

November 2006

**Annex to the report
on subsidiarity and proportionality check
1/2006 of COSAC:
National Parliaments'
replies to the questionnaire**

Prepared by the COSAC Secretariat and presented to:

XXXVI Conference of Community
and European Affairs Committees
of Parliaments of the European Union

19-21 November 2006
Helsinki, Finland



**ANSWERS TO THE QUESTIONNAIRE OF THE COSAC SECRETARIAT
CONCERNING THE EXERCISE ON THE CONTROL OF THE SUBSIDIARITY
PRINCIPLE WITH RESPECT TO THE REGULATION ON THE APPLICABLE
LAW AND JURISDICTION IN DIVORCE MATTERS**

The COSAC chairpersons agreed on 20 February 2006 that national parliaments upon completion of the examination of the commission proposal would draw up a short report summarising how they had set about the subsidiarity and proportionality check project and any lessons learnt. The reports should be submitted to the COSAC secretariat by 27 September. This would allow the secretariat to make a compilation of the replies in time for the XXXVI COSAC in Helsinki in order to facilitate an exchange of views and best practises between national delegations.

The Presidency has asked for the following points to be covered in the reports from national parliaments:

Procedures:

1. Which committees were involved in examining the Commission proposal for a Regulation on the applicable law and jurisdiction in divorce matters and what role did each committee play?
2. Was your plenary involved?
3. Were any other administrative services of your parliament involved in the process?
4. Could you describe the procedure used for the examination from start to finish with regard to the committees involved and other actors and the chronology of their involvement?
5. Did your government provide any information as part of the scrutiny process?
6. Did your national parliament consult regional parliaments with legislative powers?
7. Were any other external actors involved in the examination?
8. In case of a bicameral system, did you coordinate your examination with the other parliamentary chamber?
9. Was the procedure used for this project in accordance with the procedure your parliament plans to use following the Constitutional Treaty's entering into force?

Findings:

10. Did you find any breach on the subsidiarity principle?
11. Did you find any breach on the proportionality principle?
12. Did you adopt a reasoned opinion for non-compliance? (If yes please enclose a copy with your report to the COSAC secretariat)
13. Did you find the Commission's justification with regard to the subsidiarity principle satisfactory?
14. Did you find the Commission's justification with regard to the proportionality principle¹ satisfactory?
15. Did you encounter any specific difficulties during the examination?
16. Any other comments?

¹ The protocol on subsidiarity and proportionality does not stipulate an explicit legal obligation for the Commission to include a justification with regard to proportionality in the explanatory memorandum of a legislative proposal. However, according to the interinstitutional agreement on better lawmaking of 2003 the Commission "will also explain in its explanatory memorandum how measures proposed are justified in the light of the principles of subsidiarity and proportionality" (Art. 15)

Belgium: Chamber of deputies

Procédure

1. Quels sont les comités qui ont participé à l'examen de la proposition de la Commission de Règlement relatif à la loi applicable et de la compétence en matière de divorce et quel était le rôle de chaque comité ?

La sous-commission « droit familial » de la commission de la Justice

2. Votre assemblée plénière y a-t-elle participé ?

non

3. Y avait-il d'autres services administratifs de votre parlement qui ont aussi participé à ce processus ?

Le Secrétariat du comité d'avis pour les questions européennes

4. Pouvez-vous décrire la procédure utilisée durant l'examen, par rapport aux comités et autres participants, ainsi que la chronologie de leur participation ?

La sous-commission a entendu dans une première phase des experts du Ministère de la justice. Dans une deuxième phase, la sous-commission formulera (deuxième semaine du mois de novembre) un avis de subsidiarité.

5. Votre gouvernement a-t-il fourni quelque information que ce soit dans le cadre de la procédure de contrôle ?

voir question 4

6. Votre gouvernement national a-t-il consulté les parlements régionaux détenant des pouvoirs législatifs ?

Les parlements régionaux n'ont pas de compétence en cette matière.

7. Y avait-il d'autres participants à l'examen ?

non

8. Dans le cas d'un système bicaméral, avez-vous coordonné votre examen avec l'autre chambre parlementaire ?

non. Lors des négociations d'un accord de coopération parlementaire en matière de subsidiarité, (décembre 2005), les assemblées ont exprimé le souhait de développer, chacune sa propre procédure et de formuler un avis de subsidiarité d'une façon autonome.

9. La procédure utilisée pour ce projet était-elle conforme à la procédure que votre parlement prévoit d'utiliser après l'entrée en vigueur du Traité Constitutionnel ?

La procédure suivie est encore toujours provisoire. On essaie surtout, dans cette phase de sensibiliser les commissions concernées. Il serait donc désigné de choisir dans la phase expérimentale d'autres cas pour atteindre toutes les commissions.

Constats:

10. Avez-vous trouvé que le principe de subsidiarité a été violé ?

non

11. Avez-vous trouvé que le principe de proportionnalité a été violé ?

Lors de la première discussion, certains membres sont d'avis que la matière concernée appartient au domaine national. Selon certains spécialistes, la législation belge pourrait être modèle pour régler ce genre de problèmes.

12. L'avis que vous avez émis sur la non-conformité était-il raisonné ? (Si oui, joignez-en une copie à votre rapport lorsque vous l'envoyez au secrétariat de la COSAC)

L'avis suivra ultérieurement.

13. Pensez-vous que la justification de la Commission en ce qui concerne le principe de subsidiarité soit satisfaisant ?

Les membres de la commission compétente ont en tous cas examiné la proposition avec beaucoup d'intérêt.

14. Pensez-vous que la justification de la Commission en ce qui concerne le principe de *proportionnalité* soit satisfaisant ?

réponse à formuler la semaine prochaine

15. Avez-vous rencontré des difficultés spécifiques lors de votre examen ?

voir 14

16. Autres commentaires ?

voir 14

Cyprus

Procedure:

1. Which committees were involved in examining the Commission proposal for a Regulation on the applicable law and jurisdiction in divorce matters and what role did each committee play?

The examination was undertaken exclusively by the Parliamentary Committee on European Affairs. This was attributed to the fact that the Parliamentary Committee on European Affairs will primarily be conducting the control of the application of the principle of subsidiarity in the House of Representatives.

2. Was your plenary involved?

The plenary of the House of Representatives was not involved in this experimental exercise, but this does not preclude the possibility of the plenary being involved in future proceedings and / or when the mechanism of subsidiarity control, as provided in the European Constitution, actually enters into force.

3. Were any other administrative services of your parliament involved in the process?

The European Affairs Service of the House of Representatives was involved in a technocratic level with the exercise.

4. Could you describe the procedure used for the examination from start to finish with regard to the committees involved and other actors and the chronology of their involvement?

On the 3rd August 2006, the legislative proposal, accompanied by material concerning the principle of subsidiarity and proportionality and the explanatory note of the COSAC Secretariat concerning the matter, were distributed to the members of the Parliamentary Committee on European Affairs. The documents were also accompanied by a letter from the president of the Parliamentary Committee on European Affairs, explaining the requirements of the task before the Committee. A report of the European Affairs Service, which studied the legislative proposal and put down its recommendations concerning the principle of

subsidiarity and proportionality, was distributed to all the members of the House of Representatives.

Due to summer vacations of the House of Representatives, the members of the Committee were not allowed sufficient time to study the material distributed to them. Upon the commencement of the working session in September, an examination of the matter was conducted by the Parliamentary Committee on European Affairs. During the course of the meeting, the Committee, taking into account the material before it, both by the COSAC Secretariat and the European Affairs Service, examined the legislative proposal in question on the basis of the criteria set out under the Treaty of Maastricht concerning the principle of subsidiarity and proportionality.

5. Did your government provide any information as part of the scrutiny process?

The government did not provide any information for this experimental exercise, but this does not preclude the possibility of the government providing all the necessary information in future proceedings.

6. Did your national parliament consult regional parliaments with legislative powers?

No regional parliaments exist in Cyprus.

7. Were any other external actors involved in the examination?

No external actors were involved in the examination.

8. In case of a bicameral system, did you coordinate your examination with the other parliamentary chamber?

No bicameral system in Cyprus.

9. Was the procedure used for this project in accordance with the procedure your parliament plans to use following the Constitutional Treaty's entering into force?

The House of Representatives may follow largely the same procedure following the Constitutional Treaty's entry into force. In future cases, it is possible that the Parliamentary Committee on European Affairs will, firstly, notify the competent sectoral parliamentary committees and request their views on the matter under examination, where this is deemed

necessary, and, secondly, invite interested parties to express their views on the matter at hand. Finally, where it is deemed necessary to adopt a reasoned opinion concerning a breach of the subsidiarity principle, the President and the Plenary of the House of Representatives will be notified. The findings of the Committee may also be transmitted to the government. The abovementioned procedure is currently under consideration by the House of Representatives.

Findings:

10. Did you find any breach on the subsidiarity principle?

No.

11. Did you find any breach on the proportionality principle?

The Standing Committee on European Affairs has found that the provisions of the proposal for a Council Regulation amending Regulation (EC) 2201/03 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters go beyond the extent necessary and are consequently in breach of the proportionality principle. According to the findings of the Committee, the regulation should not confer the right of choice of applicable law to the spouses in order to safeguard the principles of legal certainty and predictability. In addition, in those cases where the parties choose the application of a law which is totally foreign to the domestic legal order, this would entail practical problems for the national courts in finding and correctly applying the law in question.

12. Did you adopt a reasoned opinion for non-compliance? (If yes please enclose a copy with your report to the COSAC secretariat)

No reasoned opinion was adopted concerning a breach of the subsidiarity principle.

13. Did you find the Commission's justification with regard to the subsidiarity principle satisfactory?

The Commission's justification concerning the principle of subsidiarity was found to have been satisfactory.

14. Did you find the Commission's justification with regard to the proportionality principle satisfactory?

The justification was considered satisfactory, but the Committee disagreed with the solution proposed. The proposal should not include any provisions concerning the choice of application.

15. Did you encounter any specific difficulties during the examination?

The Committee felt that the time available to the national parliaments would not be sufficient if, during the time frame provided, the proper procedure were to be followed, during which interested parties and the competent sectoral parliamentary committees would be invited to express their opinion on the matter at hand.

16. Any other comments?

See answer to the question number 15.

Parliament of the Czech Republic: CHAMBER OF DEPUTIES

SUBSIDIARITY TEST REPORT

**on the Commission proposal for a
Regulation on the applicable law and jurisdiction in divorce matters**

1. Which committees were involved in examining the Commission proposal for a Regulation on the applicable law and jurisdiction in divorce matters and what role did each committee play?

In the Chamber of Deputies of the Parliament of the Czech republic, the Committee on European Affairs was involved.

2. Was your plenary involved?

No.

3. Were any other administrative services of your parliament involved in the process?

Yes. The Parliamentary Institute of the Office of Chamber of Deputies provided expert assistance to the Committee on European Affairs and especially to the Member of Parliament, who was appointed by the Committee as rapporteur.

4. Could you describe the procedure used for the examination from start to finish with regard to the committees involved and other actors and the chronology of their involvement?

The procedure used for examination of the proposal in question was the same as for other important EU documents deliberated by the Committee on European Affairs.

The Government fulfilled its obligation to inform Parliament, as provided for under Article 10b of the Constitution and in accordance with the provision of Article 109a (1) of the Rules of Procedure of the Chamber of Deputies, by submitting the proposal to the Chamber of Deputies via Committee on European Affairs on 25 July 2006. The Government sent its preliminary position on the proposal to the Committee by means of the Information System for the Approximation of Law on 7 August 2006.

At its first meeting after parliamentary elections, on 13 September 2006, the Committee on European Affairs voted that the proposal would be deliberated at its next meeting and appointed a rapporteur, the vice-person Mrs. Čurdová.

The proposal was deliberated at the Committee meeting on 27 September 2006 after hearing the Government's preliminary position submitted by the Ministry of Justice and presented by the Deputy Minister of Justice, Mr. Polášek, and the rapporteur's report. The proposal was assessed based on its legal basis, its compliance with international agreements and the subsidiarity principle and on the basis of its likely economic and legal effects. The draft

conclusions contained in the rapporteur's report were submitted to discussion and finally were adopted by a large majority of the members of the committee.

The result of the deliberation was a Committee resolution (see the enclosed annex). According to Article 109 (4) of the Rules of Procedure, a resolution of the Committee on European Affairs is deemed to be the position of the Chamber of Deputies.

5. Did your government provide any information as part of the scrutiny process?

Yes.

The obligation of the Government to provide the Chamber of Deputies with information concerning the European agenda is set in the Article 10b of the Constitution and specified by the Rules of Procedure of the Chamber of Deputies and by the Directive of the Government on the procedure for transmitting EC/EU draft legislative acts and European Commission documents to the Chamber of Deputies and the Senate (Annex to Government Resolution No 415 of 13 April 2005).

In accordance with this Directive, the Ministry of Justice – i.e. the coordinating ministry responsible for the proposal in question – provided the Committee on European Affairs with its preliminary position regarding the proposal. The representative of the Ministry, the Deputy Minister of Justice, *Mr. Polášek*, introduced the proposal and explained the Government's position at the meeting of the Committee for European Affairs.

6. Did your national parliament consult regional parliaments with legislative powers?

No.

7. Were any other external actors involved in the examination?

No.

8. In case of a bicameral system, did you coordinate your examination with the other parliamentary chamber?

No.

9. Was the procedure used for this project in accordance with the procedure your parliament plans to use following the Constitutional Treaty's entering into force?

The procedure used for this proposal was in accordance with the Rules of procedure in force.

Findings:

10. Did you find any breach on the subsidiarity principle?

Yes. See the enclosed annex.

11. Did you find any breach on the proportionality principle?

Yes. See the enclosed annex.

12. Did you adopt a reasoned opinion for non-compliance? (If yes please enclose a copy with your report to the COSAC secretariat)

Yes. See the enclosed annex.

13. Did you find the Commission's justification with regard to the subsidiarity principle satisfactory?

No.

