Statement by
the Committee on the Constitution
2013/14:KU45

Review of Commission reports on subsidiarity and proportionality, etc.

Summary

This statement will discuss two reports by the Commission. One is the twentieth annual report on subsidiarity and proportionality, COM(2013) 566 (also known as the twentieth report on better law making). The other is the eighteenth annual report on relations between the European Commission and the national parliaments, COM(2013) 565. These reports relate to 2012 and concern *inter alia* the application of the principles of subsidiarity and proportionality, and political dialogue between the Commission and the national parliaments, known as the Barroso initiative. As part of the Committee's follow-up and assessment work, an overview of knowledge concerning the principles of subsidiarity and proportionality was produced (2013/14:RFR10). This overview forms part of the Committee's basis for its review.

The Committee on the Constitution would like to point out *inter alia* that the mechanisms for testing subsidiarity are based on the desire of the signatories to the Treaty to ensure that all decisions are made as closely as possible to Union citizens. The Committee takes this as meaning that the mechanism constitutes a commitment under the Treaty on the part of the national parliaments that is substantially democratic and creates profound legitimacy. The Committee would also like to point out some of its most important findings from its fourth round of follow-up on the Swedish Parliament's testing of how the principle of subsidiarity is applied, including that approximately one-eighth of Union proposals that were tested for subsidiarity in 2012 had no or incomplete grounds for subsidiarity. The Committee still repudiates the suggestion that Parliaments should be required to test proposals for subsidiarity where absolutely no grounds are given. A lack of grounds should be treated as non-compliance with the Subsidiarity Protocol. The Committee is of the view that the Subsidiarity Protocol is ineffective in its current form. Extending the eight-week period and reviewing the levels and impact of the thresholds for yellow and orange cards should be considered in appropriate contexts. Finally, the Committee would also like to point out that those who submit proposals on behalf of the Union are obliged to consider the reasoned opinions of the national parliaments and the fact that the list of areas in which the Union must have exclusive competence, as set out in Article 3 TFEU, is exhaustive.

Table of Contents

Committee proposal for a decision by the Swedish Parliament

Commission reports on subsidiarity and proportionality, and on relations between the Commission and the national parliaments

The Swedish Parliament hereby places the statement on file.

Stockholm, 27 May 2014

On behalf of the Committee on the Constitution

Per Bill

The following members took part in the decision: Per Bill (Moderate Party), Björn von Sydow (Social Democratic Party), Andreas Norlén (Moderate Party), Helene Petersson i Stockaryd (Social Democratic Party), Lars Elinderson (Moderate Party), Billy Gustafsson (Social Democratic Party), Phia Andersson (Social Democratic Party), Hans Hoff (Social Democratic Party), Per-Ingvar Johnsson (Centre Party), Hans Ekström (Social Democratic Party), Tuve Skånberg (Christian Democrats), Jonas Åkerlund (Sweden Democrats), Mia Sydow Mölleby (Left Party), Cecilia Brinck (Moderate Party), Sedat Dogru (Moderate Party) and Stefan Käll (Liberal Party).

Report on the matter

The matter at issue and its preparation

This statement discusses two documents by the Commission, which on 30 July 2013 adopted both an annual report for 2012 on subsidiarity and proportionality, COM(2013) 566 (hereinafter *the subsidiarity report*) and an annual report for 2012 on relations between the European Commission and the national parliaments, COM(2013) 565 (hereinafter *the relations report*).

The Swedish version of the former report reached the Swedish Parliament on 27 August 2013. The Swedish version of the latter report arrived on 26 August 2013. Following a decision by the Speaker, the Chamber referred the reports to the Committee on the Constitution on 21 November 2013 (please see Section 3 of Parliamentary Proceedings 2013/14:32) for a review under Section 5 of Chapter 10 of the Swedish Parliament Act.

Background

The Commission submits reports on better law making to the European Council, the European Parliament (EP), the Council and the national parliaments, in line with the Protocols to the Treaty. These reports concern *inter alia* the application of the principles of subsidiarity and proportionality.

In 2006, the Commission took the initiative to reinforce the political dialogue between the Commission and the national parliaments, known as the Barroso initiative. In its communication 'A citizens' agenda – Delivering results for Europe' (COM(2006) 211), the Commission emphasised that it is particularly important for the national parliaments to be more closely involved with the work of developing and implementing EU policy, not least because the increased involvement of national parliaments can help make European policies more attuned to diverse circumstances and more effectively implemented. The Commission decided that new draft laws and consultation documents be sent quickly and directly to the national parliaments. The Commission also stated that giving the national parliaments more opportunities to submit their views could improve the process of policy formulation.

Main content of the reports

As in previous years, the subsidiarity report (i.e. the annual report for 2012 on subsidiarity and proportionality) examines how the principles of subsidiarity and proportionality have been applied by the EU's various institutions and bodies. The report discusses in detail some of the Commission's initiatives and legislative proposals that gave rise to questions relating to subsidiarity in 2012. Since scrutiny of the principle of subsidiarity is closely linked to the Commission's political dialogue with the national parliaments, the subsidiarity report

supplements the relations report (i.e. the annual report for 2012 on relations between the European Commission and the national parliaments).

The subsidiarity report is divided into three sections that deal with the application of the principles of subsidiarity and proportionality, key cases where subsidiarity concerns were raised, and conclusions. The relations report is divided into four main sections that deal with the main challenges of political dialogue (i.e. smart budget consolidation and democratic legitimacy), written opinions from the national parliaments, contacts and visits between the Commission and the parliaments, and the Commission's view of the outlook for its relations with the national parliaments. The reports also contain lists of reasoned opinions and other opinions (as part of the political dialogue) in 2012, as well as the Commission's proposals and initiatives that generated the most opinions as part of the political dialogue. The seven sections of the combined reports are summarised below.

Application of the principles of subsidiarity and proportionality

The section on the application of the principles of subsidiarity and proportionality explains how the principles are applied, primarily by the Commission but also by the national parliaments and the Council. With regard to application by the Commission, the report states *inter alia* that a subsidiarity analysis is carried out as part of the impact assessment process for the proposals. The analysis is then thoroughly scrutinised by the Impact Assessment Board, which has previously emphasised the need for all impact assessments to include solid, detailed grounds for subsidiarity.

With regard to application by the national parliaments, the report states that, despite a 9 % increase in the submission of reasoned opinions in 2012, these only accounted for approximately 10.5 % of the 663 opinions that were submitted to the Commission in 2012 as part of the wider political dialogue with the national parliaments (known as the Barroso initiative). The three national parliaments that produced the most reasoned opinions in 2012 were the Swedish Parliament (20), the French *Sénat* (7) and the German *Bundesrat* (5). The subsidiarity report states that the Swedish Parliament scrutinises all Commission proposals in terms of subsidiarity, and it decentralises scrutiny to all Parliamentary committees, which seem to apply different criteria. With reference to the third follow-up report by the Committee on the Constitution (report 2012/13:KU8), the report emphasises that this may have an impact on the number of reasoned opinions issued by the *Riksdag* (Swedish Parliament). The subsidiarity report also refers to the eighteenth bi-annual report of COSAC, which gives an overview of the procedures and practices regarding Parliamentary scrutiny. According to the COSAC report, the replies sent by the national parliaments to a questionnaire state *inter alia* that most national parliaments are of the opinion that subsidiarity checks are not effective unless a proportionality check is included. According to the COSAC report, a large majority of national parliaments report that their reasoned opinions are often based on a broader interpretation of the principle of subsidiarity than the wording in Protocol No 2 on the application of the principles of subsidiarity and proportionality (hereinafter *the Subsidiarity Protocol* or the *Protocol*). For example, the Dutch *Eerste Kamer* believes that 'it is not possible to exclude the principles of legality and proportionality when applying the subsidiarity check'. Both the Czech *Senát* and the British House of Lords expressed similar views on the general and abstract nature of the subsidiarity principle. The latter argued in favour of a wider interpretation of the principle because 'in practice its application depends on political judgement'.

