

Joint Committee on European Union Affairs
Opening statement by Dr Emmanuelle Schön-Quinlivan
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Chairman, Deputies and Senators, I would like to thank you for the invitation to share my analysis and views on the European Commission's Task Force's report on Subsidiarity, Proportionality and "Doing Less More Efficiently". It is a great honour to be asked and I hope I can contribute insightfully to the discussion.

I might first explain how I will structure my talk today:

- I would like to start by briefly recalling the history of the principle of subsidiarity and its mutations since its official enshrining in the 1992 Maastricht treaty. I think this contextualisation is useful in understanding the Task Force's approach in 2018.
- I will then analyse the key points and recommendations made by the Task Force as well as its shortcomings
- Finally, I would like to set this report in the broader context of the Future of Europe and specifically the the future of European democracy.

1. A brief history of the concept of subsidiarity

Despite having its roots in European political philosophy, the principle of subsidiarity was not used in the context of the European Community until 1986. It was first mentioned in the Single European Act with regards environmental policy. It coincided with the increase in usage of majority voting, as opposed to unanimity, and the concern of Member States that the European Community was encroaching on their sovereign power. Therefore support for the idea of subsidiarity as a tool to assign limits to the growth of the Community's powers grew substantially until being enshrined in article 3(b) of the Maastricht treaty. This article provides that 'in areas which do not fall within its exclusive competence, the Community shall take action in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.'

The Treaty of Lisbon set up the Early Warning Mechanism elevating national parliaments to the position of 'subsidiarity watchdogs' (Granat, 2018)¹. However in nine years, only three 'yellow' card procedures were started and no orange one, showing the process's limitations.

Looking back helps us understand the context for this Task Force report. Maastricht marked the shift from a 'permissive consensus to a constraining dissensus' (Hooghe and Marks, 2009)² when it comes to European Union affairs and policies. The subsidiarity principle was introduced at a time of public contestation over the legitimacy of the European integration project. 25 years on, the landscape has not changed much except for the fact that this contestation has taken shape in populist political parties whose support is increasing across a significant number of Member States.

2. What are the key points of the report?

Moving onto the report itself, it is worth mentioning that the Task Force was set up in a context of reflection about the Future of Europe and the questions of democratic and legitimacy deficits that the European Commission and the European Union as a whole have not yet resolved.

The President of the European Commission set three objectives to the Task Force:

- How to better apply the principle of subsidiarity and proportionality with regards preparation and implementation of legislation.
- How to better involve the regional and local level in policy-making
- Identify policies that could be re-delegated to the national level

Overall, the recommendations are not radical but offer welcome clarification. In particular, it acknowledges the shortcomings of the Early Warning Mechanism (EWM) put in place by the Lisbon Treaty but which can not be remedied without a treaty change. Therefore it recommends that the Commission interprets flexibly the 8-week deadline for national parliaments to submit their reasoned opinions. The same flexibility should also apply if a significant number of reasoned opinions, but below the threshold for a yellow card, are submitted. It is also recommending a lowering of the yellow card threshold, which would force the Commission to justify more thoroughly its legislative proposals.

¹ Granat, K. (2018) *The Principle of Subsidiarity and its Enforcement in the EU Legal Order – the Role of National Parliaments in the Early Warning System*, Oxford: Hart

² Hooghe, L., & Marks, G. (2009) 'A Postfunctionalist Theory of European Integration: From Permissive Consensus to Constraining Dissensus', *British Journal of Political Science*, 39(1), 1-23

The overall tone is for the Commission and the European co-legislators:

- To be more attuned to the national, regional and local levels,
- To give more visibility to how they use the inputs from regional and national parliaments and
- To promote increased coordination and information-sharing between national and regional parliaments.

As often with the European Commission, they consider that the problem lies in communicating better regarding the effective operation of the principle of subsidiarity. Beyond a flexible implementation of the principle, the European Commission recommends a more consistent approach as well. The Task Force's main contribution regards a model assessment grid to be used on subsidiarity and proportionality issues by all European institutions not only at the start of the legislative process but also during it as well as *ex post*. This is what the Task Force brands 'active subsidiarity' which is grounded in the concept of European added value. On this aspect, it is interesting to see that the expert the Task Force called upon, Professor Dougan from the University of Liverpool, specifically cautioned against this idea of 'added-value'. He highlighted that the 'added-value' to having EU action in cross-border situations would always be positive and render the test pointless, frustrating national and sub-national levels of governance.

Yet, the idea of translating the subsidiarity principle into 'European added-value' is pervasive throughout the entire report as a concept better understood by citizens. This brings us back to the idea of using subsidiarity as a communication tool to boost the European Union's action's legitimacy in the eyes of the citizens. Dehousse analysed in 1993 that 'subsidiarity's direct utility as a legal instrument [was] limited'. He argued that 'its introduction into the treaty should be understood as a strong political message: the Member States are not prepared to accept an unlimited extension of Community competences' (p.30)³. He nonetheless concluded that no matter whether subsidiarity was workable legally or an effective tool of allocation of competence, this political message trumped all and 'we are therefore likely to hear more of subsidiarity'.