14. Did you find the Commission's justification with regard to the proportionality principle satisfactory?

No.

15. Did you encounter any specific difficulties during the examination?

Yes. We found very inconvenient that the proposal was submitted to the National Parliaments at the time of parliamentary holidays when no committee meetings are scheduled.

16. Any other comments?

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ANNEX

Parliament of the Czech Republic
CHAMBER OF DEPUTIES

2006
5th electoral term

6th

Resolution

of the Committee on European Affairs
at its the 2nd meeting on 27 September 2006

regarding the Commission Proposal on a Council Regulation amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters /COD 11818/06, COM(2006) 399 final/

The Committee for European Affairs after hearing the report of the Deputy Minister of Justice, Mr. Polášek, and after hearing the report of the rapporteur, Mrs Anna Čurdová, and after deliberating the matter

a p p r o v e s the position annexed to this resolution.

Josef Šenfeld
Verifier of the Committee
Committee
Annex to the resolution No 6

Anna Čurdová
Rapporteur of the Committee

Ondřej Liška
Chairman of the

DOCUMENT 11818/06

PROPOSAL FOR A COUNCIL REGULATION

Commission Proposal for a Council Regulation amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters

COM(2006) 399 final, COD 11818/06

- **Legal basis:**
Article 61c) and article 67 (1) of the EC Treaty
- **Date of transmission to the Council:**
17 July 2006
- **Date of transmission to the Chamber of Deputies via the Committee on European Affairs:**
25 July 2006
- **Procedure for Adoption:**
Consultation
- **Preliminary position of the Government (art. 109a (1) of the Rules of Procedure of the Chamber of Deputies):**
Transmitted to the Committee on European Affairs on 7 August 2006 by means of the Information System for the Approximation of Law.
- **Conformity with the principle of subsidiarity:**
The proposal does not comply with the principle of subsidiarity.
- **Background:**
Establishing an area of justice, freedom and security where free movement of persons is guaranteed is a vital aim of the EU. At the same time the increasing mobility of citizens has resulted in an increasing number of “international” marriages (i.e. the spouses are of different nationalities, or live in different Member States or live in a Member State of which they are not nationals). Pursuant to Article 65 of the EC Treaty, the Community shall adopt measures in the field of judicial cooperation in civil matters having cross-border implications insofar as they are necessary for the proper functioning of the internal market. Article 65 (b) specifically

refers to measures "promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction".

There are currently no Community provisions on applicable law in matrimonial matters. The first Community instrument adopted in the area of family law, Council Regulation (EC) No 1347/2000², set out rules on jurisdiction, recognition and enforcement of judgments in matrimonial matters as well as judgments on parental responsibility for children of both spouses given in the context of a matrimonial proceeding. It did not include rules regarding the applicable law. The entry into force of Council Regulation (EC) No 2201/2003³, which repealed and replaced Council Regulation (EC) No 1347/2001 as of 1 March 2005, did not entail any change in this respect because it adopted the original provisions on matrimonial matters from Council Regulation (EC) 1347/2000.

The European Council in Vienna requested in 1998 that the possibility of drawing up a legal instrument on the law applicable to divorce be considered within five years of the entry into force of the Treaty of Amsterdam.⁴ More recently, the European Council called upon the Commission in November 2004 to present a Green Paper on the conflict-of-law rules in matters relating to divorce in 2005.⁵ The Commission presented a Green Paper on applicable law and jurisdiction matters in divorce matters on 14 March 2005⁶. After an assessment of the received contributions from the Member States, non-governmental organizations and other stakeholders, the Commission presents this Proposal for Council Regulation amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters⁷.

- **Main objectives:**

According to the European Commission the proposed rules should meet the following objectives

- to enhance legal certainty and predictability (unification of the conflict-of-law rules, limited choice of applicable law),
- to increase flexibility and party autonomy (possibility of a limited choice of the competent court in proceedings and of the applicable law),
- to ensure access to a court (new rules on „residual jurisdiction“ for spouses who live in a third State but retain strong links with a certain Member State), and
- to prevent a “rush to court” by one spouse (unified conflict-of-law rules)

- **Content:**

The content of the proposal can be divided into two parts. The first part deals with international jurisdiction, whereas the second unifies conflict-of-law rules. While the first part modifies and amends the existing rules, the second introduces completely new rules.

² Council Regulation (EC) 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility for children of both spouses, OJ L 160, 30.06.2000, p. 19.

³ Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, OJ L 338, 23.12.2003, p. 1.

⁴ The Vienna Action Plan, adopted by the European Council 3 December 1998, OJ C19, 23.01.1999, p.1.

⁵ The Hague Programme: strengthening freedom, security and justice in the European Union, adopted by the European Council 4-5 November 2004.

⁶ COM(2005) 82 final.

⁷ COM(2006) 399 final.

In the first part, the Commission proposes to modify the current rules contained in Council Regulation (EC) No 2201/2003 on international jurisdiction. There is introduced a limited possibility for spouses to designate by common agreement the competent court ("prorogation") in a proceeding relating to divorce and legal separation. Spouses of different nationalities are allowed to designate by common agreement a court or the courts of a Member State of which one of them is a national. This possibility applies to spouses living in a Member State as well as to spouses living in third States. At the same time, the provision on exclusive competence is deleted because of its redundancy. Confusion was also caused by the provision specifying the rule on residual jurisdiction. The proposal introduces a rule ensuring access to court for spouses who live in a third State but who retain strong links with a certain Member State of which they are nationals or in which they have resided for a certain period.

The second part contains new provisions unifying the conflict-of-law rules in matters of divorce and legal separation, based in the first place on the choice of the spouses. The choice is confined to laws of states with which the spouses have a close connection: (a) the state of their last common habitual residence if one of them still resides there, or (b) the state of the nationality of one of the spouses, or (c) the state of their previous habitual residence of at least five years, or (d) the state of the forum.

In the absence of choice by the parties, the applicable law is to be determined on the basis of a variety of connecting factors, based in the first place on the habitual residence of the spouses. Failing that, divorce and legal separation would be subject to the law of the State of the last habitual residence of spouses if one of them still resides there, or failing that, of which both spouses are nationals, or failing that, where the application is lodged. In the proposal there is also a provision regarding a "public policy exception" allowing the court to disregard the rules of the foreign law designated by the conflict-of-law rule where the application of the foreign law in a given case would be manifestly incompatible with public policy according to the law of the forum.

The regulation should be applied from 1 March 2008.

- **Reasoned opinion:**

1. **Legal basis:**

The legal basis for this proposal is Article 61 (c) of the EC Treaty conferring powers on the Community to adopt measures in the field of judicial cooperation in civil matters as provided for in Article 65.

Article 65 confers legislative powers on the Community providing that three conditions are fulfilled:

- a) it is a measure in civil matters,
- b) this civil matter has cross – border implications, and
- c) a measure is necessary for the proper functioning of the internal market.

It is arguable to what extent a measure in the area of family law fulfills the last criterion, i.e. how unification of the conflict-of-law rules applicable in matrimonial matters contributes to the proper functioning of the internal market.

2. **Provisions modifying the provisions in the Council Regulation (EC) No 2201/2003 on international jurisdiction:**

It is obvious that the application of current provisions on international jurisdiction provided for by the Council Regulation (EC) No 2201/2003 encounters some difficulties which should be eliminated. But it is somewhat surprising that those troublesome provisions were taken unchanged from the previous Council Regulation

(EC) 1347/2000 which was applicable just for four years. It is a questionable how come that within the four years when Regulation 1347/2000 was applied there were no difficulties in applying those provisions and now, after only two years of application of the newer Regulation 2201/2003, the Commission seeks to amend these provisions.

3. **Provisions unifying the rules concerning applicable law in matrimonial matters:**
In some Member States, conflict-of-law rules are designated to correspond with substantive family law values which reflect different and specific cultural, religious and ideological traditions. The Commission's intervention into this area should be subjected to very detailed and accurate reasoning and justification. But neither the explanatory memorandum nor the impact assessment to the proposal removes doubts the necessity of a Community legal instrument regulating such conflict-of-law rules. The reluctance of Member States to give up their national conflict-of-law rules has been the reason for difficulties in the process of ratification of certain international conventions. But the form of the international convention adopted by the Hague Conference on Private International Law is probably the most appropriate and widely acceptable form in the field of international family law. There is no doubt that a regulation – with regard to its direct effect and direct applicability – represents a more effective tool, but if we accede to the unification of conflict-of-law rules on divorces, we should not limit the rules only to the Member States. It is not just a problem of the European Union, it is an international problem. In addition, Denmark is not participating in the adoption of this proposal, so the unification of conflict-of-law rules in the whole European Union is just illusory.
4. **Principle of subsidiarity:**
The proposal regulates the issue of “international relations” where Community legislation generally complies with the principle of subsidiarity because such objectives can usually be always accomplished more effectively at the Community level. However, in this case, the principle of subsidiarity is apparently infringed because the current regulation of individual Member States is satisfactory. The proposed regulation does not show any “added value” which would allow for intervening into the Member States’ regulation of family law. The Commission’s effort towards the unification of conflict-of-law rules (that Commission wrongly designates this as “harmonization”) can be considered as a step towards the harmonization of family law of the Member States, since the main objective of the proposal, i.e. “legal certainty and predictability” can be attained in full only through the complete harmonization of substantive family law of the Member States.

- **Conclusions:**

The Committee on European Affairs

1. **d o e s n o t c o n s i d e r** the Proposal for a Council Regulation amending Regulation (EC) No 2201/2003 to be a measure necessary for the proper functioning of the internal market, insofar as this is a condition provided for in Article 65 of the EC Treaty for measures in the field of judicial cooperation in civil matters,

2. **f i n d s** the proposal to be disputable in terms of the principle of subsidiarity, since the proposed regulation does not offer any “added value” which would justify the intervention into the internal regulation of the family law of the Member States,
3. **f i n d s** the proposal disputable in terms of the principle of proportionality, since the regulation – with regard to the international scale of the problem, not being only European – is not the appropriate instrument for unification of conflict-of-law rules in the field of international family law,
4. **t h e r e f o r e r e c o m m e n d s t o t h e G o v e r n m e n t** to support complying with the seven-year-period set in the Article 65 of Council Regulation (EC) No 2201/2003 and only until after its expiration, no sooner than 1 January 2012, to reconsider the need for any changes. This is consistent with the principle of the stability of law and with the principles set out in the Better regulation initiative,
5. **a u t h o r i z e s t h e C h a i r m a n o f t h e C o m m i t t e e** to send the Committee’s resolution regarding this proposal the to the European Commission, Council of the European Union, European Parliament and to the COSAC chairpersons and also to inform the chairperson of the Chamber of Deputies of the contents of the resolution
6. **r e q u e s t s t h e G o v e r n m e n t** to provide continuous information on subsequent deliberations regarding this proposal.

Parliament of the Czech Republic: Senate

Report on subsidiarity principle check relating to the Proposal for a Council Regulation amending Regulation (EC) No. 2201/2003, as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters

The EU-Affairs Committee of the Czech Senate - as a body designated generally to tackle the EU agenda in the upper parliamentary chamber - decided to examine the above mentioned Proposal and to scrutinize the respective position of the Czech Government on August 9th, 2006. Hence, the conformity of the Proposal with the subsidiarity and proportionality principle has been examined due to regular parliamentary scrutiny of EU affairs, as defined by the Rules of Procedure of the Senate in particular. Therefore, the Czech Government provided the explanatory memorandum to the Proposal as it usually does with regard to other scrutinized dossiers.

During its session on 13th September 2006, the EU-Affairs Committee discussed the draft Regulation. Then, following results of the debate, the Committee passed a Resolution on the Proposal and the respective position of the Government of the Czech Republic on 20th September 2006. This Resolution is considered as a recommendation for the plenary, which should pass the final position on the Proposal subsequently.

As far as the administrative aspects are concerned, the EU division of the Senate Office provided background material and analysis. Some issues concerning the impact assessment and legal consequences for the national legal order were discussed with the legislative department of the Senate office too. Neither external actors nor regional assemblies were involved in the examination due to the exclusive competence of national parliament in the matter. The chambers of the Parliament did not coordinate their examination.

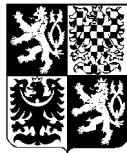
The Czech language version of the Proposal was during Committee sessions subjected to substantial critique for its unintelligibility and apparent errors resulting in legal alteration in the meaning of particular provisions.

Concerning the findings of the EU-Affairs Committee vis-a-vis the subsidiarity and proportionality principle, the following theses were involved:

- 1) the Proposal is premature, the judicial practice could not verify the necessity to pass the amending Regulation;
- 2) the residual jurisdiction clause as proposed should be subjected to a more profound impact analysis as concerns were voiced that it could interfere with international commitments of Member States and cause difficulties in the recognition of judicial decisions in third countries;
- 3) the European conflict-of-law rule is not an appropriate measure in order to reach legal certainty and to prevent the risk of the „rush to court“, because the risk of interference with national customs and rules cannot be properly avoided.

The expert and administrative background of the Senate Office would embrace a more thorough justification of the Proposal with regard to both the subsidiarity and proportionality principle.