With regard to application of the principles of subsidiarity and proportionality by the legislature (the European Parliament and the Council), the Commission's subsidiarity report states that the Committee of Permanent Representatives (Coreper) ensures that the principles are respected by the Council. The report also states that the European Parliament (EP) created a new directorate in 2012 that handles assessments *inter alia* of changes that the EP is considering, at the request of individual EP Committees.

With regard to application by the European Court of Justice (hereinafter *the Court*), the report states that in 2012 the Court did not give any judgments that significantly developed the subsidiarity principle. In two of its judgments, the Court confirmed that the subsidiarity principle does not apply in the field of State aid, in which the Commission has exclusive competence (Case C-288/11) and that the same principle, and more generally the competence rules of the Treaty, do not give rise to individual rights, and therefore an infringement of these rules does not in itself cause non-contractual liability of the Union and its institutions (Case C-221/10).

Cases where subsidiarity concerns were raised

This section explains the Commission proposals that caused the most discussion about subsidiarity and proportionality, primarily the Monti II proposal (Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services), against which the national parliaments issued the first 'yellow card' (i.e. reasoned opinions representing more than 18 votes). Most of the Parliaments that adopted reasoned opinions questioned the application of Article 352 TFEU as the legal basis for the Monti II proposal. Most found the use of this legal basis to be insufficiently justified. Some Parliaments expressed doubts as to the added value of the proposal and the need for the action proposed. The report states that the Commission, however, found that the principle of subsidiarity had not been breached, but it recognised that its proposal was unlikely to gather the necessary political support, and it withdrew the proposal on 26 September 2012. This section also discusses the proposal for a Fund for European Aid to the Most Deprived. The five reasoned opinions triggered by this proposal included one from the Swedish Parliament, which pointed out *inter alia* that social security is the responsibility of Member States and aid is most efficiently managed by Member States (please see report 2012/13:SoU8).

Conclusions of the subsidiarity report

2012 brought increased awareness of the principles of subsidiarity and proportionality in the inter-institutional context, not least due to the triggering of the first yellow card. The Commission is of the view that the intensification of discussions concerning the definition of the principles in 2012 is based on a need to better define the scope of subsidiarity control as described in the Treaty. According to the Commission, national parliaments see clear benefits in closer coordination of their scrutiny work, and more voices call for guidelines, although they wish to retain the right to interpret these principles. In this context, the Commission points out in its subsidiarity report (COM(2013) 566) that its Impact Assessment Guidelines already set out clearly the criteria that must be used to assess the compliance of Commission

proposals with the principles, and that the Commission has always encouraged other institutions to apply the same criteria.

Main challenges of political dialogue

The relations report (COM(2013) 565) states that in 2012 the national parliaments focused even more on the European response to the crisis. The Danish COSAC Presidency boosted Parliamentary activity *inter alia* on the twelve key actions in the Single Market Act. At the COSAC meeting in April 2012, there was a call for enhancing political dialogue during the European Semester. The Commission therefore committed itself to intensified dialogue with national parliaments at two times in particular: first, early in the year, following the publication of the Annual Growth Survey, and secondly once the European Council has endorsed the country-specific recommendations. The political dialogue between the Commission and the national parliaments in 2012 also concerned the question of better coordination between Member States' macro-economic and budgetary policies. The issue of the democratic legitimacy of the European Semester also started to emerge as a key feature of inter-Parliamentary dialogue as such, and of national parliaments' dialogue with the Commission.

Written opinions from national parliaments

This section discusses *inter alia* participation in and the scope of political dialogue between the Commission and the national parliaments. With regard to participation, the report states that a total of 663 opinions (including reasoned opinions) were received from the Parliaments in 2012, which represents an increase of nearly 7 % as compared with 2011. The Commission notes that the increase is much smaller than in previous years (it was 55 % in 2010 and 60 % in 2011). There was a particular increase in the number of opinions from the Portuguese Parliament (which alone accounted for just over 34 % of all opinions sent to the Commission in 2012), both chambers of the German Parliament, and the French, Italian and Polish Senates. There were six chambers that did not participate in the political dialogue at all in 2012 (compared to four in 2011 and ten in 2010). Overall, some 15 chambers sent more opinions in the context of the political dialogue in 2012, some 15 were less active, and seven sent exactly the same number of opinions as in 2011.

In the relations report, the Commission notes particularly that the Swedish Parliament did send nearly double the number of reasoned opinions (20 instead of 11), but 60 % fewer opinions relating to the content of Commission proposals and initiatives. 2012 saw a continuation of the trend whereby national parliaments are focusing their political dialogue with the Commission more and more on legislative, rather than non-legislative, documents. Only a negligible proportion of the Parliaments' opinions concerned non-legislative documents. The exception to this was the Swedish Parliament. Its 13 political opinions concerned exclusively non-legislative documents, while the 20 opinions issued on legislative documents were all reasoned opinions.

With regard to the focus of opinions in both 2012 and in previous years, the Commission's relations report states that there are three policy areas that are perennial and key areas of interest for the national parliaments: the internal market and services, justice, and home affairs.

Contacts and visits

The Commission continued its practice of responding to consultation by the national parliamentary committees upon request and holding regular network meetings for the Permanent Representatives of the national parliaments at Brussels to discuss forthcoming initiatives or pending cases. Officials from ten of the Commission's Directorates-General attended 17 meetings with the Parliaments' Permanent Representatives.

Outlook

The Commission's assessment is that the debate on democratic legitimacy will stay high on the agenda for inter-institutional dialogue in 2013, including the dialogue between the Commission and the national parliaments. The Commission will focus on effective implementation of the strengthened political dialogue it has offered national parliaments at two crucial points in the European Semester process. The Commission is strongly encouraging the Parliaments to enter into enhanced discussion with it on the priorities identified in the Annual Growth Survey and on the most efficient way for national policy-making to implement the country-specific recommendations. The Commission is of the view that this is especially important as the European Semester is becoming a crucial tool in supporting and accompanying structural reforms in Member States. For instance, the Commission has introduced the EU Justice Scoreboard into the European Semester. Finally, the Commission mentions that it supports the initiative of a regular 'Europe Day' to raise awareness of European affairs.

The Committee's review

Legislation, etc. in force

The EU Treaty

According to Article 5(3)(1) 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. According to the second sub-paragraph, the institutions of the Union shall apply the principle of subsidiarity as laid down in Protocol No 2 on the application of the principles of subsidiarity and proportionality (hereinafter *the Subsidiarity Protocol* or *the Protocol*), and national parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol. According to Article 12(a) of the EU Treaty, national parliaments contribute actively to the good functioning of the Union through being informed by the institutions of the Union and having draft legislative acts of the Union forwarded to them in accordance with the Protocol on the role of national parliaments in the European Union (hereinafter *the Protocol on the role of national parliaments*).

Treaty on the Functioning of the European Union (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. The Swedish Government Bill adopting the Treaty of Lisbon states that the above list is exhaustive (Bill 2007/08:168, p. 98).

Protocol on the role of national parliaments

Article 4 of the Protocol states that an eight-week period shall elapse between a draft 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 or for adoption of a position under a legislative procedure. Exceptions shall be possible in cases of urgency, the reasons for which shall be stated in the act or position of the Council. Save in urgent cases for which due reasons have been given, no agreement may be reached on a draft legislative act during those eight weeks. Save in urgent cases for which due reasons have been given, a ten-day period shall elapse between the placing of a draft legislative act on the provisional agenda for the Council and the adoption of a position.