Indeed 25 years later, the search for the European Union's legitimacy and effectiveness in action in the eyes of the citizens remains elusive. The major shortcoming with the Task Force report is that it confuses subsidiarity with policy substance. When the Task Force claims on page 12 that 'National Parliaments have a pivotal role in ensuring conformity with the subsidiarity principle, and they also have a positive contribution to make on the substance of new legislation', they seem to equate both.

³ Dehousse, R. (1992) 'Does Subsidiarity Really Matter?', *EUI Working Paper Law 92/32*, Florence: EUI, pp. 1-31.

Yet, the entire report is about subsidiarity as a tool of competence allocation – who should act, not in what way. The report acknowledges that national and regional parliaments' contributions 'frequently go beyond subsidiarity issues in their reasoned opinions' (p.12) which creates frustration on both sides. Reasoned opinions on the basis of subsidiarity are the only ones that can create legal consequences. If the reasoned opinion is not made on that basis, the Commission is legally entitled to ignore the sub-European parliaments.

In 2005, the Commission introduced the 'Barroso Initiative' which can be defined as 'a broad political dialogue between the Commission and the national parliaments of the Member States on all aspects of the former's political agenda' (Jančić, 2012, p. 78)⁴. The major difference with the EWM is that the Barroso Initiative opinions can assess any political aspect of a Commission proposal, well beyond subsidiarity issues. This allows the national or regional parliament to engage in policy preferences and substance which politicises EU policies and develops their level of ownership at sub-European levels. This initiative exists at the discretion of the Commission though and could be withdrawn at any time. It is a shame to see that the Barroso Initiative is not investigated in more depth by the Task Force with a view of enshrining it into the treaties. Similarly, the idea of a 'green card', which gives parliaments a right to suggest to the Commission to take action, is pushed aside. The only small light of hope for significant policy shaping by national and regional parliaments came on page 14 with a suggestion that they and the Commission should exchange more intensely on shaping the Commission's work programme.

If the concept of subsidiarity is to demonstrate European added-value in its action while closing the gap with the citizens by decentralizing decision-making to the level the closest to the citizen, moving away from a technocratic conception of policy proposal to a more political one would make sense. However, since it would further challenge the Commission's right of initiative, the Task Force fell back on a classic: reinforced cooperation and coordination among national parliaments.

3. What does it mean for the future of Europe?

At the end of the day, this report was commissioned in the context of a reflection on the Future of Europe. The Task Force clearly rejects scenario 4 on 'doing less more efficiently' regarding re-delegating certain policies to the national level. However it recommends that existing legislation be reviewed with regards subsidiarity, proportionality and regulatory density in order to improve effectiveness of implementation of the existing body of law.

⁴ Jančić, D. (2012) 'The Barroso Initiative: Window Dressing or Democracy Boost?', *Utrecht Law Review*, 8 (1), pp. 78-91.

As Jančić points out (2018)⁵, ‘the report missed an opportunity to highlight the political nature of parliamentary contributions to EU integration’. As much as technocracy with its fragmentation of political power and empowerment of unelected institutions was needed at the start of the European Union construction in order to avoid a repeat of 1930s and 1940s totalitarianism⁶, it is now damaging to European democracy.

Jančić (2018) suggests ‘a periodic balance of competences review [...] organised across the Union with national and regional parliaments’ (every four to five years). I do not consider this as a meaningful democratic reform which would engage the public. However, I believe that it is time to change the message and broaden the scope of contribution of regional and national parliaments to the European policy-making.

We need to politicise EU policies so that citizens and sub-European parliaments can develop ownership of those policies. And yes, it involves infringing further on the right of initiative of the European Commission. However the time has come to realise that European democracy is not working and it goes beyond simply increasing the powers of the European Parliament. This has been systematic with every treaty change and inversely proportionate to the EU average level of turnout in European elections. It is time for supranational institutions to engage with and carve out space for sub-European parliaments’ political views on EU policies and EU policy-shaping. Many significant democratic reforms should be envisaged beyond the very fragile Spitzenkandidat implemented in 2014, which I believe was a step in the right direction.

The lack of visionary approach for the Future of Europe is disappointing given the increasing rise of populist parties across the European Union and the risks it poses to the European project. In his last State of the Union address, Jean-Claude Juncker mentioned subsidiarity only once, in reference to ‘being big on the big things and small on the small things’ (p6)⁷, a cheap communication turn-of-phrase. His big example of the use of subsidiarity was clock-changing! At a time, whether winter or summer, when European citizens and their regional and national parliaments are contesting the legitimacy and effectiveness of European action, it seems odd and even condescending to send them back to do some clock work.

⁵ Jančić, D. (2018) ‘Frans Timmermans’ subsidiarity proposals do not go far enough to address the EU’s democratic deficit’, *LSE Europ*, <http://blogs.lse.ac.uk/euoppblog/2018/07/26/frans-timmermans-subsidiarity-proposals-do-not-go-far-enough-to-address-the-eus-democratic-deficit/>

⁶ Müller, J-W (2017) *What is Populism*, UK, USA: Penguin Books

⁷ Juncker, J-C (2018) *State of the Union – The Hour of the European Sovereignty*, https://ec.europa.eu/commission/priorities/state-union-speeches/state-union-2018_en