THE PARLIAMENT OF THE CZECH REPUBLIC
SENATE



5th term

342nd RESOLUTION

delivered on the 53rd meeting held on 20th September 2006

on Proposal for a Council Regulation amending Regulation (EC) No. 2201/2003, as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters

(Senate Press no. N 89/05)

JUDr. Roman Polášek, Deputy Minister of Justice, the rapporteur's report by Senator Ludmila Müllerová and after a debate

- I. **adopts a recommendation on**
Proposal for a Council Regulation amending Regulation (EC) No. 2201/2003, as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters, which forms a supplement to this resolution;
- II. **recommends**
that the Senate of the Parliament of the Czech Republic give a statement on Proposal for a Council Regulation amending Regulation (EC) No. 2201/2003, as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters in accordance with the recommendation adopted by the Committee;
- III. **appoints**
Senator Ludmila Müllerová the committee's rapporteur at the session of the Senate of the Parliament of the Czech Republic;
- IV. **authorises**
the committee chairperson, Senator Luděk Sefzig, to

submit this resolution to the President of the Senate of the Parliament of the Czech Republic.

sign manual

Ing. Ludmila Müllerová

sign manual

Committee Rapporteur

Supplement to Resolution No. 342 from the 53rd meeting of the Committee on EU Affairs

20. 9. 2006

PaedDr. Alena Gajdůšková

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**Recommendation to the Senate of the Parliament of the Czech Republic
on Proposal for a Council Regulation amending Regulation (EC) No.
2201/2003, as regards jurisdiction and introducing rules concerning
applicable law in matrimonial matters**

(Senate Press no. N 89/05)

- considers

the submitted document to be premature as the relevant analysis of the conformity of the particular proposal with the principle of subsidiarity can, with regard to judicial practice, only be carried out after a longer period of time has elapsed since Regulation (EC) No. 2201/2003 has come into force;

- expresses fear

this particular Proposal amending the Regulation (EC) No. 2201/2003 could represent a further step in the transfer of Member States' exclusive powers regarding family law to the European level;

- believes

that the concept of residual jurisdiction needs to be examined through greater analysis in view of the need for it, particularly reflecting the problem of recognition in third countries of the decisions made by Member States' bodies, and due to Member States' international commitments;

- does not consider

the introduction of the European conflict-of-law rule in divorce matters to be a suitable measure to ensure legal certainty and prevent the risk of "rush to court", in particular with regard to the difficulties which could occur while justifying the use of the EU conflict-of-law rule in specific cases;

- finds

it necessary for the linguistic, logical and substantive quality of the proposal to be of such a standard in the official languages of all the Member States that it guarantees the compatibility of the submitted document with the version, in which the proposal was drawn up;

- **authorises**

the President of the Senate to deliver this resolution to

- a) the European Commission,
- b) the Government of the Czech Republic.

6 October 2007

Danish Parliament

Report from the Folketinget

On the experience of the subsidiarity and proportionality check on the proposal for a regulation on the applicable law and jurisdiction in divorce matters

- 1. Which committees were involved in examining the Commission proposal for a Regulation on the applicable law and jurisdiction in divorce matters and what role did each committee play?**

The European Affairs Committee and the Committee on Legal Affairs

- 2. Was your plenary involved?**

No

- 3. Were any other administrative services of your parliament involved in the process?**

The secretariat of the Committee on Legal Affairs

- 4. Could you describe the procedure used for the examination from start to finish with regard to the committees involved and other actors and the chronology of their involvement?**

On 31 August 2006 the European Affairs Committee invited the Committee on Legal Affairs to examine the proposal on "*jurisdiction and introducing rules concerning applicable law in matrimonial matters*" and to assess whether it adhered to the principle of subsidiarity. The Committee on Legal Affairs tabled 8 written questions regarding the proposal which were responded to by the competent Minister (Family and Consumer Affairs) on 7 September.

The Minister was invited to give evidence at a joint expert hearing organised by the European Affairs Committee and the Committee on Legal Affairs.

The majority of the European Affairs endorsed an opinion concerning the proposal's compliance with the subsidiarity principle at its meeting on 6 October, where it declared that the proposal was fully in compliance with the principle of subsidiarity.

Two political parties disagreed with the majority and expressed minority opinions.

- 5. Did your government provide any information as part of the scrutiny process?**

Yes the Minister of Family and Consumer Affairs gave evidence at a joint hearing organised by the European Affairs Committee and the Committee on Legal Affairs on 29 September 2006. In addition the Minister replied to 8 written questions concerning the proposal tabled by the Committee on Legal Affairs.

6. Did your national parliament consult regional parliaments with legislative powers?

No. There are no regional parliaments with legislative powers in Denmark.

7. Were any other external actors involved in the examination?

No.

8. In case of a bicameral system, did you coordinate your examination with the other parliamentary chamber?

-

9. Was the procedure used for this project in accordance with the procedure your parliament plans to use following the Constitutional Treaty's entering into force?

Yes

10. Did you find any breach on the subsidiarity principle?

No. The following opinion was adopted by a majority of the European Affairs Committee:

Opinion adopted by the European Affairs Committee of the Danish Parliament

6 October 2006

On the Commission's proposal for a Council regulation on jurisdiction and introducing rules concerning applicable law in matrimonial matters.

At the request of COSAC the European Affairs Committee and the Committee on Legal Affairs of the Danish Parliament have conducted an assessment of whether the "*proposal for a Council regulation on jurisdiction and introducing rules concerning applicable law in matrimonial matters*" adheres to the principle of subsidiarity.

In order to improve the scrutiny of the proposal, the European Affairs Committee and the Committee on Legal Affairs organised an expert hearing on 29 September 2006, where the Minister of Family and Consumer Affairs and his experts at a joint session gave evidence to the committees.

The Committee on Legal Affairs tabled 8 written questions which were replied to by the Minister on 27 September 2006.

The proposal for a Council regulation, which was put forward on 17 July 2006, aims at providing a clear and comprehensive legal framework in matrimonial matters in the European Union and ensure adequate solutions to the citizens in terms of legal certainty, predictability, flexibility and access to court.

A majority of the European Affairs Committee composed of The Liberal Party, The Social Democrats, The Conservatives, The Socialist People's Party and The Social-Liberal Party, notes that the proposal does not affect national substantive rules, but is focusing on determining which country's law will apply and which court should have jurisdiction in matrimonial proceedings in international marriages. In addition the proposal provides the

possibility for spouses to choose the applicable law and the competent court in such proceedings.

It is the assessment of the majority in the European Affairs Committee that the proposal aims at resolving a cross-border problem, which by reason of scale cannot sufficiently be achieved by the Member States through national rules.

The majority therefore finds that the Commission proposal is fully in compliance with the principle of subsidiarity in TEC article 5.

Minority opinions:

Two political parties have wished to express a minority opinion.

The Danish Peoples' Party declares that it cannot endorse the opinion of the majority of the Committee, because it finds that the proposal breaches the principle of subsidiarity.

The Red-Green Alliance has stated that it agrees with both Houses of the States General of the Kingdom of the Netherlands, which have concluded that the proposal in question does not comply with the principle of subsidiarity. The Red-Green Alliance therefore cannot support the opinion.

11. Did you find any breach on the proportionality principle?

No

12. Did you adopt a reasoned opinion for non-compliance? (If yes please enclose a copy with your report to the COSAC secretariat)

No

13. Did you find the Commission's justification with regard to the subsidiarity principle satisfactory?

Yes

14. Did you find the Commission's justification with regard to the proportionality principle satisfactory?

Yes

15. Did you encounter any specific difficulties during the examination?

No

16. Any other comments?

Estonian Riigikogu

Ms. Sarita Kaukaoja
COSAC Secretariat

26 September 2006 No 2-22/846

Dear Ms. Kaukaoja,

Following the decision of the COSAC chairpersons in Vienna in February 2006 the European Union Affairs Committee of the Riigikogu has carried out the subsidiarity and proportionality check on the proposal for a Council Regulation amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters [COM(2006) 399]. In order to facilitate the compilation of the replies, we have structured our reply in the form of answers to the questions posed in the aide-mémoire.

Procedures:

1. Which committees were involved in examining the Commission proposal for a Regulation on the applicable law and jurisdiction in divorce matters and what role did each committee play?

The European Union Affairs Committee and the Legal Affairs Committee of the Riigikogu were involved. The Legal Affairs Committee gave an opinion to the European Union Affairs Committee. The European Union Affairs Committee formed an opinion by taking into account also the opinions of the Legal Affairs Committee of the Riigikogu and the Ministry of Justice.

2. Was your plenary involved?
No.

3. Were any other administrative services of your parliament involved in the process?

Yes, in addition to the aforementioned two committees the translation bureau of the documentation department was involved.

4. Could you describe the procedure used for the examination from start to finish with regard to the committees involved and other actors and the chronology of their involvement?

The European Union Affairs Committee of the Riigikogu discussed the procedure for conducting the subsidiarity and proportionality check at its sitting on 28 August and decided to forward the materials to the Legal Affairs Committee of the Riigikogu and the Ministry of Justice in order to ask their opinion.

The Legal Affairs Committee of the Riigikogu discussed the proposal at its sitting on 19 September and submitted its opinion to the European Union Affairs Committee. The Ministry of Justice submitted its opinion on 25 September.

The European Union Affairs Committee discussed the proposal as well as the opinions of the Legal Affairs Committee and the Ministry of Justice at its sitting on 25 September and formed an opinion.

The opinions of the The European Union Affairs Committee, the Legal Affairs Committee and the Ministry of Justice were translated into English by the translation bureau. The European Union Affairs Committee forwarded the translated opinions to the Commission, European Parliament, Council and COSAC Presidency on 26 September. Finally, the information and opinions in Estonian and English were uploaded on the IPEX website on 26 September.

5. Did your government provide any information as part of the scrutiny process?

Yes, the Ministry of Justice gave its written opinion on 25 September.

6. Did your national parliament consult regional parliaments with legislative powers?

Estonia does not have regional parliaments.

7. Were any other external actors involved in the examination?

No.

8. In case of a bicameral system, did you coordinate your examination with the other parliamentary chamber?

Estonia has a unicameral parliament.

9. Was the procedure used for this project in accordance with the procedure your parliament plans to use following the Constitutional Treaty's entering into force?

The Riigikogu has not yet decided what procedure to use after the entering into force of the Constitutional Treaty.

Findings:

10. Did you find any breach on the subsidiarity principle?

No.

11. Did you find any breach on the proportionality principle?

No.

12. Did you adopt a reasoned opinion for non-compliance? (If yes please enclose a copy with your report to the COSAC secretariat)

No.

13. Did you find the Commission's justification with regard to the subsidiarity principle satisfactory?

Yes.

14. Did you find the Commission's justification with regard to the proportionality principle satisfactory?

Yes.

15. Did you encounter any specific difficulties during the examination?

The six weeks time limit proved to be unrealistic due to the fact that the Riigikogu was on collective vacation from 21 July until 25 August.

16. Any other comments?

The procedure used at the moment by COSAC works well, although the possibility to submit common positions should be more readily employed.

In addition, there should be in place an information exchange system on a regular basis regarding the additional subsidiarity checks conducted by national parliaments that are not coordinated by COSAC. The exchange of information should preferably take place through the IPEX website. In order to facilitate access to the information, national parliaments should strive to provide on the IPEX website translations to English of the opinions where they have found a breach on the subsidiarity principle. The COSAC secretariat should compile annual summaries on the subsidiarity checks conducted by national parliaments.

During the subsidiarity and proportionality checks in the Riigikogu the standing committees have been involved in the process only by giving their opinion to the European Union Affairs Committee. In order to make the subsidiarity and proportionality checks even more efficient, the standing committees could be encouraged to exchange information with their colleagues from respective committees in other parliaments.

Yours sincerely,

Kristiina Ojuland

Chairman of the European Union Affairs Committee
Riigikogu

Annexes: 1. Minutes of the European Union Affairs Committee (1 page);
 2. Opinion of the Legal Affairs Committee (1 page);
 3. Opinion of the Ministry of Justice (4 pages).

Siret Neeve (tel: +372 631 6499; e-mail: siret.neeve@riigikogu.ee)

Minutes no. 155 of the sitting of the European Union Affairs Committee of the Riigikogu

Tallinn, Toompea

Monday, 25 September 2006

Beginning at 14.00, end at 14.17

Chair: Kristiina Ojuland

Minutes taken by: Piret Valler

Participants present: Enn Eesmaa, Raivo Järvi, Mati Kepp, Mart Nutt, Kristiina Ojuland, Juhan Parts, Ülle Rajasalu, Sven Sester, Tiit Tammsaar, Olev Aarma (Counsellor), Siret Neeve (Counsellor)

Absent: Küлло Arjakas, Urmas Reinsalu, Katrin Saks, Liina Tõnisson, Vladimir Velman, Taavi Veskimägi

Persons invited: Natalja Mjalitsina, Adviser to the EU Secretariat of the State Chancellery

AGENDA:

1. Monitoring of the principles of subsidiarity and proportionality: Proposal for a Council Regulation amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters

IT WAS DECIDED:

- 1.1 To concur with the opinion of the Legal Affairs Committee of the Riigikogu and Ministry of Justice regarding Proposal for a Council Regulation amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters;
- 1.2 That the Committee finds the Proposal for a Council Regulation amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters to be in compliance with the principles of subsidiarity and proportionality.

Kristiina Ojuland
Chair

Piret Valler
Minutes taken

Opinion

At its 19 June 2006 sitting the Legal Affairs Committee of the Riigikogu discussed the proposal for a Council Regulation amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters. Subject of the discussion was the conformity of the proposal to the principles of subsidiarity and proportionality.

As a result of the discussion the Legal Affairs Committee reached the following positions:

1. The Proposal conforms to the principle of subsidiarity. According to the principle of subsidiarity, in case of shared competence the Community is authorised to adopt legal acts only if the relevant objectives cannot be achieved by the national regulation of Member States as the issue has cross-border aspects and therefore its objectives are better achieved at the Community level. In this case the objective is to provide a comprehensive legal framework in matrimonial matters in the EU that would ensure the citizens legal certainty, predictability, flexibility and access to justice. At present there is no international convention concerning the applicable law in divorce matters between the Member States. Thus the Legal Affairs Committee is of the opinion that solving the issue with a legal act at the EU level is necessary. In terms of achievability of the objective, Council Regulation would also be the most practical way.
2. The Proposal conforms to the principle of proportionality. It is evident that the Proposal is limited to what is strictly necessary for achieving the objectives. The proposed rules on applicable law and prorogation are limited to divorce and legal separation, and do not apply e.g. to marriage annulment.
3. By their content the proposed changes conform to our national law (Private International Law Act, Family Law Act, Code of Civil Procedure), therefore no significant budgetary expenses or changes to national legal acts are foreseen if the Regulation enters into force.