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. The Preamble to the Protocol states that the high contracting parties wished to ensure that decisions are taken as closely as possible to citizens of the Union. Article 4 states *inter alia* that 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. the Council and EP in most cases). Article 5 states *inter alia* that draft legislative acts shall be justified with regard to the principles of subsidiarity and proportionality. That Article also states that any draft legislative act should contain a detailed statement making it possible to appraise compliance with the principles of subsidiarity and proportionality, and that this statement should contain 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. Article 6 states that any 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.

The *Riksdag* (Swedish Parliament) Act

Consideration of EU documents

According to Section 5(1) of Chapter 10 of the Riksdag Act (RA), the Riksdag shall consider green papers and white papers which are forwarded to the Riksdag in the manner laid down in this paragraph. After conferring with the special representatives of the party groups, the Speaker may determine that other documents from the European Union, other than draft legislative acts, shall also be considered in this manner. According to the third paragraph, the provisions of Section 8 of Chapter 4 apply to the Committee's examination of the document, i.e. the examining committee may give another committee the opportunity to express its views on a matter or issue relating to that committee's area of responsibility, and that the Committee shall obtain any necessary information from the Swedish Government. According to the fourth paragraph, the Committee shall give an account of its examination in a statement to the Chamber (hereinafter *review statement*). Sections 15 and 16 of Chapter 4 apply to the Committee's decision regarding the statement; in other words, members have the right to request an open vote within the Committee and for the statement to contain reservations or special opinions. According to the fifth paragraph, the Chamber takes a decision on the statement.

The statement by the Committee on the Constitution on the legal case (2005/06:KU21, pp. 28–29) states that a decision by the Chamber in relation to the consideration of the EU documents in question is not legally binding upon the Swedish Government or the Swedish Parliament or any of the Swedish Parliament's bodies. The Committee also stated that a parliamentary decision on such matters may be regarded as a preliminary view of a non-binding nature in constitutional terms, but that such opinions may, however, be regarded as expressive of the prevailing opinions at the Swedish Parliament and thus provide the

Swedish Government with an opportunity to check whether these views are deeply rooted at the Swedish Parliament.

Subsidiarity control

According to Section 6(1) of Chapter 10 of the RA, 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 the Committee so requests, the Swedish 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. It also states that the Committee shall also deliver a statement to the Chamber (hereinafter *control statement*) if so requested by at least five members of the Committee, and 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 statements by both the Lisbon Committee (2008/09:URF2) and the Committee on the Constitution (2009/10:KU2, pp. 13–15) on the legal case stated that the subsidiarity control is mainly a test of applicability and that it must therefore be carried out by the Committee that has expertise in the area in question. The Committee emphasised that the test involves determining the level, whether Union level or national level, at which the proposed measures are to be implemented, not whether the proposed measures are to be implemented or not, and that the Committee should seek guidance for the test from the guidelines that have provided guidance on the application of the subsidiarity principle ever since it was inserted into the EU Treaty, and which the Committee cited. The preparatory work also states that national parliaments have an obligation under the Treaty to ensure that the subsidiarity principle is complied with (2008/09:URF2, p. 30).

Summary

To summarise, the current arrangements for the processing of various EU documents by the Swedish Parliament as part of the EU decision-making process involves the following. During the initial stage of the process, the Committee and the Swedish Parliament must examine green and white papers and other EU documents, with the exception of draft legislative documents. As part of this examination, subsidiarity aspects may be discussed afresh in so far as the Committee's examination uncovers any. The Committee's review leads to a review statement in accordance with Section 5 of Chapter 10 of the RA.

At one of the later stages in the process, and in accordance with Section 6 of Chapter 10 of the RA, the Committee and, in some cases, the Chamber and the Swedish Parliament, must assess the applicability of the principle of subsidiarity to certain draft legislative acts. As part of this assessment, the Swedish Parliament may send a reasoned opinion to the Presidents of the European Parliament, the Council and the Commission stating why it considers that the draft in question does not comply with the principle of subsidiarity. If at least five Committee members consider a draft not to comply with the principle of subsidiarity, they have the right

to propose a reasoned opinion in a control statement submitted by the assessing Committee to the Chamber.

The Commission's Impact Assessment Board

The Impact Assessment Board was established by the Commission President in 2006. It carries out independent quality controls on the Commission's impact assessments. The Board's controls are predominantly carried out by reviewing draft impact assessments. The Board may issue statements making recommendations for improving such drafts, on the basis of its reviews. The Board's statements are published. The Board's report for 2010 was published in January 2011 (please see statement 2010/11:KU26, p. 11 f. for a brief summary of the relevant parts of the report). The Board's report for 2011 was published in January 2012; please see SEC(2012) 101. This report stated that the Board believed on the whole that the Commission had continued to make progress in its use of evidence-based decision-making, and that the record numbers of impact assessments sent in 2011 demonstrated the depth to which work on impact assessments was rooted in the Commission's work methods. The Board did, however, emphasise that the quality of the impact assessments remains variable. The report stated that, even though the proportion of recommendations in opinions relating to subsidiarity and proportionality in 2011 (43 %) had fallen in comparison with 2010 (50 %), views were still submitted in a significant number of the Board's opinions (compared to 2007–09, when the proportion of such recommendations hovered at around 30 %). In its report, the Board states that it often asks for stronger justification of the need for action at EU level.

The Board's report for 2012 was published on the Commission website in February 2013. The report stated that the Board had noted significant concerns relating to subsidiarity in connection with a number of impact assessments. Against this background, it recommended that all of the Commission's Directorates-General should pay particular attention to the subsidiarity justifications given in proposals, especially bearing in mind the new subsidiarity control mechanism introduced by the Treaty of Lisbon. Despite the fact that the proportion of recommendations in opinions relating to subsidiarity and proportionality in 2012 (33 %) fell further (please see above for the proportions in 2010 and 2011), the Board was of the view that there was room for improvement.

The Board's report for 2013 was published on the Commission website in April 2014. The report states *inter alia* that the proportion of recommendations in the Board's opinions relating to subsidiarity and proportionality had increased, but only marginally.

Statistics from the Riksdag Administration

Control statements

According to information compiled by the Secretariat of the Chamber, the Chamber dealt with five control statements in accordance with Section 6 of Chapter 10 of the Riksdag Act during the 2010-11 session. Three of these were debated by the Chamber, and none of them resulted in a vote. In all five cases, the Swedish Parliament decided to send reasoned opinions to the Presidents of the EP, the Council and the Commission. The Commission has responded

to all of the reasoned opinions adopted by the Swedish Parliament during the 2010-11 session.

During the 2011-12 session, the Chamber dealt with 22 control statements, one of which related to two draft legislative acts. Of these, 14 were debated by the Chamber, and ten of them resulted in a vote. In 20 cases, the Swedish Parliament decided to send reasoned opinions, one of which related to two draft legislative acts. The Commission has responded to all of the reasoned opinions adopted by the Swedish Parliament during the 2011-12 session.

During the 2012-13 session, the Chamber dealt with 15 control statements, one of which related to five draft legislative acts. Of these, four were debated by the Chamber, and three of them resulted in a vote. In all 15 cases, the Swedish Parliament decided to send reasoned opinions, one of which related to five draft legislative acts. The Commission has responded to all of the reasoned opinions adopted by the Swedish Parliament during the 2012-13 session.

Thus far during the 2013-14 session, the Chamber has dealt with five control statements. Of these, three have been debated by the Chamber, and one of them has resulted in a vote. In four cases, the Swedish Parliament has decided to send reasoned opinions. The Commission has thus far responded to all four of the reasoned opinions adopted by the Swedish Parliament during the 2013-14 session.

