

## Reasoned Opinion of the House of Commons

Submitted to the Presidents of the European Parliament, the Council and the Commission, pursuant to Article 6 of Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality

**concerning**

### **Draft Regulation of the European Parliament and of the Council on the Fund for European Aid to the Most Deprived 15865/12<sup>1</sup>**

#### **Treaty framework for appraising compliance with subsidiarity**

1. The principle of subsidiarity is born of the wish to ensure that decisions are taken as closely as possible to the citizens of the EU. It is defined in Article 5(3) TEU:

“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.”

2. The EU institutions must ensure “constant respect”<sup>2</sup> for the principle of subsidiarity as laid down in Protocol (No. 2) on the Application of the Principles of Subsidiarity and Proportionality.

3. Accordingly, the Commission must consult widely before proposing legislative acts; and such consultations are to take into account regional and local dimensions where necessary.<sup>3</sup>

4. By virtue of Article 5 of Protocol (No 2), “any draft legislative act should contain a detailed statement” making it possible to appraise its compliance with the principles of subsidiarity and proportionality. This statement should contain:

- some assessment of the proposal’s financial impact;
- in the case of a Directive, some assessment of the proposal’s implications for national and, where necessary, regional legislation; and
- qualitative and, wherever possible, quantitative substantiation of the reasons “for concluding that a Union objective can be better achieved at Union level”.

The detailed statement should also demonstrate an awareness of the need for any burden, whether financial or administrative, falling upon the EU, national governments, regional or local

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<sup>1</sup> COM(12) 617.

<sup>2</sup> Article 1 of Protocol (No. 2).

<sup>3</sup> Article 2 of Protocol (No. 2).

authorities, economic operators and citizens, to be minimised and to be commensurate with the objective to be achieved.

5. By virtue of Articles 5(3) and 12(b) TEU national parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in Protocol (No. 2), namely the reasoned opinion procedure.

### **Previous Protocol on the application of the principle of subsidiarity and proportionality**

6. The previous Protocol on the application of the principle of subsidiarity and proportionality, attached to the Treaty of Amsterdam, provided helpful guidance on how the principle of subsidiarity was to be applied. This guidance remains a relevant indicator of compliance with subsidiarity. The Commission has confirmed it continues to use the Amsterdam Protocol as a guideline for assessing conformity and recommends that others do.<sup>4</sup>

“For Community action to be justified, both aspects of the subsidiarity principle shall be met: the objectives of the proposed action cannot be sufficiently achieved by Member States’ action in the framework of their national constitutional system and can therefore be better achieved by action on the part of the Community.

“The following guidelines should be used in examining whether the abovementioned condition is fulfilled:

- the issue under consideration has transnational aspects which cannot be satisfactorily regulated by action by Member States;
- actions by Member States alone or lack of Community action would conflict with the requirements of the Treaty (such as the need to correct distortion of competition or avoid disguised restrictions on trade or strengthen economic and social cohesion) or would otherwise significantly damage Member States’ interests;
- action at Community level would produce clear benefits by reason of its scale or effects compared with action at the level of the Member States.”<sup>5</sup>

“ The form of Community action shall be as simple as possible, consistent with satisfactory achievement of the objective of the measure and the need for effective enforcement. The Community shall legislate only to the extent necessary. Other things being equal, directives should be preferred to regulations and framework directives to detailed measures”.

### **Proposed legislation**

#### ***Background***

7. The purpose of the draft Regulation is to establish a new Fund for European Aid to the Most Deprived (“the Fund”), with a proposed budget of €2.5 billion for the period 2014–20, to alleviate poverty and material deprivation in the EU by supporting national schemes for the distribution of food products and the provision of basic consumer goods for the personal use of

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<sup>4</sup> See, respectively, pages 2 and 3 of the 2010 and 2011 Reports on Subsidiarity and Proportionality (COM(10) 547 and COM(11) 344).

<sup>5</sup> Article 5.

homeless people or children. It would replace an existing EU Food Distribution Programme for the Most Deprived, in place since 1987, which enables Member States to use public intervention stocks of agricultural products as food aid. Participation is voluntary but has risen in recent years to include 20 Member States (but not the UK).

### *Operation*

8. Unlike the Food Distribution Programme, which is a measure based on the EU's Common Agricultural Policy, the new Fund for European Aid to the Most Deprived is an instrument of the EU's cohesion policy, based on Article 175(3) TFEU. This Article provides for the adoption of specific actions outside the framework of the EU's Structural Funds (the European Social Fund and European Regional Development Fund) if necessary to achieve the objectives of economic, social and territorial cohesion in the EU. Although the Fund would be resourced from the Structural Funds, it is intended to complement the objectives of the ERDF and ESF by offering temporary relief to the most deprived, who are also likely to be furthest from the labour market.

9. Member States would be responsible for identifying, by means of objective criteria, those individuals, families or households qualifying as "most deprived" and for selecting partner organisations at national level to distribute food and basic consumer goods. These may be directly purchased by partner organisations or provided to them free of charge by a public body. A small element of funding may be used by partner organisations for social inclusion activities involving beneficiaries of EU aid.