Yours sincerely,

Väino Linde
Chairman of the Legal Affairs Committee

Linnar Liivamägi
6457

Ms Kristiina Ojuland
Chairman
European Union Affairs Committee
Riigikogu
Lossi plats 1a
15165 TALLINN

Yours 28.08.2006 No 2-22/760

Ours 25.09.2006 No 3-3-04/8685

Giving an analysis of conformity to the principles of subsidiarity and proportionality

You have asked the opinion of the Ministry of Justice about the proposal for a Council Regulation amending Regulation (EC) No. 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters [COM (2006) 399] to evaluate if the principles of subsidiarity and proportionality are taken into account.

The objective of the draft under discussion is the necessity to preserve and develop the Community as an area based on freedom, security and justice where free movement of persons is guaranteed. In the framework of establishing such an area, the Community among other things has to take measures necessary for the adequate functioning of internal market in connection with legal cooperation in civil matters. The draft regulates the issues of applicable law and international jurisdiction in divorce (and legal separation) matters containing international element. According to the Commission the lack of common rules in this sphere causes legal uncertainty and impairs the citizens' access to administration of justice.

According to Article 2 of the Treaty on European Union, the principle of subsidiarity has to be followed in achieving the objectives of the Union. Pursuant to Article 5 of the Treaty establishing the European Community, both conditions of Article 5(2) have to be fulfilled for the application of subsidiarity requirement:

- measures for achieving the objectives of the Union at the level of member states are not adequate (necessity criterion), and
- the objectives of the Community are better achieved through Community action (criterion of effectiveness).

Besides that, one has to take into account "prohibition of excess" in the third clause of the Article, according to which it is necessary to see that the measures of the Community would be proportional.

Subsidiarity principle is based on the idea that higher social units (in the given case, the Community) should take upon themselves only the tasks lower social units (respectively, the member states) are not able to carry out. This also reflects the principle that decisions should be taken as closely as possible to the citizens. Principle of subsidiarity was first laid down in the Maastricht Treaty of 1992, although it had been shaping the development of integration in the European Union already since the 1970s.

Protocol No. 30 on the Application of the Principles of Subsidiarity and Proportionality, annexed to the Treaty of Amsterdam, (hereinafter, the Protocol) gives guidelines for observing the principle of subsidiarity. It specifies the content of the principles of subsidiarity and proportionality and establishes the rules that, proceeding from these principles, should be taken into account in the preparation of the legal acts of the Community:

- it should be examined whether the issue under consideration has aspects that influence several member states, which cannot be satisfactorily regulated by action by member states (Clause 5 of the Protocol).

According to the impact assessment organised by the Commission, the number of international marriages is steadily increasing. The problems caused by the fact that the issues connected with international jurisdiction in matrimonial matters are not regulated at the Community level can be felt

ever more sharply. In the opinion of the Commission the situation is especially complicated if the couple wishes to divorce. As the conflict of laws rules of different member states are not coordinated, it is not possible to predict which state's law will be finally applied. This causes legal uncertainty. The same also applies to international jurisdiction because the current rules of competence contain several alternative bases and in practice the choice is made by the spouse who is the first to turn to court. The issue may not be discussed by the court most closely connected with the spouses. The spouses have no possibility to flexibly determine their relations, deciding the applicable law already in advance and the competent forum together. These problems hinder the development of an area of security and justice.

According to the explanatory memorandum of the draft, the member states alone are not able to accomplish the objectives of the proposal as the rules to be established should be common for all member states in order to guarantee legal certainty and predictability. Therefore it is necessary to take measures dealing with jurisdiction and applicable law at the Community level.

There are no international legal acts connected with these matters that the member states could ratify to solve the problem.

The Ministry of Justice agrees that the issue of cross-border divorces is complex and the multitude of the legal norms of member states makes the choice of applicable law complicated. Law to be applied in divorce matters on the basis of common conflict of laws rules would be clearly established and not depend on the place of filing an action.

- according to Clause 5 of the Protocol, in observing the principle of subsidiarity it should also be estimated whether actions by member states alone or lack of Community action would conflict with the requirements of the Treaty (such as the need to strengthen economic and social cohesion) or would otherwise significantly damage member states' interests.

The explanatory memorandum compiled by the Commission states that unilateral action by member states would run counter to the objective of the proposal, as in the light of the scale of the problem (all member states except Denmark who does not participate in cooperation in civil matters) the issue can be solved only at the Community level. According to impact assessment the legal expectations of the EU citizens of functioning internal market and establishing effective common legal space are endangered if action is not taken. Cross-border divorces are considerably costlier and more time-consuming. Common regulation of issues of applicable law would help to reduce this difference with so-called ordinary divorce. Adoption of legal act would help to ensure citizens' fundamental rights and avoid discrimination on grounds of nationality;

- action at Community level should produce clear benefits by reason of its scale or effects compared with action at the level of the member states (Art. 5 of the Protocol).

It may be said that the coordination of the standards of private international law and establishing rules for jurisdiction works traditionally effectively at the Community level as common rules for all member states are necessary for accomplishing the above-mentioned objectives. So far both issues have been successfully regulated with Community legal acts (e.g. Brussels I regulation) within the framework of cooperation in civil matters.

According to impact assessment the planned Community legal act would bring along greater legal certainty, flexibility, better access to administration of justice;

- the form of the Community action should be as simple as possible, consistent with the 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 (Clause 6 of the Protocol).

The Commission justifies the choice of regulation as an instrument by saying that to leave member states any margin of discretion in matters of jurisdiction and applicable law would endanger the objectives of legal certainty and predictability.

The Ministry of Justice agrees that a directive is not sufficient for solving certain issues already proceeding from the essence of the object to be regulated. In regulating the issues of private international law and jurisdiction, namely regulation is the suitable form of legal act. We refer to the above-mentioned need for common directly applicable set of rules, without which the striving for regulation would come to nothing;

- keeping in mind the nature and extent of Community action, Community measures should leave as much scope for national decision as possible, consistent with securing the aim of the measure and observing the requirements of the Treaty. While respecting Community law, care should be taken to respect well-established national arrangements and the organisation and working of member states' legal systems. If Community measures are necessary, they should guarantee member states with alternative ways to achieve the objectives of the measures, taking into account the need for their proper enforcement (Clause 7 of the Protocol).

The explanatory memorandum of the draft emphasises that the proposal is strictly limited to what is necessary to achieve its objectives. The proposed rules are limited to divorce and legal separation involving cross-border element and they shall not be applied to marriage annulment. It is underlined that the national divorce law of member states is not harmonised and thus the sovereignty of member states is not interfered.

In the replies to the Green Paper of the Commission the member states have, among other things, expressed fear that the unification of conflict of laws rules would inevitably force the courts of member states to apply foreign law. Different member states may have different opinion of observing the principle of subsidiarity, especially in the spheres that are characterised by strong national traditions. Regulation of family and matrimonial issues has always been a so-called conservative sphere where states stick to established regulations and where the differences between states are great. This is connected with the peculiarities of social organisation, religion and history.

Another problem is whether a member state has to apply foreign law also in the case its content significantly contradicts the important legal principles of this member state. In the answers to the questions of the Green Paper, Estonia has stated that it considers necessary to use the clause of public order or the possibility of not applying foreign law in cases where the law to be applied cannot be reconciled with the general principles of Estonian (family) law.

Article 20e of the draft establishes the possibility of applying *ordre public* clause.

It is clear that the member states whose legislation envisages *lex fori* as mainly applicable law are most affected by the draft. Estonia's private international law is considerably more flexible and the solutions of the draft are generally acceptable to Estonia.

Proceeding from the above, in the opinion of the Ministry of Justice the draft does not contradict the principle of proportionality. The sovereignty of member states is invaded to the smallest extent possible (the divorce law of member states is not harmonised), and the established order of the member states and the peculiarities of the legal systems of the member states are taken into account (enacting the possibility to use *ordre public* reservation);

- pursuant to Clause 9 of the Protocol, the Commission should consult widely before proposing legislation and publish consultation documents.

Before initiation of the draft the Commission has consulted interested parties by presenting Green Paper dealing with law applicable in divorce matters and jurisdiction on 14 March 2005. According to the explanatory memorandum of the draft regulation, the Green Paper received c. 65 opinions. European Economic and Social Committee submitted its approval of the draft on 28 September 2005. The Commission has also organised a public hearing (on 6 December 2006) and a meeting of experts from member states (on 14 March 2006). Impact assessment analysing different aspects of the problem and different ways of solution has been made, and it is found that unification of conflict of laws rules and also reviewing of norms dealing with jurisdiction are necessary for achieving the set objective. Answers to the Green Paper and impact assessment are available to the public on the web.

In conclusion the Commission has observed the procedural requirements in analysing the correspondence to the principle of subsidiarity, consulting the interested parties before drafting the proposal, organising research and required impact assessment. In the explanatory memorandum the Commission has justified the relevance of its proposals, keeping in mind the principle of subsidiarity; the issue is dealt with in more detail in the impact assessment.

Currently the cross-border divorce law is legally excessively complicated, unreasonably costly and time-consuming. Common regulation of law applicable in divorce matters and the issues of international jurisdiction would help to mitigate these problems. At member states level it is not possible to create such regulation; the only effective method is interference of the Community. The draft interferes to the smallest extent possible, leaving the annulment of marriage unregulated (this was also desired by several member states in answering to the questions of the Green Paper) and establishing the *ordre public* rule.

Taking the above into account, in our opinion the draft does not violate the principle of subsidiarity.

Yours sincerely,

Rein Lang
Minister

Karin Rammo
620 8208

Finnish Eduskunta

4. Report from national parliaments on experience of the subsidiarity and proportionality check:

The COSAC chairpersons agreed on 20 February 2006 that national parliaments upon completion of the examination of the commission proposal would draw up a short report summarising how they had set about the subsidiarity and proportionality check project and any lessons learnt. The reports should be submitted to the COSAC secretariat by 27 September. This would allow the secretariat to make a compilation of the replies in time for the XXXVI COSAC in Helsinki in order to facilitate an exchange of views and best practises between national delegations.

The report can be forwarded to the secretariat on: secretariat@cosac.eu in either English or French.

The Presidency has asked for the following points to be covered in the reports from national parliaments:

Procedures:

1. Which committees were involved in examining the Commission proposal for a Regulation on the applicable law and jurisdiction in divorce matters and what role did each committee play?

The Legal Affairs Committee and the Grand Committee.

2. Was your plenary involved?

No.

3. Were any other administrative services of your parliament involved in the process?

No.

4. Could you describe the procedure used for the examination from start to finish with regard to the committees involved and other actors and the chronology of their involvement?

After receiving the proposal the Grand Committee asked the Legal Affairs Committee to examine the Commission's proposal. Legal

5. Did your government provide any information as part of the scrutiny process?

Yes, they did.

6. Did your national parliament consult regional parliaments with legislative powers?

No.

7. Were any other external actors involved in the examination?

No.

8. In case of a bicameral system, did you coordinate your examination with the other parliamentary chamber?

-

9. Was the procedure used for this project in accordance with the procedure your parliament plans to use following the Constitutional Treaty's entering into force?

Partly yes.

Findings:

10. Did you find any breach on the subsidiarity principle? **No.**
11. Did you find any breach on the proportionality principle? **No.**
12. Did you adopt a reasoned opinion for non-compliance? (If yes please enclose a copy with your report to the COSAC secretariat) **Yes.**
13. Did you find the Commission's justification with regard to the subsidiarity principle satisfactory? **Yes.**
- 14. Did you find the Commission's justification with regard to the proportionality principle satisfactory? No. With regard to the proportionality principle, the Eduskunta finds the Commission's justifications very general without any assessment on the substance and the Eduskunta notes that the Commission's justifications with regard to the proportionality principle are inadequate.**
15. Did you encounter any specific difficulties during the examination? **No.**
16. Any other comments? -



Position of the Grand Committee on the Commission Proposal for a Regulation on the applicable law and jurisdiction in divorce matters (2005/JSL/187)

- approved in the context of COSAC's subsidiarity and proportionality check

The Commission proposal has been scrutinised by the Legal Affairs Committee and the Grand Committee of Parliament of Finland (Eduskunta).

Based on the information received, the Eduskunta states that the proposal does not infringe the subsidiarity or proportionality principles.

With regard to the subsidiarity principle, the Eduskunta finds the Commission's justifications adequate considering the substance of the matter. With regard to the proportionality principle, the Eduskunta finds the Commission's justifications very general without any assessment on the substance. The Eduskunta notes that the Commission's justifications with regard to the proportionality principle are inadequate.

French Assemblée National

D630/GC/CB

Paris, le 21 septembre 2006

***Examen au regard de la subsidiarité
et de la proportionnalité de la proposition de règlement sur la compétence et
les règles relatives à la loi applicable en matière matrimoniale***

Objet : Réponse au questionnaire.

1. Quels sont les comités qui ont participé à l'examen de la proposition de la Commission de règlement relatif à la loi applicable et de la compétence en matière de divorce et quel était le rôle de chaque comité ?

– La Délégation de l'Assemblée nationale pour l'Union européenne.

2. Votre assemblée plénière y a-t-elle participé ?

– Non.

3. Y avait-il d'autres services administratifs de votre Parlement qui ont aussi participé à ce processus ?

– Non.

4. Pouvez-vous décrire la procédure utilisée durant l'examen, par rapport aux comités et autres participants, ainsi que la chronologie de leur participation ?

– La Délégation a examiné le texte lors de sa séance du mardi 19 septembre 2006 (voir extrait du compte rendu joint).

5. Votre Gouvernement a-t-il fourni quelque information que ce soit dans le cadre de la procédure de contrôle ?

– Le Gouvernement a fourni une « fiche d'impact » comme il le fait généralement sur les propositions d'actes communautaires, relative à l'incidence du projet de règlement sur le droit national.

6. Votre Gouvernement national a-t-il fourni quelque information que ce soit dans le cadre de la procédure de contrôle ?

– Non.

7. Y avait-il d'autres participants à l'examen ?

– Non.