In total, therefore, the Swedish Parliament has sent 44 reasoned opinions to date since the Treaty of Lisbon entered into force, and relating to 49 draft legislative acts. To date, the Swedish Parliament has carried out subsidiarity checks on a total of 481 draft legislative acts.

Review statements

According to information from the Secretariat of the Chamber, the Committee submitted ten review statements during the 2006-07 session. Seven out of these ten statements were debated by the Chamber, and three of them resulted in a vote. The European Commission responded to nine of the Swedish Parliament's statements from the 2006-07 session.

The Committee submitted 17 review statements during the 2007-08 session. Eight out of these 17 statements were debated by the Chamber, and two of them resulted in a vote. The Commission responded to all of the Swedish Parliament's statements from the 2007-08 session.

The Committee submitted 18 review statements during the 2008-09 session. Nine out of these 18 statements were debated by the Chamber, and six of them resulted in a vote. To date, the Commission has responded to 15 of the Swedish Parliament's statements from the 2008-09 session.

The Committee submitted 17 review statements during the 2009-10 session. Seven out of these 17 statements were debated by the Chamber, and six of them resulted in a vote. The Commission has responded to 16 of these 17 statements.

The Committee submitted 26 review statements during the 2010-11 session. Some 18 out of these 26 statements were debated by the Chamber, and nine of them resulted in a vote. The Commission has responded to 25 of these 26 statements.

The Committee submitted 23 review statements during the 2011-12 session. Some 15 out of these 23 statements were debated by the Chamber, and ten of them resulted in a vote. The Commission has responded to all of these 23 statements.

The Committee submitted 14 review statements during the 2012-13 session. Eight out of these 14 statements were debated by the Chamber, and four of them resulted in a vote. The Commission has responded to 13 of these 14 statements.

Thus far during the 2013-14 session, the Committee has submitted two review statements. Both of them have been subject to debate by the Chamber, and both have resulted in a vote. The Commission has not responded to either of these two statements.

Follow-up of application of the principle of subsidiarity

The Committee on the Constitution carried out its fourth annual follow-up on the application of the principle of subsidiarity (report 2013/14:KU5) in autumn 2013, finishing it on 5 December 2013. This follow-up covers the period 1 January – 31 December 2012 as well as the 125 subsidiarity checks carried out by the Swedish Parliament during that period. The Committee has given other committees an opportunity to express their views on certain observations that the Committee made when it reviewed the subsidiarity checks that had been carried out. The review of justifications for the subsidiarity principle in the 125 relevant subsidiarity checks showed that there were either no or deficient justifications in nearly one-eighth of cases (i.e. in 16 cases or approximately 13 %). There is a slight quantitative improvement in comparison with previous follow-ups. In 2011, approximately one-seventh of cases had no justification (i.e. 20 out of 124 drafts), or approximately 16 % of proposals (report 2012/13:KU8, p. 56). On the whole for the two follow-ups relating to 2010 (reports 2010/11:KU18 and 2011/12:KU4), there were no or deficient justifications in one-third of cases (a total of 24 out of 71 proposals), or approximately 34 %. The deficiencies noted by the Committee in this respect are naturally unacceptable. The Committee on the Constitution noted that several of the Swedish Parliament's other committees had also pointed out that the justifications were often very brief. The Committee on the Constitution emphasised the importance of the fact that the Commission, in its capacity as the body that submits draft legislative acts, also submits thorough justification as to why the draft is compatible with the principle of subsidiarity. The Committee stated that in many cases the Commission's justifications are almost obligatory texts and are not written on the basis of the prevailing conditions in the draft in question. The justifications are thought to be based on the requirement to carry out subsidiarity checks rather than being based on individual cases, and the Committee is of the view that circular arguments can be put forward. It is often said that the aims of a proposal cannot be achieved unless action is taken at EU level, but there is no explanation of why the aims cannot be achieved. It is also often the case that the Commission provides extensive arguments relating to subsidiarity in the working document but not in the draft that is sent to the Parliaments. The Committee on the Constitution is of the view that a clear improvement would be to reproduce these arguments in the draft that is sent to the national parliaments. The Committee recalled that, according to the Subsidiarity Protocol, the Commission and other proposers have an absolute obligation to justify their draft legislative acts with regard to the principle of subsidiarity. Much remains to be done before the Commission fulfils the requirements of the Protocol. Against this background, the Committee reiterated and stressed that omitted or scanty justifications in turn mean that it is difficult for

the Swedish Parliament and other national parliaments to fulfil their obligation under the Treaty to ensure that the principle of subsidiarity is followed in accordance with the Protocol. The Committee is of the view that this constitutes a serious deficiency in the European Union legislative process. The Committee emphasised that it is of the utmost importance for the Commission to send proposals that include more exhaustive accounts of its reasoning in concluding that the proposals are compatible with the principle of subsidiarity. The Committee on the Constitution is of the view that exhaustive justifications are a prerequisite for the national parliaments to be able to check the compatibility of the proposals with the principle of subsidiarity.

Findings by the Secretariat of the Chamber

EU coordination at the Secretariat of the Chamber has involved combining its experience and findings regarding the criteria for the scope of the Subsidiarity Protocol in a memorandum dated 15 April 2014. The memorandum relates to findings in 2013 and also includes observations building on those reported in the three previous frameworks for 2010, 2011 and 2012 (please see statements 2010/11:KU26, p. 18 f., 2011/12:KU5, p. 24, and 2012/14:KU14, p. 22 f.). The memorandum comments on the Commission's administrative routines, matters that could by their very nature constitute exclusive competence, some other findings concerning the subsidiarity checks, and finally the Swedish Parliament's other review procedures under Section 5 of Chapter 10 of the Riksdag (Swedish Parliament) Act (RA).

With regard to experiences in 2013, the EU coordination unit is of the view that the Commission's administrative routines relating to the application of the subsidiarity control mechanism have established themselves and now include a reasonable amount of the clarity and predictability required by the Committee on the Constitution (please see statement 2010/11:KU26). The EU coordination unit is also of the view that the Commission has, as the Committee requested (opinion 2011/12:KU5), clarified application in relation to amended proposals and the areas covered by the Union's exclusive competence. The Commission's approach, as may be seen from its response to the Committee's most recent statement (statement 2012/13:KU14), means that the Commission believes amended proposals are not covered by the subsidiarity control mechanism, but that it may, in exceptional circumstances, subject amended proposals to a subsidiarity check if the proposed amendments are such that they could affect the subsidiarity analysis. According to the EU coordination unit, however, there are grounds for continuing to adhere to application in the future. In this context, two cases in the area of VAT have been referred to where the Commission cited the introduction of the subsidiarity check as a reason for particular attention in the future.

The memorandum by the EU coordination unit highlights two other findings. The first relates to the eight-week block in Article 4 of Protocol No 1 on the role of national parliaments in the European Union (please see the section above on legislation, etc. in force), which applies to Council decisions in new cases. The second relates to the proportionality criterion, which may be regarded (please see report 2010/11:KU18, p. 9) as being included in the subsidiarity assessment. In the first instance, which was caused by two referred cases, the memorandum states that the exception to this block (which may be made in urgent cases for which due reasons have been given) means that the opportunity for the national parliaments to exercise their right, as enshrined in the Treaty, to check the subsidiarity of draft legislative acts may in practice be restricted to its content, or at least limited by bringing forward the deadline for

performance of the check. In this context, the EU coordination unit is of the opinion that, in cases where the Commission recommends an exception from the block, it would be advantageous for the Commission to notify the Swedish Parliament and the other national parliaments of this, not only in the justification for the proposal but also in the Protocol 2 documents (which precede a subsidiarity check). The second matter is based on the Commission communication on an overhaul of the proposal to establish a European Public Prosecutor with regard to the principle of subsidiarity; please see the response sent by the Commission to the Swedish Parliament concerning its reasoned opinion (please see statement 2013/14:JuU13). The communication and response state that the Commission is of the view that some of the Swedish Parliament's arguments are close to the limits for the principle of subsidiarity, while others are not. Even if the Commission is inconsistent in this respect, this is a specific argument linked to the proportionality criterion which is, as the Committee on the Constitution has pointed out, accommodated by the subsidiarity check. The Commission's approach, i.e. not accepting arguments in reasoned opinions relating to proportionality aspects, has also been confirmed through contact between the EU coordination unit and Commission officials. The EU coordination unit notes in this context that, in a letter to the Commission, the European Union Committee of the British House of Lords expressed its fears that the Commission could thus regard itself as being able to narrow down the meaning of the principle of subsidiarity unilaterally.