### *Legislative objectives*

10. Article 3 of the draft Regulation defines the legislative objective as follows:

"The Fund shall promote social cohesion in the Union by contributing to achieving the poverty reduction target of at least 20 million of the number of persons at risk of poverty and social exclusion in accordance with the Europe 2020 Strategy. The Fund shall contribute to achieving the specific objective of alleviating the worst forms of poverty in the Union by providing non-financial assistance to the most deprived persons."

11. The Commission estimates in its explanatory memorandum that nearly one quarter of Europeans (116 million) are at risk of poverty or social exclusion and approximately 40 million suffer from severe material deprivation, adding:

"While the needs of those who are at the margins of society keep growing, the ability of Member States to support them has in many cases diminished. Social cohesion is threatened by fiscal constraints more than ever before. In many Member States it is felt that policies decided at European level are in some way responsible for these developments."<sup>6</sup>

12. The Commission suggests in the impact assessment that,

"[C]urrently more and more social stakeholders and EU citizens perceive the EU as a threat for their personal and collective protection. Action at European level is required,

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<sup>6</sup> See p.2 of the (Commission's) explanatory memorandum.

all the more so, as a lack of social cohesion would hinder the Union's further development and undermine its legitimacy in the eyes of its citizens."<sup>7</sup>

13. The Commission describes poverty and social exclusion as major obstacles to achieving the balanced vision of economic growth and social progress set out in the Europe 2020 Strategy. It suggests that the type of emergency assistance provided by the new Fund is needed to address continuing uncertainty "about the ability of all Member States to sustain social expenditure and investment at levels sufficient to ensure that social cohesion does not deteriorate further" and to achieve the objectives and headline targets of the Europe 2020 Strategy.<sup>8</sup>

### *Subsidiarity*

14. The Commission's explanatory memorandum justifies the need for EU action as follows:

"EU action is justified on the grounds of Article 174 (TFEU) which provides for the Union to "promote its overall harmonious development" by "developing and pursuing its actions leading to the strengthening of its economic, social and territorial cohesion", and on Article 175 (TFEU) which specifies the role of the EU structural funds in achieving this objective and makes provisions for the adoption of specific actions outside the Structural Funds.

"EU-level action is necessary given the level of poverty and social exclusion in the Union and the unacceptable diversity of the situation among individual Member States, further aggravated by the economic and fiscal crisis, which has led to a deterioration of social cohesion and lessened the chances of achieving the Europe 2020 strategy's objective in relation to the fight against poverty and social exclusion."<sup>9</sup>

15. In its impact assessment, under the heading of "Right to Act", the Commission states that "Article 174 (TFEU) provides for the Union to 'promote its overall harmonious development'. The first subparagraph defines the overall objective of cohesion policy which is to 'strengthen economic, social and territorial cohesion'. Cohesion policy is thus not limited to acting on regional disparities."<sup>10</sup> It suggests that the new Fund is "strongly anchored in the principle of subsidiarity", adding:

"While helping ensure the availability of emergency assistance for most deprived people across the Union in the context of the Europe 2020 strategy and thus contributing to strengthening social cohesion in the Union, it leaves up to Member States and their lower levels of government decisions that should be taken at their respective levels."<sup>11</sup>

16. In its impact assessment, under the heading of "EU added-value" the Commission says:

"European financial support can demonstrate the direct solidarity of the Union with the poor people, thus taking up on the broad request by European citizens. It can encourage the exchange of experience and information about the effectiveness and efficiency of actions and it increases awareness of the situation in which these groups are by actually

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<sup>7</sup> See p.14 of the impact assessment.

<sup>8</sup> See p.26 of the impact assessment.

<sup>9</sup> See p. 4 of the explanatory memorandum.

<sup>10</sup> See p. 24 of the impact assessment.

<sup>11</sup> See p. 25 of the impact assessment.

asking Member State's representatives to talk about the situation and to develop a sort of strategy (Operational Programme) how best to address the immediate needs of these people. Finally, it allows the Union to lead by example.

“[...] As well as helping enable the most deprived members of the society to maintain their dignity and human capital it will contribute to the strengthening of social capital and social cohesion within their communities.

### **Aspects of the Regulation which do not comply with the principle of subsidiarity**

17. The House of Commons considers that the draft Regulation of the European Parliament and of the Council on the Fund for European Aid to the Most Deprived does not comply either with the procedural obligations imposed on the Commission by Protocol (No 2) or with the substantive principle of subsidiarity in the following respects.

#### *i) Failure to comply with essential procedural requirements*

18. By virtue of Article 5 of Protocol (No 2) “*any draft legislative act should contain a detailed statement making it possible to appraise compliance with the principles of subsidiarity and proportionality*”. The requirement for the detailed statement to be within the draft legislative act implies that it should be contained *in the Commission’s explanatory memorandum*, which forms part of the draft legislative act and which, importantly, is translated into all official languages of the EU. The fact that it is translated into all official languages of the EU allows the detailed statement to be appraised for compliance with subsidiarity (and proportionality) in all Member States of the EU, in conformity with Article 5 of Protocol (No 2). This is to be contrasted with the Commission’s impact assessment, which is not contained within a draft legislative act, and which is not translated into all the official languages of the EU.