8. Dans le cas d'un système bicaméral, avez-vous coordonné votre examen avec l'autre chambre parlementaire ?

– Il y a eu des contacts de travail entre les secrétariats des délégations.

9. La procédure utilisée pour ce projet était-elle conforme à la procédure que votre Parlement prévoit d'utiliser après l'entrée en vigueur du Traité constitutionnel ?

– Il n'a pas été décidé de la procédure qui serait mise en œuvre dans le cadre d'une entrée en vigueur du Traité constitutionnel.

10. Avez-vous trouvé que le principe de subsidiarité a été violé ?

– Non.

11. Avez-vous trouvé que le principe de proportionnalité a été violé ?

– Non.

12. L'avis que vous avez émis sur la non-conformité était-il raisonné ?

–

13. Pensez-vous que la justification de la Commission en ce qui concerne le principe de subsidiarité soit satisfaisante ?

– Oui.

14. Pensez-vous que la justification de la Commission en ce qui concerne le principe de proportionnalité soit satisfaisante ?

– Il gagnerait à être plus approfondi.

15. Avez-vous rencontré des difficultés spécifiques lors de votre examen ?

– Non.

16. Autres commentaires ?

– Non.

Mardi 19 septembre 2006 à 15 heures

Extrait du compte rendu n° 181

XII^E LEGISLATURE

**Présidence de M. Pierre Lequiller,
Président**

- **Examen au regard de la subsidiarité et de la proportionnalité de la proposition de règlement sur la compétence et les règles relatives à la loi applicable en matière matrimoniale (E 3205)**

Examen au regard de la subsidiarité et de la proportionnalité de la proposition de règlement sur la compétence et les règles relatives à la loi applicable en matière matrimoniale (E 3205)

M. Jérôme Lambert, rapporteur, a indiqué que la Délégation était saisie par la COSAC d'une demande d'avis, au titre du contrôle de la subsidiarité et de la proportionnalité, à propos de la proposition de règlement sur la compétence et les règles relatives à la loi applicable en matière matrimoniale, et en particulier de divorce. Il a rappelé qu'il s'agissait d'une opération « test », dans le cadre du renforcement du contrôle de la subsidiarité et de la proportionnalité par les parlements nationaux, découlant précisément des décisions prises par la réunion de la COSAC qui s'est tenue à Londres en octobre 2005.

Il est prévu que la Délégation transmette directement à la COSAC et aux institutions européennes un avis sur ce texte, au titre de la subsidiarité et de la proportionnalité, avant la fin de ce mois.

Le projet de règlement concerné vise à renforcer la sécurité et la prévisibilité juridique dans les procédures de divorce et de séparation de corps pour les couples européens de deux nationalités différentes. Cette proposition de règlement – qui modifie le règlement du 27 novembre 2003 – est basée sur l'article 65 du traité qui vise les mesures relevant du domaine de la coopération judiciaire civile ayant pour objet de favoriser la compatibilité des règles applicables dans les Etats membres en matière de conflits de lois et de compétences. Elle fait suite directement aux recommandations du Conseil européen de La Haye en novembre 2004. La proposition de la Commission a été transmise le 17 juillet dernier. Elle doit faire l'objet d'un avis simple du Parlement européen.

S'agissant du fond du texte, le dispositif juridique et administratif proposé prévoit en premier lieu la mise en place de règles communautaires relatives à la loi applicable en matière de divorce et de séparation de corps. L'objectif recherché est d'instaurer une règle de conflit de lois communautaires afin de mettre fin à la disparité des règles de conflits de lois existant au sein de l'Union européenne, qui favorise le « forum shopping » et est source d'insécurité juridique.

Il est proposé que la loi applicable au divorce et à la séparation de corps soit la loi choisie par les parties, à condition que celle-ci présente des liens étroits avec leur situation conjugale. A défaut de choix de loi par les parties, il s'agirait de la loi qui présente le lien le plus étroit avec les parties, déterminée en fonction d'une échelle de critères de rattachement, dont le lieu de résidence.

Le texte vise également à améliorer les règles de compétence en matière de divorce et de séparation de corps. Sans modifier les compétences générales fixées par le règlement actuellement en vigueur, la proposition prévoit la possibilité pour les époux de choisir la juridiction compétente, à condition qu'elle présente des liens étroits avec leur situation conjugale.

Au total, la proposition de règlement tient largement compte des observations formulées par la France dans sa réponse au Livre vert du 14 mars 2005 sur le droit applicable et la compétence en matière de divorce. La France y est favorable dans son principe. La discussion au sein du Conseil n'a pas encore débuté et ne commencera pas avant décembre.

S'agissant du respect par le texte du principe de subsidiarité, le rapporteur a proposé d'émettre un avis positif. Il a souligné que la promotion de la compatibilité des règles applicables dans les Etats membres en matière de conflits de lois et de compétences est de la responsabilité de l'Union et que l'action individuelle des Etats membres ne pourrait à l'évidence être de nature à établir des règles communes dans ce domaine.

De même, en ce qui concerne le principe de proportionnalité, le rapporteur a estimé que le règlement du Conseil proposé n'allait pas au-delà de ce qui est nécessaire pour atteindre l'objectif poursuivi : il se cantonne aux règles de compétence et à la détermination de la loi applicable et ne comporte pas de modification sur le fond de la nature des règles applicables.

M. François Guillaume a souhaité connaître les critères prévus par la proposition de règlement s'agissant de la loi applicable lorsque les parties ne l'ont pas expressément prévu. Il a par ailleurs interrogé le rapporteur sur les améliorations que le texte proposé pourrait apporter quant à la situation des enfants de divorcés de nationalités européennes différentes.

Le **rapporteur** a précisé que le règlement posait le principe selon lequel, à défaut de choix par les parties de la loi applicable, le divorce sera soumis à la loi de l'Etat dans lequel les conjoints ont leur résidence habituelle commune ou, à défaut, dans lequel les conjoints ont eu leur dernière résidence commune, si l'un d'eux y réside toujours. Il a par ailleurs rappelé que la proposition ne modifiait pas le fond des règles nationales applicables, mais qu'en harmonisant au niveau de l'Union les règles de conflits de lois, elle contribuait à renforcer la sécurité et la prévisibilité juridique quant à la loi applicable.

La Délégation a donné un avis positif sur le respect des principes de subsidiarité et de proportionnalité par la proposition de règlement du Conseil (CE/2201/2203) sur la

compétence et les règles relatives à la loi applicable en matière matrimoniale, et en particulier de divorce.

Le **Président Pierre Lequiller** a évoqué la décision prise par la Commission en mai dernier de transmettre directement aux parlements nationaux ses propositions d'actes communautaires et ses documents de consultation. Il a considéré que cette décision contribuait fortement à faire enfin sortir le contrôle de l'application des principes de subsidiarité et de proportionnalité des discussions théoriques et à concrétiser le renforcement du rôle joué par les parlements dans ce domaine.

Il a souligné qu'il ne s'agissait pas d'une application anticipée des règles de l'« alerte précoce » prévues par le traité constitutionnel.

La Commission ne sera pas tenue de suivre les avis exprimés par les parlements. Néanmoins, si un nombre significatif de parlements nationaux émettent des avis convergents sur le non-respect par une proposition de la Commission des principes de subsidiarité et de proportionnalité, il sera politiquement impossible à la Commission de ne pas en tenir compte.

S'agissant de la procédure à suivre au sein de l'Assemblée nationale à propos des avis qui seront transmis, le Président Pierre Lequiller a indiqué qu'il saisirait très prochainement le Président Jean-Louis Debré d'une proposition, en ayant présent à l'esprit le rapport d'information de MM. Jérôme Lambert et Didier Quentin sur l'application du principe de subsidiarité établi en novembre 2004.



SERVICE DES
AFFAIRES
EUROPÉENNES

Paris, le 26 septembre 2006

RAPPORT AU SECRETARIAT DE LA COSAC
SUR L'EXPERIENCE DE CONTROLE DE LA SUBSIDIARITE ET DE LA PROPORTIONNALITE
AU SUJET DE LA PROPOSITION DE REGLEMENT COM (2006) 0399 FINAL

1. Quels sont les comités qui ont participé à l'examen de la proposition de la Commission de Règlement relatif à la loi applicable et de la compétence en matière de divorce et quel était le rôle de chaque comité ?

L'examen a été mené par la délégation pour l'Union européenne. Aucun autre organe du Sénat n'y a participé. Il faut souligner que les membres de la délégation pour l'Union européenne sont obligatoirement membres d'une des six commissions permanentes du Sénat. De cette manière, un lien est toujours assuré avec ces commissions.

2. Votre assemblée plénière y a-t-elle participé ?

Non.

3. Y avait-il d'autres services administratifs de votre parlement qui ont aussi participé à ce processus ?

Non.

4. Pouvez-vous décrire la procédure utilisée durant l'examen, par rapport aux comités et autres participants, ainsi que la chronologie de leur participation ?

La délégation pour l'Union européenne a été officiellement saisie du texte le 26 juillet et s'est prononcée lors de sa réunion du 19 septembre.

5. Votre gouvernement a-t-il fourni quelque information que ce soit dans le cadre de la procédure de contrôle ?

Oui. Il a transmis le 28 août une fiche d'impact présentant les principales dispositions du texte et analysant ses conséquences juridiques.

6. Votre gouvernement national a-t-il consulté les parlements régionaux détenant des pouvoirs législatifs ?

Sans objet.

7. Y avait-il d'autres participants à l'examen ?

Les professions concernées (notaires et avocats) ont été consultées.

8. Dans le cas d'un système bicaméral, avez-vous coordonné votre examen avec l'autre chambre parlementaire ?

Non. Toutefois, les deux délégations se sont tenues informées de leurs travaux respectifs.

9. La procédure utilisée pour ce projet était-elle conforme à la procédure que votre parlement prévoit d'utiliser après l'entrée en vigueur du Traité Constitutionnel ?

La future procédure n'a pas été décidée.

10. Avez-vous trouvé que le principe de subsidiarité a été violé ?

Non.

11. Avez-vous trouvé que le principe de proportionnalité a été violé ?

Non.

12. L'avis que vous avez émis sur la non-conformité était-il raisonné ?

Voir en annexe le résumé des conclusions de la délégation.

13. Pensez-vous que la justification de la Commission en ce qui concerne le principe de subsidiarité soit satisfaisante ?

Non. Les justifications avancées par la Commission ont été jugées insuffisantes.

14. Pensez-vous que la justification de la Commission en ce qui concerne le principe de proportionnalité soit satisfaisante ?

Non. Les justifications avancées par la Commission ont été jugées insuffisantes.

15. Avez-vous rencontré des difficultés spécifiques lors de votre examen ?

Nous n'avons obtenu ni de la Commission européenne, ni de notre Gouvernement, des indications chiffrées sur l'ampleur du « forum shopping », alors qu'il s'agit d'un élément important pour apprécier l'utilité du texte.

16. Autres commentaires ?

Non.

ANNEXE

RESUME DES CONCLUSIONS DE LA DELEGATION

La délégation a regretté, tout d'abord, l'insuffisante motivation de la proposition de la Commission européenne au regard des principes de subsidiarité et de proportionnalité.

Puis la délégation a examiné trois questions.

1°) Une harmonisation européenne des règles de conflit de loi est-elle réellement nécessaire ?

La délégation a répondu qu'il y avait une réelle « valeur ajoutée » d'une intervention européenne qui résidait essentiellement dans le souci de résoudre les difficultés rencontrées par les citoyens en matière de divorce dans les situations transfrontalières et par la réduction du risque de « course au juge ». Toutefois, elle a regretté que la Commission ne fournisse aucun élément chiffré permettant d'apprécier les risques réels de « tourisme judiciaire ».

2°) L'Union européenne constitue-t-elle l'échelon le plus pertinent pour ce type d'intervention ?

Une action au niveau de chaque État membre, voire même au niveau bilatéral, serait insuffisante pour atteindre l'objectif fixé. En effet, la plus-value d'une intervention au niveau européen réside précisément dans une harmonisation des règles de conflit de loi, pour lesquelles il existe actuellement une forte disparité entre les États.

Il serait possible d'agir au sein d'un espace plus vaste, comme la « Conférence de droit international privé » (dite Conférence de La Haye). Mais, les « conventions de La Haye » restent la production d'une organisation intergouvernementale classique et souffrent de limites : nombre insuffisant de ratifications, qui limite leur application ; possibilité de déclarations et de réserves au moment des ratifications ; absence de contrôle juridictionnel.

L'Union européenne apparaît donc bien, du point de vue de la délégation, comme le niveau le plus approprié pour agir dans ce domaine.

3°) Les moyens envisagés n'excèdent-ils pas ce qui est nécessaire pour atteindre l'objectif fixé ?

L'initiative de la Commission porte uniquement sur la détermination du droit applicable et de la compétence en matière de divorce. Elle ne vise en aucune manière l'harmonisation des règles nationales qui régissent le divorce. Si tel avait été le cas, le problème de la subsidiarité se serait sans doute posé.

La proposition de la Commission respecte les différences existantes entre les traditions et les systèmes juridiques des États membres. Elle comporte notamment des exceptions pour tout ce qui relève de l'ordre public. Ainsi, le champ d'application du règlement est limité au divorce et à la séparation de corps. Il ne concerne pas l'annulation du mariage, qui touche directement à l'ordre public de chaque État.

L'harmonisation des règles de compétence et du règlement des conflits de lois doit ici être privilégiée par rapport à d'autres formes d'intervention (comme la reconnaissance mutuelle ou la coordination par exemple), car il s'agit bien de fixer des règles précises permettant de déterminer la loi applicable ou le juge compétent.

Enfin, quant au choix de l'instrument, un règlement apparaît plus approprié qu'une directive ou une simple recommandation étant donné l'objectif d'assurer une véritable unification des règles de compétence.

En définitive, pour la délégation, le dispositif tel qu'il est proposé par la Commission européenne paraît conforme aux principes de subsidiarité et de proportionnalité.