In its memorandum, the EU coordination unit notes that, in its report on relations with national parliaments, the Commission highlights the Swedish Parliament as the only exception from a trend whereby national parliaments are focussing their political dialogue with the Commission on legislative acts rather than other documents. According to the memorandum, the comments show that the Commission has not entirely grasped the purpose of the review of Union documents by the Swedish Parliament. The memorandum mentions the fact that the Commission considers it noteworthy that the Swedish Parliament sent 60 % fewer opinions on Commission initiatives in 2012 than in 2011. According to the EU coordination unit, however, the reason for the variation is not so much a change in approach at the Swedish Parliament but rather a change in the types of document that the Commission is adopting. Section 5 of Chapter 10 of the RA states that the number of green and white papers from the Commission has a direct impact on the number of review statements that are dealt with by the Chamber. These papers account for approximately half of the documents reviewed by the Swedish Parliament. The memorandum states that no unequivocal signs of changes to the Swedish Parliament's review procedure can be perceived in the outcome of the procedure. One of the alternative explanations mentioned in the memorandum could be the Commission's mandate cycle, i.e. the fact that the Commission adopts several policy strategy documents, i.e. green and white papers, some way into and towards the middle of the Commission's mandate and then reduces them towards the end.

Opinions from other national parliaments

The IPEX database contains information that has been submitted concerning positions and opinions from other national parliaments on the Commission's current reports. Up until 27 May 2014, according to information in the database, six chambers in the Member States had finished their review of the subsidiarity report, and five chambers had finished their review of the relations report. Some of these opinions are available in English in the database, and have been summarised by the Secretariat of the Committee on the Constitution below.

The United Kingdom's House of Commons

On 6 November 2013, the European Scrutiny Committee of the British House of Commons published its twenty-second report, which discussed the Commission reports under review here. With regard to the relations report, the Committee shared the view of the British Government regarding the importance of strong democratic and parliamentary responsibility requirements and legitimacy at the national level. In this context, the Committee pointed out that it also shared the view of the British Minister for Europe that the Commission's apparent focus on these matters is being trivialised by its recommendation of the proposed 'Europe Day'. With regard to the subsidiarity report, the Committee agreed that the development of common criteria for assessing compliance with the principles of subsidiarity and proportionality could be detrimental to the freedom of national parliaments to interpret these principles. The Committee also supported the fact that the Minister pointed out the Commission's lack of responses to reasoned opinions, and above all the absence of individual responses to the reasoned opinions that triggered the first yellow card on the Monti II proposal. The Committee also asked the Minister to explain what was meant by the 'reinforced yellow card' initiative and the new 'red card' that was discussed then, and the approach to be used for them. Finally, the Committee highlighted to the Minister the defects in the British Government's equivalents to memoranda or subsidiarity assessments in terms of subsidiary assessments founded on an insufficient basis, and it wondered what the Minister could do to solve this.

Italy's Chamber of Deputies

On 15 January 2014, the Chamber's Committee on European Union Policies sent the following observations after a review of the Commission's subsidiarity report. The Union's institutions must adapt their activities so that they better reflect the dynamic nature of the principle of subsidiarity, which may involve increasing the scope of action taken at the Union level where circumstances so require, or on the contrary limiting or completely discontinuing action where there are no longer any grounds for such action. The Committee is of the view that every kind of coordination for subsidiarity checks could be contrary to the Treaty. The Italian Committee feels that even lower thresholds for the use of yellow or orange cards could be unacceptable, since the Parliament could thus be encouraged to block or slow down Union legislation. The Committee was of the view that proposers, primarily the Commission, should provide more detailed subsidiarity justifications for their proposals. The Council should develop tools for producing impact assessments like the Commission and the EP, and the methods used by all of these Union institutions to produce impact assessments should be comparable in order to support the subsidiarity checks carried out by the national parliaments.

Italy's Senate

On 20 November 2013, the Senate's Committee on European Union Policies adopted a resolution on both the subsidiarity report and the relations report reviewed in this statement. The resolution states *inter alia* that there is still a need to give the Senate the right to review non-legislative proposals from the Commission too, and to promote the gradual Europeanisation of the activities of the national parliaments. The resolution highlights the

importance of strengthening the legitimacy of measures taken at the EU level through cooperation and coordination between the national parliaments and the European Parliament, particularly with regard to measures for implementing and following the finance pact and the growth and employment pact.

Germany's *Bundesrat*

On 29 November 2013, the *Bundesrat* adopted an opinion on the subsidiarity report, in which it pointed out *inter alia* the value of continued discussions to reach a consensus on the principles of subsidiarity and proportionality. This should be viewed in light of the differing opinions and definitions found in relation to these principles at both the national and European levels. In this context, the *Bundesrat* emphasised that subsidiarity checks must also include a competence check, and that the Commission should in the future give deeper consideration to the arguments submitted through reasoned opinions. Finally, the *Bundesrat* stressed the importance of coordination between the national parliaments with regard to subsidiarity matters, and it highlighted the 'Monday morning meetings'.

The Czech Senate

On 30 October 2013, the Senate adopted a resolution that dealt with both the subsidiarity report and the relations report. The Senate took the view that inter-parliamentary cooperation is an important instrument for exchanging information and views between the national parliaments and the European Parliament. The Senate did not, however, consider such cooperation to be an instrument that guarantees democratic legitimacy or the required responsibility. The Senate appreciated the network of national parliaments' Permanent Representatives to the Union. According to the Senate, this network has developed into a practical tool for exchanging information that facilitates coordination. The Senate encouraged both the EP and the Commission to improve the quality of political dialogue by responding to the national parliaments' contributions in a more specific, detailed manner, rather than merely repeating general statements from the justifications for their original proposals. The Senate was, however, aware that this meant the Senate itself submitting specific proposals and views in its opinions for Union institutions.

Overview of knowledge concerning the principles of subsidiarity and proportionality

In order to obtain deeper knowledge of the specific content of the principle of subsidiarity, including under EU law, as well as the relationship between the principle of subsidiarity and the principle of proportionality and how each of these principles is applied by the Union institutions and by the Member States, the Committee on the Constitution decided on 11 June 2013 to issue a mandate to produce an overview of knowledge on the principles of subsidiarity and proportionality. This mandate was issued to the Swedish Institute for European Policy Studies, and it entails the production of a report *inter alia* by Jörgen Hettne, Senior Researcher in EU Law. On 5 December 2013, the key conclusions from the report were delivered at a meeting of the Committee. March 2014 saw the publication of the report (2013/14:RFR10) Subsidiarity in the EU Following the Treaty of Lisbon. The evaluations

and conclusions set out in the report are the authors' own, and the members of the Committee have not taken a position on its content, which is summarised below.

