarcation problems affecting the Riksdag's examination of the application of the subsidiarity principle. These difficulties are mainly linked to the justifications advanced by the Commission.

Firstly, for some proposals (draft legislative acts) for codification[6] and revisions to laws, the Commission has initiated a 'subsidiarity procedure'. In some other cases, it did not do this even though the criteria for a subsidiarity review in accordance with the Subsidiarity Protocol were satisfied. The Secretariat of the Chamber, which was unable to find any consistent pattern in the Commission's approach in these cases, is still awaiting clarification of the matter from the Commission.

Secondly, the Secretariat of the Chamber made other similar observations in relation to the proposed amendments to the Visa Regulation (see above) concerning the Commission's actions in other areas.

Thirdly, the memorandum mentions certain implications of these points; among other things, some Committees opted to review the application of the subsidiarity principle to proposals where the Commission had not yet initiated such a 'subsidiarity procedure'. Some Committees also conducted 'conditional' subsidiarity reviews, meaning that the Committee concerned determined that a proposal did not conflict with the subsidiarity principle provided that a subsidiarity review procedure was initiated and that the proposal in question was referred to the Committee for review.

[6] Official codification means the procedure for repealing the acts to be codified and replacing them with a single act containing no substantive change to those acts. On 20 December 1994, the Commission, the Council and the European Parliament adopted an Interinstitutional Agreement on an accelerated working method for official codification of legislative texts; see OJ C 102, 4.4.1996, pp. 2-3. Article 5 of the Agreement states that the Community's normal legislative process will be complied with in full.

Position of the Committee

By way of introduction, the Committee on the Constitution wishes to draw attention to the observations and experiences gained in the course of following up the Riksdag's review of the application of the subsidiarity principle. Although the follow-up related to the period from 1 December 2009 to 30 June 2010 and the report under discussion here relates to 2009, the Committee considers that some questions of principle need to be addressed at this stage in the interests of improving the application of the subsidiarity principle.

First of all, the Committee noted in its follow-up report that subsidiarity arguments were lacking in just over a third of the Commission proposals reviewed. Without such supporting arguments, the Committee finds it harder, not to say impossible, to meet its obligation under the Treaty to ensure that the subsidiarity principle is observed in accordance with the procedure laid down in the Subsidiarity Protocol and to assess whether an action should be taken at EU level or not. The Committee wishes to point out that the obligations on the Commission and other proposers to justify proposals in terms of the subsidiarity principle are laid down in Treaty protocols. In this connection, the Committee notes that the Impact Assessment Board clearly stated in its most recent report that it aims to ensure that the Commission Directorates-General produce a well-substantiated case for EU action, fit for scrutiny by national Parliaments.

Secondly, in its follow-up, the Committee observed certain deficiencies in the subsidiarity arguments advanced in one particular case. The Secretariat of the Chamber made other similar observations concerning the Commission's approach to the matter in other areas. The Committee considers it important to create clarity and predictability regarding which proposals for EU action meet the criteria for a subsidiarity review in accordance with the Subsidiarity Protocol. The Committee assumes that the Commission will improve its administrative procedures with the aim of resolving these uncertainties.

Thirdly, the Committee mentioned in its follow-up that it saw no constitutional barriers to Riksdag Committees contacting the Commission directly if the latter failed to meet the requirements laid down in the Subsidiarity Protocol to justify any proposal in terms of the subsidiarity and proportionality principles. The Committee on the Constitution still considers that obtaining information from the Commission could compromise the eight-week time limit. In the Committee's view, this means that, in reality, obtaining such information will hardly be feasible in practice and so should only be done in exceptional cases. According to the Committee, not the least reason why obtaining information in this way should be the exception is that the need to do so only arises when the Commission has failed in its obligation to draw up proposals for EU action in conformity with the Treaties, i.e. with detailed subsidiarity considerations.

The Committee also wishes to stress the importance of ensuring that the subsidiarity principle is observed at all stages of the decision-making process for EU legislation. The Committee notes that the Interinstitutional Agreement of 1993 stipulates that any amendment which may be made to a Commission proposal, whether by the European Parliament or the Council, must, if it entails more extensive or intensive

intervention by the Community, be accompanied by a justification under the principle of subsidiarity. In the light of this, the Committee wishes to stress the importance of the Government, in its dealings within the Council of Ministers, working to ensure that the Council complies with the Agreement and puts forward amendments to Commission proposals to uphold the subsidiarity principle. In this connection, the Committee on the Constitution also wishes to highlight the options open to the Riksdag Committees and the Committee on European Union Affairs to draw attention to subsidiarity issues in the Council's amendments to Commission proposals.

The Committee on the Constitution intends in the future to revisit the Commission's reports on better lawmaking, not least in the light of the Committee's findings in the course of its annual follow-up of the application of the subsidiarity principle, as stipulated in Chapter 10 Article 6, eighth paragraph, of the Riksdag Act. In this connection, the Committee also wishes to mention that, in its annual follow-up, it reviews the Riksdag's formal handling of subsidiarity reviews and the outcome of these reviews. The purpose of the Committee's follow-up activities is to monitor how this outcome affects the division of competences between the EU and the Member States, and to draw attention to the fact that there are many proposals that do not individually constitute a threat to the subsidiarity principle, but which taken together may indicate a tendency where the subsidiarity principle is at risk. The review of the Commission's reports on better lawmaking, which is supported by Chapter 10 Article 5 of the Riksdag Act and which the Committee intends to conduct in the future, will cover the Commission's subsidiarity arguments.

ANNEX

List of documents referred to

Report from the Commission on subsidiarity and proportionality (17th report on better lawmaking, 2009), COM(2010) 547.

Printed: Elanders, Vällingby 2011