En outre, le choix de la Commission d'accorder une large place à l'autonomie des parties, en permettant aux conjoints de se mettre d'accord sur la loi applicable ou le juge compétent, semble s'inscrire dans l'esprit même de la subsidiarité au sens philosophique du terme.

COSAC Secretariat

via E-Mail

Answers to the questions put forward in the Aide-mémoire for the subsidiarity and proportionality check on the Commission proposal concerning applicable law in matrimonial matters

Procedures:

17. Which committees were involved in examining the Commission proposal for a Regulation on the applicable law and jurisdiction in divorce matters and what role did each committee play?

The committees involved within the German Bundestag were the Committee on Legal Affairs as the committee responsible and the committees on Family Affairs, Senior Citizens, Women and Youth and the Committee on the Affairs of the European Union as committees asked for an opinion.

18. Was your plenary involved?

Yes, based on the Committee on Legal Affairs recommendation for a decision and report the item was set on the agenda of the plenary sitting of 28 September 2006.

19. Were any other administrative services of your parliament involved in the process?

The Committee on Legal Affairs had requested a legal analyse of the research services of the administration of the German Bundestag.

20. Could you describe the procedure used for the examination from start to finish with regard to the committees involved and other actors and the chronology of their involvement?

- 28 July 2006: The German Government has formally transmitted the document to the so-called European Affairs Office of the German Bundestag, which in organizational terms is integrated in the secretariat of the EU-Committee.
- 8 September 2006: The President of the Bundestag then, in agreement with the Council of Elders, referred the item to the Committee on Legal Affairs as the committee responsible and to the Committee on Family Affairs, Senior Citizens, Women and Youth and the Committee on the Affairs of the European Union as committees asked for an opinion.
- 20 September 2006: The Committee on Family Affairs, Senior Citizens, Women and Youth had no objection to the proposal regarding subsidiarity and proportionality.
- 20 September 2006: The Committee on the Affairs of the European Union started its deliberations, which were concluded in the committee meeting of 27 September 2006. It unanimously stated having no objection to the proposal regarding subsidiarity and proportionality.
- 27 September 2006: The Committee on Legal Affairs as the committee responsible in its so-called recommendation for a decision and report unanimously recommended to the plenary, that the committees involved had had no objection to the proposal regarding subsidiarity and proportionality.
- 28 September 2006: In accordance with the Committee on Legal Affairs recommendation for a decision, the Bundestag finally adopted a resolution in printed paper Nr. 16/2784.

21. Did your government provide any information as part of the scrutiny process?

The German government has submitted a report (so-called Ressortbericht), which contained relevant informations to the item.

22. Did your national parliament consult regional parliaments with legislative powers?

No, the consultation of regional Parliaments is in the responsibility of the Bundesrat.

23. Were any other external actors involved in the examination?

No.

24. In case of a bicameral system, did you coordinate your examination with the other parliamentary chamber?

There was no particular coordination with the Bundesrat.

25. Was the procedure used for this project in accordance with the procedure your parliament plans to use following the Constitutional Treaty's entering into force?

No, the procedure followed the current legal basis of the Basic Law and the rules of procedure of the German Bundestag. The procedure foreseen in the case of

entering into force of the Constitutional Treaty is described in the so-called national implementation law (Begleitgesetz).

Findings:

26. Did you find any breach on the subsidiarity principle?

No.

27. Did you find any breach on the proportionality principle?

No.

28. Did you adopt a reasoned opinion for non-compliance? (If yes please enclose a copy with your report to the COSAC secretariat)

No.

29. Did you find the Commission's justification with regard to the subsidiarity principle satisfactory?

30. Did you find the Commission's justification with regard to the proportionality principle satisfactory?

The Committee on Legal Affairs as the committee responsible and the Committee on Family Affairs, Senior Citizens, Women and Youth as committee asked for an opinion did find the Commission's justification satisfactory.

The Committee on European Affairs agreed to the legal basis chosen by the European Commission (Art. 61 c, 65, 67 EC Treaty) but anyhow underlined the necessity of a specific justification, how far the regulation as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters is necessary for the proper functioning of the internal market.

31. Did you encounter any specific difficulties during the examination?

One practical problem laid in the fact that the proposal was officially transmitted in July during the summer break and therefore could only be referred by the President of the Bundestag then, in agreement with the Council of Elders, on 8 September to the committees en bloc.

32. Any other comments?

The current check on subsidiarity and proportionality has shown the necessity of strengthening the parliamentary process in EU matters as set out in Rules 93 and 93a of the Rules of Procedure of the Bundestag.

Signed on behalf

Jan Schlichting

Report
from the German Bundestag on experience of the subsidiarity and proportionality
check on the European Commission proposal for a Council regulation amending
Regulation (EC) No 2201/2003 as regards introducing rules concerning applicable
law in matrimonial matters –
COM(2006) 399 final

I. Summary

Deliberations on the proposal for a Council regulation in matrimonial matters (COM(2006) 399 final) were held as part of a test run of the subsidiarity and proportionality check launched by COSAC. The national parliaments of the Member States were called upon to submit comments on whether the proposal for a regulation fulfilled requirements for compliance with the principles of subsidiarity and proportionality as set out in Article 5 of the Treaty of Amsterdam and in the Protocol on the Role of National Parliaments. The national parliaments were asked to submit their comments within six weeks after the document was published in all official languages on 27 July 2006. The German Bundestag reached the conclusion that the proposal for a regulation does indeed fulfil these requirements. The Bundestag submitted its comments to the European Commission, the European Parliament and the Council on 6 October 2006.

II. The scrutiny procedure in detail

1. The Federal Government formally referred the proposal to the German Bundestag on 28 July 2006 (Section 93 in conjunction with Section 93a of the Rules of Procedure of the German Bundestag). Once the Federal Government has referred EU proposals to the Bundestag, the President of the Bundestag, in consultation with the Council of Elders, passes them on to the committee responsible, as well as to one or more committees asked for an opinion. This stage in the procedure generally takes 14 days.

On account of the summer recess, the proposal on the law applicable to divorce matters that was formally referred on 28 July 2006 was not referred for deliberation to the Committee on Legal Affairs (which was the committee responsible) or to the Committee on the Affairs of the European Union and the Committee on Family Affairs, Senior Citizens, Women and Youth (which were asked for an opinion) until 8 September 2006 (referral as printed matter 16/2555 in accordance with Section 93(3) of Rules of Procedure of the Bundestag).

In order nonetheless to be able to take part in the test run launched on the initiative of COSAC and to be able to submit its comments on the proposal for a regulation within the specified six-week period, the Committee on Legal Affairs (the committee responsible) and the Committee on the Affairs of the European Union and the Committee on Family Affairs, Senior Citizens, Women and Youth (which were asked for opinion) took up the matter in anticipation of the subsequent transferral from the Council of Elders.

2. The **Committee on Family Affairs, Senior Citizens, Women and Youth** discussed the proposal during its 17th session on 20 September 2006 and recommended that no reservations be expressed against the proposal as regards subsidiarity and

proportionality. The Committee welcomed the objective of strengthening legal certainty and predictability for couples affected by means of harmonising conflict-of-law rules on the jurisdiction and applicable law in matrimonial matters. It declared that national legislation was not able to regulate all aspects of family law matters that had an international dimension. The Committee also found that there could be no reservations as regards proportionality. The Committee on Family Affairs, Senior Citizens, Women and Youth, which was asked for an opinion, had concentrated on examining the proposal as regards specific aspects of equal rights and family policy. However, given the fact that the focus here was on an examination of subsidiarity and proportionality, these were only side issues. Another, separate issue was the examination of the content of the proposal, on which it reserved the right to submit a separate opinion.

3. The Committee on the Affairs of the European Union consulted on the proposal during its 18th session on 27 September 2006 and voted unanimously to recommend that no reservations be expressed against the choice of legal basis or against compliance with the principle of subsidiarity and the principle of proportionality. The Committee examined the proposal for a regulation as regards the choice of legal basis and the principles of subsidiarity and proportionality. It supported the proposal as it represents a step forward in terms of legal certainty and predictability in international divorce matters and in terms of strengthening personal autonomy on account of the jurisdiction and choice of law it introduces. The Committee on the Affairs of the European Union emphasised the need for a comprehensive explanation regarding the extent to which a regulation on applicable law and jurisdiction in divorce matters would actually have been necessary for the proper functioning of the internal market.

4. The Committee on Legal Affairs discussed the proposal for a regulation (with regard to an examination of subsidiarity and proportionality) during its 25th session on 27 September 2006. It voted unanimously to recommend that the plenary adopt the resolution that no reservations be expressed against the proposal as regards compliance with the EU's principles of subsidiarity and proportionality. However, it reserved the right to look into other aspects of the proposal at a later date.

As regards the work involved in examining the proposal and the need to guarantee a thorough and swift scrutiny procedure, the parliamentary groups represented on the Committee on Legal Affairs consensually agreed to emphasise that the six-week period had proved too short. It also felt there was a need to clarify within the Bundestag what form the subsidiarity and proportionality check on EU proposals for regulations was to take in future.

5. In its 54th sitting on 28 September 2006, the **German Bundestag** passed the following resolution:

The German Bundestag hereby establishes that it has no reservations against the European Commission proposal for a Council regulation amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters (COM(2006) 399 final, Council Doc. 11818/06) with regard to compliance with the principles of subsidiarity and proportionality applied under European law.

III. Conclusion

Despite the summer recess, the German Bundestag was able to complete its examination of the proposal for a regulation as close as possible to within the six-week deadline proposed by COSAC. Nevertheless, the Committee on Legal Affairs (which was the committee responsible) consensually agreed to emphasise that this six-week period had proved too short. Furthermore, it also established that there was a need for the Bundestag to clarify what form the subsidiarity and proportionality check on EU proposals for regulations was to take in future.

Until the Treaty establishing a Constitution for Europe has come into force and until the German Bundestag has introduced a special scrutiny procedure for EU proposals with regard to compliance with the principle of subsidiarity and proportionality, the procedure set out in Sections 93 and 93a of the Rules of Procedure applies to EU proposals.

Overview of the scrutiny procedure:

- **27 July 2006:** Publication of the proposal by the European Commission in all official languages.

- **28 July 2006:** The Federal Government formally refers the proposal to the German Bundestag.

- **8 September 2006:** Referral of printed paper 16/2555 in accordance with Section 93(3) of the Rules of Procedure of the Bundestag to the Committee on Legal Affairs for discussion as the committee responsible and to the Committee on the Affairs of the European Union and the Committee on Family Affairs, Senior Citizens, Women and Youth (which were asked for an opinion).

- **20 September 2006:** The Committee on Family Affairs, Senior Citizens, Women and Youth discusses the proposal during its 17th session and recommends that no reservations be expressed against the proposal.

- **20 September 2006:** The Committee on the Affairs of the European Union begins deliberations on the proposal, which are concluded on **27 September 2006**. It votes unanimously to recommend that no reservations be expressed against the proposal with regard to the aspects of subsidiarity and proportionality.

It judges the legal basis chosen by the Commission (Articles 61 c), 65, 67 of the Treaty) to be appropriate. Nevertheless, the Committee emphasises the need for a separate clarification of the extent to which a regulation on applicable law and jurisdiction in divorce matters is actually necessary for the proper functioning of the internal market.

- **27 September 2006:** The Committee on Legal Affairs concludes its deliberations on the proposal during its 25th session and votes unanimously to recommend that the plenary adopt the resolution that no reservations be expressed against the proposal for a regulation with regard to the principles of subsidiarity and proportionality.

- **28 September 2006:** The recommendation for a decision (printed paper 16/2784) is adopted during the 54th sitting of the Bundestag.

pp.
(Schlichting)

Bundesrat/Germany

Report from national parliaments: subsidiarity and proportionality check

Bundesrat/Germany

Procedures:

- 1. Which committees were involved in examining the Commission proposal for a Regulation on the applicable law and jurisdiction in divorce matters and what role did each committee play?**

At the Bundesrat the Committee on Questions of the European Union is the competent committee for the deliberation of EU legislative proposals and other EU documents. The EU Committee deliberates on the basis of recommendations from sectoral committees.

The sectoral committees that were involved in the subsidiarity check of the above mentioned regulation are the Committee on Legal Affairs, the Committee on Family and Senior Citizen Affairs as well as the Committee on Women and Youth.

- 2. Was your plenary involved?**

Following deliberation in the committees, the Bundesrat plenary will adopt an opinion on the above mentioned proposal in its meeting on 3 November 2006.

- 3. Were any other administrative services of your parliament involved in the process?**

No.

- 4. Could you describe the procedure used for the examination from start to finish with regard to the committees involved and other actors and the chronology of their involvement?**

After the Bundesrat secretariat had received the legislative proposal in German language from the German government on 2 August 2006 it was distributed to the committee secretariats.

In addition to the EU Committee the Director of the Bundesrat declared three sectoral committees responsible for the deliberation of the proposal (cp. question 1). Deliberations could not be started until after summer recess.

The Committee on Legal Affairs deliberated the proposal in its session on 6 September 2006. It was decided that a clearer base for a decision was needed and a survey among experts, mainly judges from courts competent in divorce matters, should be conducted. Consequently, the adoption of a recommendation was adjourned until the committee session on 18 October 2006. The Committee on Family and Senior Citizen Affairs as well as the Committee on Women and Youth adjourned their deliberations likewise.

The Committee on Questions of the European Union adopted a recommendation to the plenary in its meeting on 20 October 2006 based on the recommendations of the three sectoral committees involved. Finally, the plenary will vote an opinion on the proposal in its session on 3 November 2006 that will be submitted to the Federal Government.

- 5. Did your government provide any information as part of the scrutiny process?**

The Federal Government explained its position to several aspects of the proposal in the deliberations of the committees.

6. Did your national parliament consult regional parliaments with legislative powers?

The Bundesrat did not directly involve regional parliaments. It lies in the responsibility of the government of each Land to consult its regional parliament.

7. Were any other external actors involved in the examination?

A survey among experts, primarily judges from competent courts, was conducted.

8. In case of a bicameral system, did you coordinate your examination with the other parliamentary chamber?

A mutual exchange on the stage of proceedings took place.