The principle of subsidiarity essentially has nothing to do with either the distribution of powers (competences) in the strict sense of the word or predetermined preferences with regard to where the power should be. Instead, the principle should be viewed as an applicability rule that helps to answer the question of which decision-making level (local, regional, national or international) is the most appropriate one for regulating a certain policy issue. Nevertheless, the principle has been introduced into cooperation at the Union level as a block to prevent centralisation, with the stated aim that decisions must be made as closely to citizens as possible. It may thus be treated as a decentralisation principle. Twenty years after the principle of subsidiarity was introduced, the European Court of Justice has still not given the principle any clear, specific content. The principle comprises two separate requirements or criteria. The Union must only adopt a measure if the objective cannot be achieved adequately by the Member States (the inadequacy criterion) and it can therefore be better achieved at the Union level (the added-value criterion). Both criteria must be fulfilled in order for the Union to be regarded as the most appropriate decision-making level.

The principles of subsidiarity and proportionality are reproduced in two separate provisions of Article 5 of the EU Treaty with different requirements that aim to regulate different aspects of how the Union may use its powers, even if a similar reasoning is given under both headings. It is not an unusual or controversial view that 'usual' proportionality is actually more useful than subsidiarity with regard to solving the question of which measures are appropriate for the Union to take and in which areas it is better for the Member States to act. The fact that there are difficulties in defining the principle of subsidiarity and giving it relevant, meaningful content, which in practice can often result in the reasoning for an EU measure covering proportionality alone, should not result in the conclusion that a full-scale proportionality assessment is actually part of the very principle of subsidiarity.

It is difficult to assess fully what the impact of subsidiarity checks by the national parliaments is or could be expected to be after only a few years. It is, however, obvious that there is some variation in approaches to the question of what constitutes an infringement of the principle of subsidiarity, and that these assessments, whether consciously or not, do not always fall within the framework prescribed by Article 5 of the EU Treaty and the Lisbon Protocol. It may also be said that, whatever is meant by this politically accentuated subsidiarity check, the Commission has voluntarily withdrawn at least one proposal (the Monti II Regulation) because there was deemed to be too much political opposition.

The overview states *inter alia* that the subsidiarity checks carried out by the Swedish Parliament appear to have created increased awareness and greater engagement with EU affairs among the members of the Swedish Parliament within a short space of time. It is obvious that the new Lisbon Protocol has been of great significance for this development, while the decentralised application of the principle of subsidiarity to all of the relevant committees of the Swedish Parliament has certainly also played its part. To summarise, the authors of the report are of the view that the subsidiarity checks carried out by the national parliaments are still under-developed and that they differ considerably. At present, there is also no clear link between the politically accentuated advance checks and the legal *ex post* checks with regard to the application of the principle of subsidiarity. Even if the contexts are different (before and after rules were adopted by the EU), the same principle applies. There is a large gap between policy and the judiciary, and if the subsidiarity checks were to be

extended so as to question both new and existing rules and give the national parliaments the right of veto at the proposal stage, the report's authors feel that there would probably be reason for the European Parliament to fear that subsidiarity arguments could be used as a pretext for questioning everything that has been achieved at the Union level. The current system has, however, had an impact, despite a lack of commitment on the part of many national parliaments. One of the most important functions is considered to be the fact that the subsidiarity checks give the Commission another forum for political reconciliation, whereby it has its own opportunity to assess whether a particular proposal is ripe for attracting sufficient political support during the forthcoming decision-making process. Against this background, the report's authors consider it premature to change the current system. The system is under-developed, but it is considered to have worked adequately so far.

With regard to the lack of clarity in practice in terms of deciding what constitutes exclusive competence under the EU Treaty, the report's authors agree with the Committee on the Constitution on this point (please see statement 2012/13:KU14, p. 32). The wording of what constitutes exclusive competence was subject to detailed consideration during the work on the European Convention. The Union's exclusive competence should not go beyond what is clearly stated in the Treaty. According to the report's authors, the opposite interpretation would contravene the principle of delegated powers. The fact that some Union measures are internal in nature and do not generate interest within the national parliaments' subsidiarity checks is another matter, and it should not be confused with the question of exclusive competence. Even if it is a fact that the question of competence is always the starting point for assessing whether, in terms of EU law, the Union can and should legislate – even where a subsidiarity check is carried out – the report's authors are of the view that it is important to clarify that the question of competence is independent of the ongoing assessment in question, i.e. the assessment of the specialised content of the legislation. Despite the fact that there is a clear link between the principle of delegated powers and the principle of subsidiarity in that they are included in the same Article of the EU Treaty and both of these principles deal with the right of the Union to adopt measures, they are still two different principles with different functions.

Previous reviews

In spring 2013, the Committee issued two statements (statements 2012/13:KU14 and 2012/13:KU15) discussing the Commission report on relations between the European Commission and national parliaments (COM(2012) 375) and the Commission report on subsidiarity and proportionality (COM(2012) 373). The Committee on the Constitution emphasised that incomplete subsidiarity justifications are a serious defect in the Union legislation process, and it rejected the idea that national parliaments should be required to carry out subsidiarity checks on proposals where no justification has been given at all. The Committee was of the view that the absence of justification should be treated as neglect of the Subsidiarity Protocol. The Committee felt that one possible scheme for dealing with proposals for which no justification is given could be to send them back to the proposer so that they can be drafted in accordance with the Treaty and the Protocols thereto. The Committee also doubted whether the subsidiarity checks were effective in their present form. One aspect relating to the effectiveness of the subsidiarity checks was the relatively short deadline for carrying them out. Against the background of the findings made by the EU coordination unit on certain matters of principle, the Committee emphasised both the

importance of ensuring that all proposers at the Union level establish routines with a view to ensuring that national parliaments submit proposals and are informed that a procedure is being launched in accordance with the Subsidiarity Protocol, and that the 'doctrine' of some kind of exclusive competence for matters of a certain nature (i.e. that matters other than those explicitly mentioned in Article 3 TFEU could by their own special nature constitute an exclusive competence for the Union) could be difficult to adopt, even if it is logical, if the proposer introduces provisions that go beyond the special nature on which such doctrine is based. The Committee also pointed out the absolute obligation for the Commission and other proposers to send their draft legislative acts and other amended drafts to the national parliaments at the same time as to the Union legislature, in accordance with Article 4 of the Subsidiarity Protocol. The Committee recalled that the content of the principle of subsidiarity enables Union measures to be taken as part of the Union's powers where circumstances so require, and on the other hand that measures be restricted or curtailed when they are no longer warranted.

On 25 July 2012 Commissioner Šefčovič sent a response (C(2013)4869) relating to statement 2012/13:KU14. The response stated that the Commission's view was *inter alia* that it was unusual for a proposal not to have any subsidiarity justification, but that national parliaments may consult the Commission services for clarification and further information regarding a proposal. The Commission also stated in its response that any changes to the check procedure under the Subsidiarity Protocol must be approved by the Member States in the event that the Protocol is overhauled. With regard to the question of exclusive competence for matters of a certain nature, the response states that the Commission does not consider the list of areas where the Union has exclusive competence contained in Article 3 TFEU to be exhaustive. The Commission is also of the view that some proposals can only be made at Union level and are therefore not covered by the EU's exclusive competence. This primarily concerns budget matters and institutional affairs (e.g. the Regulation on the multi-annual budget framework, the citizenship initiative, and rules on access to documents from Union institutions and bodies). Such proposals cover areas where the Member States cannot legislate themselves and the mechanism for subsidiarity checks is thus irrelevant and inappropriate in the Commission's view. With regard to amended drafts, the Commission is of the view that submitting an amended proposal does not mean that the eight-week deadline for the subsidiarity check must be renewed. It is only in exceptional cases where the proposed amendments are so considerable that they could affect the subsidiarity analysis that the Commission will consult the national parliaments again with regard to the compatibility of the amended proposal with the principle of subsidiarity.