19. The presumption in the Treaty on European Union<sup>12</sup> is that decisions should be taken as closely as possible to the EU citizen. A departure from this presumption should not be taken for granted but justified with sufficient detail and clarity that EU citizens and their elected representatives can understand the qualitative and quantitative reasons leading to a conclusion that “a Union objective can be better achieved at union level”, as required by Article 5 of Protocol (No 2). The onus rests on the EU institution which proposes the legislation to satisfy these requirements.

20. The extent of the Commission’s justification for compliance with subsidiarity in the explanatory memorandum is set out at paragraph 14 above. The first paragraph explains why the legal bases of Articles 174 and 175 TFEU give the EU the power to act (see further below); the second contains cursory generalisations unsupported by any evidence (see further below). There is no reference to the principle of subsidiarity.

21. The justification in the Commission’s explanatory memorandum falls disappointingly short of the contents required of the detailed statement in Article 5 of Protocol (No 2), as set out in paragraph 4 above; in particular there is no qualitative and quantitative substantiation of the necessity for action at EU level.

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<sup>12</sup> Article 5.

22. This omission, the House of Commons submits, is a failure on behalf of the Commission to comply with essential procedural requirements in Article 5 of Protocol (No 2).

*ii) Failure to comply with the principle of subsidiarity*

*- Necessity*

23. In the House of Commons' view, necessity is a pre-requisite for action at EU level and for conformity with the principle of subsidiarity.

24. This view is confirmed by the Commission:

“Subsidiarity cannot be easily validated by operational criteria. The Protocol, as revised by the Lisbon Treaty, no longer mentions conformity tests, such as ‘necessity’ and ‘EU value added’. Instead it has shifted the application more towards the procedural aspects ensuring that all key actors can have their say. The Commission has continued to use ‘necessity’ and ‘EU value-added’ tests as part of its analytical framework and recommends the other actors to do likewise.”<sup>13</sup>

25. Adequacy of national support: The Commission argues that the ability of Member States to support those who are at the margins of society has in many cases diminished, and that social cohesion is threatened by fiscal constraints more than ever before (see paragraph 11 above). Whilst the Commission suggests that there is “uncertainty” about the ability of some Member States to provide the social investment needed to prevent a further fracturing of social cohesion (see paragraph 13 above), it does not assert that all Member States are in the same position. Indeed, there is no qualitative or quantitative substantiation of which Member States are unable to provide this investment either now or over the funding period. The draft Regulation would, however, bind all Member States.

26. Europe 2020 Strategy: A further justification advanced by the Commission for action at EU level is that poverty reduction and social inclusion are essential elements of the sustainable growth agenda set out in the Europe 2020 Strategy and are reflected in the headline target endorsed by the European Council. We note, however, that the European Council, in endorsing the Europe 2020 headline target on social inclusion and poverty reduction, made clear that Member States were free to set their own national targets using the most appropriate indicators which take account of their national circumstances and priorities.<sup>14</sup> It is far from clear that the European Council contemplated that an EU funding instrument would be necessary or desirable in order to meet the headline target. We do not accept, therefore, that the Commission has provided a sufficient justification for EU action on the basis of the Europe 2020 Strategy.

27. Public perception of the EU: We are struck by two elements which appear to be at the heart of the Commission's proposal for this new Fund. The first is the perception that the EU shares responsibility for the austerity measures being implemented in many EU Member States and has, as a result, forfeited the confidence of ordinary citizens in its ability to ensure an adequate level of social protection. The second is the Commission's desire for a high visibility EU instrument, capable of providing direct material assistance to those worst affected by rising levels

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<sup>13</sup> See page 3 of the 2011 Report on Subsidiarity and Proportionality (footnote 4).

<sup>14</sup> See the footnote to the headline target on social inclusion in the European Council Conclusions of 17 June 2010 at [http://ec.europa.eu/eu2020/pdf/council\\_conclusion\\_17\\_june\\_en.pdf](http://ec.europa.eu/eu2020/pdf/council_conclusion_17_june_en.pdf)

of poverty and social exclusion, to mitigate negative perceptions of its contribution to the economic and financial crisis. The fact that the Commission is anxious to be seen to act does not mean that EU action is necessary or justified.

*- EU value-added*

28. It is axiomatic that poverty and social exclusion in EU Member States is a concern which requires action; it far less axiomatic that such action should be taken by the EU. For EU action to be justified there must be evidence of a problem that cannot be satisfactorily addressed by action at national or regional level in all EU Member States. We think that evidence is lacking.

29. Further, we are not convinced by the Commission's justification of its right to act under Articles 174 and 175 TFEU. Those Articles allow the EU take action leading to strengthening *its* social cohesion, but we question whether this extends to social cohesion in some (but not all) Member States. For this to be so, we think there would have to be evidence of some "unacceptable diversity" (see paragraph 14) in the provision of aid in some Member States that undermines social cohesion in other Member States, and therefore threatens social cohesion within the EU, which the Commission has not demonstrated.

**Conclusion**

30. For these reasons the House of Commons considers this proposal does not comply with the principle of subsidiarity.