9. Was the procedure used for this project in accordance with the procedure your parliament plans to use following the Constitutional Treaty's entering into force?

No. In case of the entering into force of the Constitutional Treaty the Bundesrat would ensure that the six week deadline was kept. For this purpose the Bundesrat can create a chamber for urgent EU matters, the so called Chamber of European Affairs, whose decisions have the same effect as decisions of the plenary. The Chamber of European Affairs consists of 16 members, one member from each Land. Decisions of the Chamber of European Affairs could also be taken in a written procedure.

Findings:

10. Did you find any breach on the subsidiarity principle?

No.

11. Did you find any breach on the proportionality principle?

No.

12. Did you adopt a reasoned opinion for non-compliance? (If yes please enclose a copy with your report to the COSAC secretariat)

13. Did you find the Commission's justification with regard to the subsidiarity principle satisfactory?

Yes. The objectives of the proposal cannot be accomplished by the member states alone.

14. Did you find the Commission's justification with regard to the proportionality principle satisfactory?

Yes.

15. Did you encounter any specific difficulties during the examination?

No.

16. Any other comments?

The commission initiatives for conflict-of-law rules should ensure coherent solutions in the sense that law courts should be able to apply the domestic law ("lex fori").

Hellenic Parliament

Procedures:

1. Which committees were involved in examining the Commission proposal for a Regulation on the applicable law and jurisdiction in divorce matters and what role did each committee play?

The Committee for European Affairs and the competent sectoral Committee (Standing Committee for Public Administration, Home Affairs and Justice).

2. Was your plenary involved?

No

3. Were any other administrative services of your parliament involved in the process?

No

4. Could you describe the procedure used for the examination from start to finish with regard to the committees involved and other actors and the chronology of their involvement?

The aforesaid Committees debated the Commission proposal, jointly, in a single meeting held on September 14th. The debate was based on introductions by rapporteurs each corresponding to one of the political groups (Most of them are members of both committees, one is a member of the Sectoral Committee only).

Previously (August 28) the Committee for European Affairs had discussed and agreed over the procedure that would be followed.

5. Did your government provide any information as part of the scrutiny process?
Yes, the Ministry Of Justice provided an explanatory memorandum, upon request by our service.

6. Did your national parliament consult regional parliaments with legislative powers?

There aren't regional parliaments in Greece.

7. Were any other external actors involved in the examination?

No

8. In case of a bicameral system, did you coordinate your examination with the other parliamentary chamber?

9. Was the procedure used for this project in accordance with the procedure your parliament plans to use following the Constitutional Treaty's entering into force?

No formal decision has been reached yet.

Findings:

10. Did you find any breach on the subsidiarity principle?

No

11. Did you find any breach on the proportionality principle?

No

12. Did you adopt a reasoned opinion for non-compliance? (If yes please enclose a copy with your report to the COSAC secretariat)

13. Did you find the Commission's justification with regard to the subsidiarity principle satisfactory?

yes

14. Did you find the Commission's justification with regard to the proportionality principle satisfactory?

yes

15. Did you encounter any specific difficulties during the examination?

16. Any other comments?

Second Subsidiarity Check pilot project in the Hellenic Parliament

The regulation proposal on applicable law and jurisdiction in divorce matters was received through the IPEX database in the end of July, but due to summer recess of the Hellenic Parliament it was debated on September 14th, in a joint meeting of the Committee for European Affairs and the competent sectoral Committee (the Standing Committee for Public Administration, Home Affairs and Justice). The agenda item was introduced by 4 rapporteurs, each one representing a respective political group. The Department of Justice provided an explanatory memorandum, but apart from that no external actors were involved in the process.

The procedure that was applied conforms to the existing provisions of the Standing Orders, for the examination of European Union 's draft legislation. Possibly these provisions will be adapted to the new circumstances, and we do not know yet the extent of the modifications.

The majority of the rapporteurs as well as the MPs who participated in the debate did not find any breach of the Principles of Subsidiarity and Proportionality and more or less found convincing the justification of the Commission. According to the minority opinion, the existing legal framework of our country, over divorce cases in mixed marriages, should be maintained.

Hungarian National Assembly

Subsidiarity and proportionality check in the Hungarian National Assembly

- on the Commission proposal for a Regulation on the applicable law and jurisdiction in divorce matters

Procedures:

1. Which committees were involved in examining the Commission proposal for a Regulation on the applicable law and jurisdiction in divorce matters and what role did each committee play?

The examination of the proposal was undertaken by the secretariat of the Committee on European Affairs, while the parliamentary summer break, and the campaign of the municipal elections did not enable the Committee to place the matter on its agenda.

Generally it is the Committee on European Affairs which is entitled to monitor the application of the principle of subsidiarity in the Hungarian National Assembly according to Article 9.§ of the act LIII of 2004 on the cooperation of the Parliament and the Government in European Union affairs.

2. Was your plenary involved?

Generally, the plenary is only involved in the procedure if a breach of the principle of subsidiarity is found by the Committee on European Affairs.

3. Were any other administrative services of your parliament involved in the process?

No.

4. Could you describe the procedure used for the examination from start to finish with regard to the committees involved and other actors and the chronology of their involvement?

N/A

5. Did your government provide any information as part of the scrutiny process?

No. It was not asked for.

6. Did your national parliament consult regional parliaments with legislative powers?

No, in Hungary there are no regional parliaments.

7. Were any other external actors involved in the examination?

No.

8. In case of a bicameral system, did you coordinate your examination with the other parliamentary chamber?

The Hungarian National Assembly is a unicameral parliament.

9. Was the procedure used for this project in accordance with the procedure your parliament plans to use following the Constitutional Treaty's entering into force?

No (see under question 1)

The procedure will be governed by the Act LIII of 2004 on the cooperation of the Parliament and the Government in European Union affairs and the Standing Orders of the National Assembly, both of which contain the rules for the procedure of subsidiarity check.

Findings:

10. Did you find any breach on the subsidiarity principle?

No.

11. Did you find any breach on the proportionality principle?

No.

12. Did you adopt a reasoned opinion for non-compliance? (If yes please enclose a copy with your report to the COSAC secretariat)

No, in lack of finding a breach of the Treaty.

13. Did you find the Commission's justification with regard to the subsidiarity principle satisfactory?

The justification was unsatisfactory as regards the following:

- (1) The justification should have included a broader discussion of the relationship between the proposal and Community objectives, especially given the fact that judicial cooperation in civil matters is, under Article 65, a Community competence with a specific objective, with action to be taken "in so far as necessary for the proper functioning of the internal market".*
- (2) The demonstration of the Community dimension of the problem and the added value of Community action was satisfactory. At the same time, there was insufficient explanation as to the insufficient achievement of the objectives of the proposed action by individual Member States. (The current system, after all, enables the adjudication of the legal disputes in question and the mutual recognition of decisions taken. This, in a certain sense, is "sufficient".)*
- (3) A problem stubbornly persists in so far that, when presenting justifications for proposals, the application of the subsidiarity principle is only ever examined in relation to the proposal as a whole, even though individual parts or provisions may equally be in breach of the subsidiarity principle. In the current case, for example, the amendment of provisions relating to jurisdiction and the introduction of new rules pertaining to applicable law should clearly have been treated separately.*

14. Did you find the Commission's justification with regard to the proportionality principle satisfactory?

The justification relating to proportionality was, on the whole, satisfactory. However, the question can be raised whether every individual provision is truly necessary as far as the objective of the proposal is concerned (e.g. those pertaining to choice of court or choice of law by the parties).

15. Did you encounter any specific difficulties during the examination?

The text of the proposal has been transmitted at a date which – taking into account the suspension of parliamentary activity during the summer break – in practice made it impossible to keep the deadline of six weeks.

16. Any other comments?

In our view, the primary problem relating to the proposal concerns Community competence, not subsidiarity or proportionality. The issue is whether – taking into account the reference in Article 61 c) – the proposal meets the requirement of Article 65, i.e. that regulation should be “necessary for the proper functioning of the internal market”. Once the existence of Community competence is accepted, this particular proposal may not easily be declared to be in breach of the subsidiarity and proportionality. (It is our understanding that a Community competence exists, as reading together the text of Articles 65 b) and c) and 67 (5) specifically justifies the introduction of rules pertaining to conflict of laws in family law disputes.)

REPORT TO COSAC

**BY THE COMMITTEE ON EUROPEAN AFFAIRS
OF THE SEIMAS OF THE REPUBLIC OF LITHUANIA**

**ON THE PROPOSAL FOR A COUNCIL REGULATION AMENDING
REGULATION (EC) No 2201/2003 AS REGARDS JURISDICTION AND
INTRODUCING RULES CONCERNING APPLICABLE LAW IN
MATRIMONIAL MATTERS**

Procedures:

1. Which committees were involved in examining the Commission proposal for a Regulation on the applicable law and jurisdiction in divorce matters and what role did each committee play?

Two parliamentary committees were involved: the Committee on European Affairs and the Committee on Legal Affairs. The Committee on Legal Affairs submitted its expert conclusion to the Committee on European Affairs, which took the final decision.

2. Was your plenary involved?

No.

3. Were any other administrative services of your parliament involved in the process?

Yes. The Legal Department of the Office of the Seimas submitted an opinion on the compliance of the Commission's proposals with the principles of subsidiarity and proportionality.

4. Could you describe the procedure used for the examination from start to finish with regard to the committees involved and other actors and the chronology of their involvement?

- **The project was presented at the meeting of the Committee on European Affairs. The Committee decided to request the Legal Department of the Seimas, the Committee on Legal Affairs of the Seimas, and the European Law Department under the Ministry of Justice to present their conclusions on the compliance of the Commission proposal with principles of subsidiarity and proportionality. The Ministry of Justice was asked to present its opinion. The Committee appointed Ms. Vilija Aleknaitė–Abramikienė as a reporter.**

- **The Institute of Law took an initiative to submit its opinion to the Committee on Legal Affairs of the Seimas, stating that the proposal does not comply with the principles of subsidiarity and proportionality.**

- **The Legal Department of the Office of the Seimas issued its detailed opinion. According to the opinion there is no obvious conflict with the principles of**

subsidiarity and proportionality since the matter under discussion is in line with the first two criteria indicated in the Protocol. However, there are some doubts concerning the clear compliance of the proposal with the third criterion indicated in the Protocol – ‘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’, given that some instruments may have negative effects on the parties of a case and burden the work of national courts.

- **The European Law Department under the Ministry of Justice** submitted its opinion to the Committee on European Affairs. In their opinion, there are no reasons to state that the draft proposal would be clearly in conflict with the legal criteria of the principles of subsidiarity and proportionality. However, the final decision should take into account also economic (i.e. possible cost of project implementation), political and social aspects (e.g. maintaining the stability of social and legal relations) of subsidiarity next to legal ones.
- **Ministry of Justice of the Republic of Lithuania** submitted its opinion to the Committee on European Affairs. No breach of the principles of subsidiarity and proportionality was found.
- **The Committee on Legal Affairs** found no breach of the principles of subsidiarity and proportionality.
- **The Committee on European Affairs** held its first debate on the issue after, listening to the conclusion of the Committee on Legal Affairs and the opinions of the Ministry of Justice, the European Law Department under the Ministry of Justice and law experts of the Seimas.
- The issue was once again included into the agenda of the **Committee on European Affairs**. The reporter of the Committee Ms. Aleknaitė-Abramikienė presented the draft conclusion. However, the Committee did not take the final decision.
- At the following meeting of the **Committee on European Affairs** the reporter Ms. Vilija Aleknaitė-Abramikienė, taking into consideration the proposals put forward during the discussion, presented a modified draft conclusion. Taking into account different opinions two options were put forward for alternative voting: 1) possible conflict with the principle of subsidiarity, but there are no possible breaches of the principle of proportionality (Draft conclusion prepared by the reporter Ms. Aleknaitė-Abramikienė) and 2) there is *no* possible conflict with the principles of subsidiarity and proportionality.

The Committee on European Affairs adopted the final conclusion finding no possible conflict with the principles of subsidiarity and proportionality.

NB: if a conflict was found the issue would be debated and the final decision would be taken by the plenary following the procedure under Article 180⁶ Parts 5, 6, 7, 8 of the Statute of the Seimas of the Republic of Lithuania

5. Did your government provide any information as part of the scrutiny process?

Yes. The Ministry of Justice of the Republic of Lithuania was commissioned to draft the Governments' opinion. In addition, the Committee on European Affairs received a special opinion of the European Law Department under the Ministry of Justice.

6. Did your national parliament consult regional parliaments with legislative powers?

No.

7. Were any other external actors involved in the examination?

Yes. The Institute of Law, which is a state scientific institution, established by the Government of the Republic of Lithuania aiming at the coordination of the reform of the legal system and legal institutions and harmonizing it with economic and social reform of the state, has submitted its opinion. According to the Institute of Law, the proposal by the Commission does not comply with the principles of subsidiarity and proportionality.

8. In case of a bicameral system, did you coordinate your examination with the other parliamentary chamber?

No. The Seimas of the Republic of Lithuania is a unicameral parliament.

9. Was the procedure used for this project in accordance with the procedure your parliament plans to use following the Constitutional Treaty's entering into force?

On 13 November 2004 the Seimas passed amendments to the Statute of the Seimas of the Republic of Lithuania (i.e. Rules of Procedure) setting forth a procedure for the examination of the proposals to adopt EU legal acts with regard to their compliance with the principle of subsidiarity.

Findings:

10. Did you find any breach on the subsidiarity principle?

No.

11. Did you find any breach on the proportionality principle?

No.

12. Did you adopt a reasoned opinion for non-compliance? (If yes please enclose a copy with your report to the COSAC secretariat)

No.

13. Did you find the Commission's justification with regard to the subsidiarity principle satisfactory?

Not fully.

14. Did you find the Commission's justification with regard to the proportionality principle satisfactory?

Not fully. The Commission could focus more attention on the issue of proportionality.