Resolution of the European Parliament

On 4 February 2014, the European Parliament (EP) adopted a resolution on the appropriateness, subsidiarity and proportionality of EU legislation – the nineteenth report on better law making relating to 2011, i.e. the report for the year before last, which the Committee on the Constitution dealt with in spring 2013 (please see statement 2012/13:KU14). In its resolution, the EP defines the principle of subsidiarity as a political guideline on how power is to be exercised at Union level. It also states that subsidiarity and proportionality are principles that go hand in hand but are still separate: the principle of subsidiarity concerns the applicability of Union measures to areas that do not fall within the Union's exclusive competence, while the principle of proportionality concerns the

applicability of the measures prescribed by the legislature in relation to the objectives pursued, and it serves as a general rule for the exercise of the Union's powers. The EP therefore states in its resolution that checking the proportionality of a draft legislative act logically follows the subsidiarity check, but it also states that the subsidiarity check cannot be sufficiently effective unless a proportionality check is also carried out.

The resolution states that the EP 'notes with unease' that some of the reasoned opinions from national parliaments emphasise the fact that the Commission's subsidiarity justification has been insufficient or non-existent in a number of legislative proposals. The EP therefore proposes that the Commission should investigate the reasons behind the low number of formal reasoned opinions from national parliaments. The EP also highlights the need for the Union institutions to enable national parliaments to review legal proposals by ensuring that the institutions provide detailed, comprehensive reasons for their legal proposals in relation to subsidiarity and proportionality, in accordance with Article 5 of the Subsidiarity Protocol.

The EP also notes that the time available for the national parliaments to carry out the subsidiarity and proportionality checks has often been regarded as insufficient. The EP is of the view that it would be desirable to investigate the measures that are required for reinforcing the subsidiarity-check mechanism and which could – potentially in conjunction with a future review of the Treaty – give the Parliament more rights. The EP proposes that such an overhaul should consider how many responses should be required from the national parliaments in order to trigger such a procedure, whether it should be restricted to questions surrounding the principle of subsidiarity and what impact it should have, with particular regard to the experience recently gained from the 'yellow card' procedure.

The EP is of the view that several initiatives should be taken in the meantime to improve the national parliaments' assessment of Union matters. In particular, the EP proposes among other things that every legislative act published in the EU's Official Journal must include a footnote containing information about which national parliaments have responded and which have submitted enquiries concerning the principle of subsidiarity, that reasoned opinions from the national parliaments must be shared with the other legislatures without delay, and that guidelines must be prepared with criteria for reasoned opinions in matters relating to subsidiarity.

Miscellaneous

Report from the British House of Lords

On 24 March 2014, the European Union Committee of the British House of Lords published a report on the role of national parliaments in the European Union. The report reaches the following findings and conclusions. According to the Committee, some deficiencies have meant that the subsidiarity check has not been as effective as hoped. These deficiencies could, and should, be corrected. The Committee highlights three issues in this context. Firstly, the scope of the check should be extended to include the proportionality principle. Secondly, the deadline for issuing a reasoned opinion should be extended from eight weeks to 12 or 16 weeks. Thirdly, the Commission should undertake that, if a yellow card is issued, the Commission will take seriously its duty of review, i.e. either withdraw or substantially amend the proposal in question. In its report, the Committee also points out that these issues and

several (please see below) amendments should be achieved through agreements between Member States and the Union institutions. Other proposed improvements include considering the question of whether the threshold for a yellow card should be lowered, and whether the scope of the check should be extended so that it also includes a legality check (i.e. a check on the legal basis for the Union proposal). Another question that has been raised is that of the Commission's subsidiarity justifications. Where there are no comprehensive, reliable justifications, the Committee is of the view that it is reasonable for a national parliament to conclude that there is no evidence that the proposal is compatible with the subsidiarity principle. The Committee was also of the view that the Commission must not take precedence in deciding which arguments fall within the scope of the principle of subsidiarity. This is in view of the fact that the Commission, in its response to the reasoned opinion by the House of Lords concerning the proposal on a European Public Prosecutor, stated that certain arguments did not relate to subsidiarity.

The Committee stated that there should, in principle, be a 'green card', i.e. a way for a group of like-minded national parliaments to submit constructive (and voluntary) proposals for Union measures without curtailing the Commission's formal right of initiative. In its report, the Committee notes that the British Minister for Europe, in an article published in December 2013, wrote that the Commission should treat every yellow card as a red card. The Committee does not, however, make any proposals to the effect that a red card should be introduced.

The European Union Committee of the British House of Lords is also of the view that the question of whether subsidiarity checks should be re-visited later on in the Union's legislative process should be considered. The Committee also stresses the importance of the national parliaments being given an opportunity to be consulted during the later stages of the Union's legislative documents, particularly where they result in major changes to legislation. The Committee proposes that the Council should consider adopting a process whereby, if a proposed law is changed substantially during the legislative discussions, the parts that have been amended should be re-examined by the national parliaments for a period of at least twelve weeks. This should be done by the Council allowing sufficient time for such a re-examination to take place. The Committee is of the view that this would be a logical development of the role of national parliaments in the Union. Without such a commitment, there would remain a fundamental gap in the Union's legislative process.

Case-law of the European Court of Justice concerning the Union's exclusive competences

Two Member States (Spain and Italy) have sought invalidation at the European Court of Justice of a Council Decision authorising enhanced cooperation in the area of the creation of unitary patent protection (combined Cases C-274/11 and C-295/11). Among other things, these Member States argued that the Council did not have the powers to establish enhanced cooperation, since the Union had those powers.

In an earlier statement (statement 2012/13:KU14) from March 2013, the Committee on the Constitution raised the question of the development of a 'doctrine' for a kind of exclusive competence for matters of a certain nature, i.e. that matters other than those explicitly mentioned in Article 3 TFEU could, by their very nature, constitute an exclusive competence for the Union. The Committee raised this question against the background of the risks of such

a doctrine being misused. Although the doctrine as such was logical in many ways, the Committee felt that it could be difficult to adopt it if proposers introduce provisions that go beyond the special nature on which such doctrine is based. The Committee found that the question of establishing the Union's exclusive competences was involved in the aforementioned cases, which had not yet ended at that time. The European Court of Justice issued its judgment on these cases on 16 April 2013.

In its judgment (paragraphs 23–24), the Court recalled that, under Article 2(6) TFEU, the scope of, and arrangements for, exercising the Union's competences are to be determined by the provisions of the Treaties relating to each area. In the case in question, the Court found that the scope of, and arrangements for, exercising the Union's competences in the area of 'competition rules necessary for the functioning of the internal market' are determined in Part Three, Title VII, Chapter 1 of the TFEU, in particular in Articles 101 TFEU to 109 TFEU. To regard Article 118 TFEU as forming part of that area would therefore be contrary to Article 2(6) TFEU and the result would be to extend unduly the scope of Article 3(1)(b) TFEU.

