

15.02.19**Decision**
Of the Bundesrat

Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions**The principles of subsidiarity and proportionality: Strengthening their role in the EU's policymaking**
COM(2018) 703 final

In its 974th session on 15th February 2019 the Bundesrat adopted the following Opinion pursuant to §§ 3 and 5, Act on Cooperation between the Federation and the Federal States in European Union Affairs (EUZBLG):

1. Subsidiarity and proportionality are core elements of European decision-making. As a constitutional body jointly responsible for monitoring subsidiarity, the Bundesrat therefore repeatedly comments on these principles (cf. recently the Bundesrat's Opinion of 29th November 2013 in BR-Official Document 608/13 (Decision)).
2. The Bundesrat welcomes the Commission's decision, under its President Jean-Claude Juncker, to tackle the issue of subsidiarity and proportionality and thus to set up a "Task Force on Subsidiarity, Proportionality and 'Doing Less More Efficiently'" (hereinafter referred to as the "Task Force").
3. The recommendations from the Task Force, some of which the Commission picks up on in its Communication, contain fitting starting points to improve application of the subsidiarity principle in legislative practice. The Bundesrat is pleased to see that the Task Force's recommendations are to form the point of

departure for the discussion process rather than its conclusion.

4. The Bundesrat views with great interest the new working method of “active subsidiarity” proposed by the Task Force, which should lead to a common understanding of subsidiarity and proportionality as well as enhancing the participation and involvement of national, regional and local authorities in EU policy-making.
5. The Bundesrat emphasises, however, that the new working method must not lead to the Commission’s remit to examine and demonstrate compliance with the subsidiarity and proportionality principles being transferred to national and regional parliaments.
6. The Bundesrat agrees with the Commission that a common understanding of subsidiarity and proportionality is necessary among all actors involved in shaping EU policy (cf. BR-Official Document 608/13 (Decision)).
7. The grid for evaluation of subsidiarity and proportionality proposed by the Task Force can contribute to achieving this. The Commission envisages including this grid in its Better Regulation guidelines and using it when presenting the results of Commission impact assessments, evaluations and explanatory memoranda and to provide guidance in communication with national parliaments. The Bundesrat considers that it would essentially be a step in the right direction if the Commission, in particular, were to apply the grid before drawing up proposals.
8. Overall, however, solely applying this grid does not appear a sufficient measure to remedy the lack of explanatory criteria for subsidiarity and proportionality. The Bundesrat notes that the Commission did not use the Communication as an opportunity to further differentiate the concept of subsidiarity in material terms. In addition, the Task Force’s conclusions do not address the substantive content of subsidiarity in greater detail.

9. The Bundesrat recalls that the principle of subsidiarity concerns the question of whether the Union should take action. According to Article 5, Sub-section 3, TEU, such action by the Union may be taken only if the Member States cannot sufficiently achieve the objectives at central or regional level and if such objectives, by reason of their scale or effects, can be better achieved at Union level. The Commission is responsible for demonstrating in a verifiable manner in each instance that both conditions are unequivocally met.
10. The Bundesrat agrees with the Commission that there is a political dimension to monitoring compliance with the subsidiarity principle. At the same time, the Bundesrat stresses that subsidiarity is a binding legal principle of Union law.
11. The Bundesrat reiterates its request to the Commission to exercise restraint and caution in using the competence clauses, in particular those with broad wording (such as internal market competence, Article 114, TFEU), in order to maintain proximity to citizens and regional scope for action (Cf. the Opinion of the Bundesrat of 25th September 2015 (BR-Official Document 242/15 (Decision))). This also applies to the competence clause in Article 352, TFEU, which the Commission, however, uses less extensively.
12. The Bundesrat supports the Task Force's recommendation that work within individual policy areas should be more efficient and based on a distribution of responsibilities between the various levels that is guided rigorously by the subsidiarity principle, with a view to the objective of reducing the volume of legislation. In this context, legislators should ensure that restraint is exercised concerning use of delegated acts.
13. Furthermore, the Bundesrat calls on the Commission to opt to adopt a Directive rather than a Regulation under otherwise identical circumstances. That allows for respect of Member States' fundamental competence in areas in which the Union does not hold exclusive competence and ensures that Member States can exercise the scope to shape policy that is incumbent on them.
14. The Bundesrat welcomes the Commission's support for the Task Force's proposal to exclude Christmas and New Year holidays when determining the eight-week deadline for national parliaments to submit reasoned opinions. It calls on the Commission to launch its planned consultations with the legislative bodies

on this point promptly.

15. The Bundesrat notes with regret that the Commission, without giving any further justification, has not taken into account the Task Force's recommendation to extend the deadline to twelve weeks. Recognising that such an extension would require an amendment to the Treaty, the Bundesrat reiterates its position that the deadline should be extended and made more flexible in order to enable national parliaments to exercise more effective oversight.
16. The Bundesrat welcomes the Commission's intention to place a greater emphasis on national parliaments' positions and to develop an aggregated response when a significant number of national parliaments have expressed similar concerns even if the "yellow card" threshold is not reached. In this context, substantive engagement with criticisms expressed in the parliaments' reasoned opinions is essential.
17. The Bundesrat renews its call for better impact assessments. The Bundesrat in principle welcomes more active involvement of local and regional authorities in the early stages of policy-making, as well as the envisaged changes to the public consultation questionnaires in order to take account of local and regional issues. The Bundesrat also welcomes the Commission's intention to amend its Better Regulation guidelines to enable improved assessment and presentation of relevant impacts at local and regional level. However, the Bundesrat points out that in order to avoid duplication of structures the procedures should not encroach upon existing decision-making processes in the Member States.
18. The Bundesrat notes with interest that the Commission intends to use the REFIT platform to assess existing legislation from the perspective of subsidiarity during its remaining term in office; closer examination is particularly useful with regard to delegated acts and implementing acts. The Bundesrat considers that active subsidiarity monitoring in the spirit of the Task Force proposals also entails examining whether delegated acts and implementing acts have been adopted in areas in which the EU has no competence.

19. The Bundesrat notes with interest the initiative of the Task Force and the Committee of the Regions (CoR) to set up so-called regional hubs, which are intended to ensure that local and regional authorities' experience can be more effectively incorporated into EU policy. It welcomes the CoR's role in coordinating the tasks and will carefully observe lessons to be learned from the pilot phase.

20. The Bundesrat shall transmit this Opinion directly to the Commission.