The Committee's position

By way of introduction, the Committee on the Constitution is dealing with the subsidiarity-check mechanism and the role of national parliaments in the Union as a result of the findings made in the Commission's reports. Among other things, the Commission's subsidiarity report (COM(2013) 566) states that parliamentary committees are thought to apply different criteria to the subsidiarity checks. It states, with reference to the third follow-up on the application of the principle of subsidiarity by the Committee on the Constitution (report 2012/13:KU8), that this may have an impact on the number of reasoned opinions from the Swedish Parliament. The Committee on the Constitution may state that it has not drawn any such conclusion from its own follow-up and that it takes a critical view of the misleading information given in the Commission report in this respect. Regardless of this, the Committee finds that the Swedish Parliament has until now submitted considerably more reasoned opinions than the other national parliaments. On this point, the Committee would like to recall that the Treaty of Lisbon gave the national parliaments greater opportunities to affect directly the distribution according to which legislative powers are exercised in the Union by virtue of a political mechanism that directly involves parliaments in checking compliance with the principle of subsidiarity. This mechanism is based on the desire of the high contracting parties, as expressed in the preamble to the Subsidiarity Protocol, to ensure that *all decisions* are taken as closely as possible to the citizens of the Union. According to the Committee on the Constitution, therefore, the check mechanism involves a commitment under the Treaty on the part of the national parliaments that is substantially democratic and creates profound legitimacy. The Committee is surprised that, to date, the mechanism has been used to such a limited extent. For its part, the Swedish Parliament has applied the mechanism consistently; for example, the repeated proposals for the allocation of resources to the most deprived in the Union meant that the Swedish Parliament sent a total of three reasoned opinions on the same subject.

The Committee would like to recall the following with regard to the findings made in the Commission's relations report (COM(2013) 565), to the effect that the Swedish Parliament has sent 60 % fewer opinions concerning the content of the Commission's proposals and

initiatives. Section 5 of Chapter 10 of the Riksdag (Swedish Parliament) Act states that green and white papers must be examined, while other Union documents, with the exception of draft legislative acts, may not be examined until a decision has been made by the Speaker following consultation of the leaders of the political parties. The number of green and white papers, which accounts for approximately half of the Union documents reviewed, thus affects the number of review statements dealt with by the Chamber. One explanation for the reduction in the number of review statements could therefore be the Commission's mandate cycle, i.e. the fact that the Commission adopts several policy strategy documents at the start and middle of the Commission's mandate and then reduces them towards the end.

The Committee on the Constitution would also like to report some of its key findings as part of its fourth follow-up on checks by the Swedish Parliament on the application of the principle of subsidiarity. This follow-up shows that approximately one-eighth of the draft legislative acts subjected to checks under the subsidiarity-check mechanism in 2012 had no or incomplete subsidiarity justifications. In comparison with the Committee's three previous follow-ups, the proportion of incomplete or missing justifications has continued to fall, which is positive. The proportion of missing or incomplete justifications for draft legislative acts was one-seventh in 2011 and one-third in 2010. Despite this, and against the background of the absolute obligation that the Commission and other proposers have to justify their draft legislation, the Committee on the Constitution must reiterate and stress that omitted or scanty justifications in turn mean that it is difficult for the Swedish Parliament and other national parliaments to fulfil their obligation under the Treaty to ensure that the principle of subsidiarity is followed in accordance with the Protocol. In this context, the Committee would like to point out that several of the Committees of the Swedish Parliament have emphasised, as part of the follow-up by the Committee on the Constitution, that the existing justifications were often very brief. In many cases the justifications are almost obligatory texts and are not written on the basis of the circumstances of the draft in question. The justifications are thought to be based on the requirement to carry out subsidiarity checks rather than being based on individual cases, and circular arguments can be put forward. Like the Commission's own Impact Assessment Board, the Committee is of the view that the justifications should be reliable and detailed. The Committee on the Constitution would also like to point out that extensive arguments relating to subsidiarity are often given in the working document but not in the draft that is sent to the Parliaments. The Committee is of the view that a clear improvement would be to reproduce these arguments in the draft that is sent to the Parliaments. The Committee still repudiates the suggestion that Parliaments should be required to test proposals for subsidiarity where absolutely no justification is given. In the Committee's view, a lack of justification should be treated as non-compliance with the Subsidiarity Protocol.

A letter from the Commission to the Speaker of the Swedish Parliament concerning the Swedish Parliament's reasoned opinion on the proposal to establish a European Public Prosecutor states that the Commission is of the view that some of the Swedish Parliament's arguments do not fall within the boundaries of the principle of subsidiarity. In this context, the Committee on the Constitution would like to remind the Commission rather sharply that Article 6 of the Subsidiarity Protocol states that any national parliament may, within eight weeks, send a reasoned opinion to the Presidents of some of the Union's institutions, stating why *it considers* that the draft in question does not comply with the principle of subsidiarity. The Protocol therefore does not provide any scope for a proposer to overrule or unilaterally disregard any of the reasons put forward by national parliaments as to why they consider a draft not to comply with the principle of subsidiarity. The Committee on the Constitution,

which shares the assessment of the European Union Committee of the British House of Lords in its report of March 2014 to the effect that the Commission does not take precedence in deciding which arguments fall within the scope of the principle of subsidiarity, would like to emphasise in this context that, on the contrary, Article 7 of the Protocol states that proposers shall take account of the reasoned opinions issued by national parliaments.

In a previous review of the Commission's nineteenth report on better law making (statement 2012/13:KU14), the Committee has raised the question of the development of a 'doctrine' for a kind of exclusive competence for matters of a certain nature, i.e. that matters other than those explicitly mentioned in Article 3 TFEU could, by their very nature, constitute an exclusive competence for the Union. The Committee raised this question against the background of the risks of such a doctrine being misused. Although the doctrine as such was logical in many ways, it could be difficult to adopt it if proposers introduce provisions that go beyond the special nature on which such doctrine is based. The Committee also found that the question of establishing the Union's exclusive competences was involved in two cases that were ongoing at the time (Cases C-274/11 and C-295/11) at the European Court of Justice. The Committee notes that the Court has issued a judgment in these combined cases. In its judgment, the Court recalls that, under Article 2(6) TFEU, the scope of, and arrangements for, exercising the Union's competences are to be determined by the provisions of the Treaties relating to each area. The Court's grounds (paragraphs 23–24) indicate that it would probably be contrary to Article 2(6) TFEU routinely to consider proposals relating to internal organisational matters falling within the Union's exclusive competences without analysing the legal basis for every single proposal, and that this could extend unduly the scope of Article 3(1) TFEU. The Committee may also state that, in a response to the Committee's aforementioned review, the Commission explained that, in its opinion, the list of areas in which the Union must have exclusive competence, contained in Article 3 TFEU, is not exhaustive. For its part, the Committee on the Constitution would like to remind the Commission that the Swedish Government has found that list to be exhaustive (please see Bill 2007/08:168, p. 98). The Committee does not currently see any reason to assess the situation differently from the Swedish Government.

Finally, the Committee on the Constitution would like to state the following views as a result *inter alia* of the analysis work started by the Dutch Government and the subsequent discussions within the Union concerning matters relating to the application of the principle of subsidiarity. The Committee's assessment is that the subsidiarity checks are ineffective in their present form. An important aspect is the excessively tight deadline for carrying out this check. In a report of March 2014, the European Union Committee of the British House of Lords recommended that the deadline be extended. The Committee on the Constitution feels that an extension should be considered in appropriate contexts. Such an overhaul should also consider the level of the thresholds for yellow and orange cards in the Subsidiarity Protocol, as well as the impact of achieving these thresholds. The Committee is aware that questions concerning Treaty amendments can be time-consuming and require a lot of energy, and would like to point out, like the European Union Committee of the British House of Lords, that there is an opportunity for such changes potentially to be made by means of agreement between the Member States and the Union's institutions. The Committee is of the view that the Parliaments' check mechanism for rejecting excessively far-reaching proposals must work effectively so as to achieve the balance that the Treaty of Lisbon is intended to provide between the additional decision-making right that has been transferred to the Union and the strengthened role of the Member States' Parliaments in examining whether the right decisions are made at the right political level.

ANNEX

List of proposals discussed

Commission's annual report for 2012 on relations between the European Commission and national parliaments, COM(2013) 565.

Commission's annual report for 2012 on subsidiarity and proportionality (twentieth report on better law making, 2012), COM(2013) 566.