15. Did you encounter any specific difficulties during the examination?

Yes. The main difficulty during the examination was lack of the translation into the Lithuanian language of the full document of the Impact Assessment.

Rapport de la Chambre des Députés du Grand-Duché de Luxembourg relatif à l'expérience du contrôle de la subsidiarité et proportionnalité concernant la proposition de règlement modifiant le règlement (CE) n° 2201/2003 en ce qui concerne la compétence et instituant des règles relatives à la loi applicable en matière matrimoniale

1. Quels sont les comités qui ont participé à l'examen de la proposition de règlement de la Commission européenne et quel était le rôle de chaque comité ?

L'examen de la proposition de règlement a été réalisé exclusivement par la Commission juridique.

2. Votre assemblée plénière y a-t-elle participé ?

L'examen de la proposition de règlement n'a pas été effectué en séance plénière.

3. Y avait-il d'autres services administratifs de votre parlement qui ont aussi participé à ce processus ?

Le Service des Commissions et le Service des Relations internationales ont participé à ce processus.

4. Pouvez-vous décrire la procédure utilisée durant l'examen, par rapport aux comités et autres participants, ainsi que la chronologie de leur participation ?

Voir question 1.

5. Votre gouvernement a-t-il fourni quelque information que ce soit dans le cadre de la procédure de contrôle ?

La Commission juridique a obtenu des informations orales d'une collaboratrice de Monsieur le Ministre de la Justice, invitée en commission.

6. Votre gouvernement national a-t-il consulté les parlements régionaux détenant des pouvoirs législatifs ?

Le Luxembourg n'a pas de parlements régionaux.

7. Y avait-il d'autres participants à l'examen ?

Non, uniquement les membres de la Commission juridique et la collaboratrice de M. le Ministre.

8. Dans le cas d'un système bicaméral, avez-vous coordonné vote examen avec l'autre chambre parlementaire ?

Le Parlement luxembourgeois est monocaméral.

9. La procédure utilisée pour ce projet était-elle conforme à la procédure que votre parlement prévoit d'utiliser après l'entrée en vigueur du Traité constitutionnel ?

Oui.

10. Avez-vous trouvé que le principe de subsidiarité a été violé ?

Non.

11. Avez-vous trouvé que le principe de proportionnalité a été violé ?

Non.

12. L'avis que vous avez émis sur la non-conformité était-il motivé ? (Si oui, joignez-en une copie à votre rapport lorsque vous l'envoyez au secrétariat de la COSAC)

13. Pensez-vous que la justification de la Commission en ce qui concerne le principe de subsidiarité soit satisfaisante ?

14. Pensez-vous que la justification de la Commission en ce qui concerne le principe de proportionnalité soit satisfaisante ?

15. Avez-vous rencontré des difficultés spécifiques lors de votre examen ?

16. Autres commentaires ?

La Commission juridique a attiré l'attention, à raison des critères alternatifs désignant la loi applicable, sur le risque inhérent du « lex shopping » que comporte la proposition de règlement de la Commission européenne.

REPORT TO THE COSAC-SECRETARIAT

THE SCRUTINY PROCEDURE OF COM(2006) 399

BY

**THE SENATE AND THE HOUSE OF
REPRESENTATIVES**

OF THE KINGDOM OF THE NETHERLANDS

26 September 2006

Staff of the TCS:

Kim van Dooren (kim.vandooren@eerstekamer.nl)

Frank Mittendorff (F.Mittendorff@tweedekamer.nl)

Fred

Bergman

(fred.bergman@eerstekamer.nl)

Procedures:

1. Which committees were involved in examining the Commission proposal for a Regulation on the applicable law and jurisdiction in divorce matters and what role did each committee play?
 - Temporary committee on subsidiarity (a joint committee of both the Senate and the House of Representatives) (short TCS)
 - Standing committee on Justice of the Senate
 - Special committee on Justice and Home Affairs Council of the Senate
 - Standing committee on Justice of the House of Representatives
 - Standing committee on European Affairs of the House of Representatives
2. Was your plenary involved?

Yes, both the plenary of the Senate and the plenary of the House of Representatives
3. Were any other administrative services of your parliament involved in the process?

Yes, staff of the supporting committees
4. Could you describe the procedure used for the examination from start to finish with regard to the committees involved and other actors and the chronology of their involvement?

See Annex I
5. Did your government provide any information as part of the scrutiny process?

No, but during the process of scrutiny we consulted the reaction of the Dutch government to the Greenpaper on these matters
6. Did your national parliament consult regional parliaments with legislative powers?

Not applicable
7. Were any other external actors involved in the examination?

No, but a notification of the procedure was published on the website to generate responses of civil society
8. In case of a bicameral system, did you coordinate your examination with the other parliamentary chamber?

Yes, the Temporary committee on subsidiarity is especially installed to coordinate and to tune the subsidiarity check in both chambers. The committee's ultimate goal is that both chambers of Parliament express the same views as regards to whether the Commission proposal complies with the principles of subsidiarity and proportionality. In case of divergence of views between the committees of both chambers, the TCS mediates in order to reach consensus. In this case, there was no need for a conciliation procedure, because the committees of both chambers did agree.
9. Was the procedure used for this project in accordance with the procedure your parliament plans to use following the Constitutional Treaty's entering into force?

Yes

Findings:

To main objection of both Chambers of the States-General is that the Community is *not* competent in this matter, as set out in their letter to the European Commission.

10. Did you find any breach on the subsidiarity principle?

Yes. Even if the problems outlined by the European Commission occur, they can in essence be attributed to differences in the substantive divorce law of the Member States. Thus it would be logical for any solutions to concern substantive divorce law rather than the national conflict-of-law rules. However, the Community is not competent to take measures that address this matter directly and the present proposal for a Regulation does not therefore affect the substantive divorce law of the Member States. The proposal may therefore be considered contrary to the principle of subsidiarity, because the proposed Regulation cannot be considered to have surplus value over whatever actions on the national level.

11. Did you find any breach on the proportionality principle?

Yes. The proportionality principle is closely linked to the question of competence of the Community. The question is whether the nature and scope of the problems outlined by the European Commission is so serious as to constitute an obstacle to the proper functioning of the internal market (i.e. the free movement of persons), thereby necessitating the proposed measures. According to both Chambers of the States-General of the Netherlands this *not* the case, because:

- According to the figures of the European Commission, an estimated 170,000 “international” divorce proceedings take place each year. It follows that approximately 340,000 people are faced each year with the conflict-of-law rules of the Member States, which is equivalent to some 0.074% of the EU population (about 457 million). The possible scope of the (potential) obstacles to the free movement of persons in the internal market should therefore not be overestimated.
- The question of in what percentage of these 170,000 cases the differences between national conflict-of-law rules actually result in the problems identified by the European Commission, including lack of legal certainty and the “rush to court”, is disregarded. For example, it is evident from the answers to the questions in the “Green Paper on applicable law in divorce matters”⁸ that there is no (statistical) proof available of the “rush to the courts” in the majority of the Member States that have responded to the Green Paper. The Netherlands Government too has indicated in its reaction to the Green Paper that this phenomenon “has not been observed” in the Netherlands. It may therefore be considered very probable that the problems outlined by the European Commission do not occur in all the 170,000 divorce proceedings concerned.
- Both Chambers also have insufficient evidence that the supposed problems do *actually* constitute an obstacle to the free movement of persons or even represent a *potential* obstacle to the proper functioning of the internal market. Both Chambers therefore have serious doubts about the opportuneness of the decision to choose Article 65 of the EC Treaty as the legal basis for the proposed Regulation.

⁸ Green Paper on applicable law and jurisdiction in divorce matters – COM(2005)82.

For these reasons both Houses of the States-General judge the proposal for a Regulation contrary to the principle of proportionality, and for these and other reasons conclude that the Community is not competent in this matter and that action in this field belongs to the competence of the individual Member States.

12. Did you adopt a reasoned opinion for non-compliance? (If yes please enclose a copy with your report to the COSAC secretariat)

Yes, see Annex II

13. Did you find the Commission's justification with regard to the subsidiarity principle satisfactory?

No

14. Did you find the Commission's justification with regard to the proportionality principle satisfactory?

No

15. Did you encounter any specific difficulties during the examination?

The proposal was published during recess of both Chambers of the States-General. Recess ended the end of August and at the beginning of September. Thus the time span for dealing with this proposal for a Regulation was rather short. Besides the third Tuesday in September is the opening of the Parliamentary Year in the Netherlands, which dominates the political agenda of both the Senate and the House of Representatives. In this short period of time a preliminary advice, two advises by the committees of each Chamber and the final advice had to be drawn up. On the 26th of September both the plenary meetings of the Senate and the House of Representatives adopted the final advice. (see Annex I on the procedure)

16. Any other comments?

Yes, during the scrutiny procedure we checked the IPEX-website several times. Although some National Parliaments provided information on the progress in their scrutiny procedure, we were not able to check any document in either French, English or German. We provided our Portuguese colleagues with a translation of the final advice of the TCS and made a link to this document in IPEX. It goes without saying that the information exchange via IPEX-website is of the utmost importance.

ANNEX I

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ANNEX II

[page 1 of the letter]

European Commission
For the attention of Mr F. Frattini
Vice-President and Commissioner for Justice, Freedom and Security
B-1049 BRUSSELS

The Hague, 26 September 2006

Dear Mr Frattini,

In accordance with the procedure adopted by them, both Houses of the States-General of the Kingdom of the Netherlands have checked the proposal of the European Commission for a Council Regulation amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters (COM(2006) 399) by reference to the principles of subsidiarity and proportionality. In doing so they have applied Article 5 of the EC Treaty and Protocol 30 to the Treaty of Amsterdam on the application of the principles of subsidiarity and proportionality. In addition, both Houses have thus implemented the conclusions of the XXXIV COSAC (London, 10-11 October 2005) regarding the implementation of the subsidiarity test by the national parliaments, as well as the conclusions of the meeting of the COSAC chairpersons of 20 February 2006 in Vienna.

On the basis of the considerations set out in this letter, both Houses have concluded that the proposal in question does *not* comply with the principles of subsidiarity and proportionality. In particular, they consider that the present proposal falls outside the powers of the Community. Pursuant to conclusion 3.4 of XXXV COSAC (Vienna, 22-23 May 2006) both Houses would appreciate receiving a reasoned response from the European Commission to the objections formulated by them in this letter.

Yours sincerely,

[signed]

Y.E.M.A. Timmerman-Buck
President of the Senate

[signed]

F.W. Weisglas
President of the House of Representatives

Reasoning

Both Chambers of the States General have examined first of all whether the European Commission actually has the competence to submit such a proposal. The European Commission considers that the Community has the competence to adopt the present Regulation under Article 61 (c) of the EC Treaty and Article 65 (b) of the EC Treaty.

Although Article 65 (b) of the EC Treaty admittedly concerns “*promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction*”, it should be noted that the competence of the Community in this field is subject to two conditions. First, there must be civil matters having “*cross-border implications*”. And, second, measures may be taken only “*insofar as necessary for the proper functioning of the internal market*”. The question of whether the Community has the power can be answered in the affirmative only if both conditions are fulfilled.

It would seem at first sight that the first requirement has been fulfilled, but this cannot be viewed separately from the extent to which this is the case or, as the case may be, the extent to which problems arise from the lack of any EU arrangement (also an aspect of proportionality). There is also the question of whether the nature and scope of the problem outlined by the European Commission is so serious as to constitute an obstacle to the proper functioning of the internal market (i.e. the free movement of persons), thereby necessitating the proposed measures.

Both Chambers of the States General have concluded that this is *not* the case for the following reasons:

- According to the figures of the European Commission, an estimated 170,000 “international” divorce proceedings take place each year. It follows that approximately 340,000 people are faced each year with the conflict-of-law rules of the Member States, which is equivalent to some 0.074% of the EU population (about 457 million). The possible scope of the (potential) obstacles to the free movement of persons in the internal market should therefore not be overestimated.
- The question of in what percentage of these 170,000 cases the differences between national conflict-of-law rules actually result in the problems identified by the European Commission, including lack of legal certainty and the “rush to court”, is disregarded. For example, it is evident from the answers to the questions in the “Green Paper on applicable law in divorce matters”⁹ that there is no (statistical) proof available of the “rush to the courts” in the majority of the Member States that have responded to the Green Paper. The Netherlands Government too has indicated in its reaction to the Green Paper that this phenomenon “has not been observed” in the Netherlands. It may therefore be considered very probable that the problems outlined by the European Commission do not occur in all the 170,000 divorce proceedings concerned.

⁹ Green Paper on applicable law and jurisdiction in divorce matters – COM(2005)82.

- Both Chambers also have insufficient evidence that the supposed problems do *actually* constitute an obstacle to the free movement of persons or even represent a *potential* obstacle to the proper functioning of the internal market. Both Chambers therefore have serious doubts whether the decision to choose Article 65 of the EC Treaty as the legal basis for the proposed Regulation is expedient.
- Article 7 (Residual jurisdiction) of the proposed Regulation guarantees above all access to the courts in the EU for spouses having a different nationality (of an EU Member State) who live in a third State. In such cases there is a cross-border dimension in two ways: (1) each of the spouses has a different nationality, and (2) both live a third State. In this case the provisions of the Regulation also specifically extend to the relationship between individual EU Member States and third States. Both Chambers doubt whether the Community has any competence in this case. The legal basis cited by the European Commission emphatically refers, after all, to the proper functioning of the *internal market* and does not – strictly speaking – extend to the relationship of an EU Member State with a third country. It should be noted that the Netherlands Government points out in its reaction¹⁰ to the Green Paper that no position can be taken on the permissibility of harmonising at EU level competence rules treated as “residual” as long as the EC Court of Justice has not ruled on this issue, which has been referred to it in connection with the revision of the Lugano Convention (Dutch Treaty Series 1989, 58).

In summary, neither Chamber has seen evidence that the nature and scope of the problems concerned constitute such a serious obstacle to the proper functioning of the internal market that they warrant the proposed measures. In the opinion of both Chambers, this removes the competence of the Community to take the proposed measures.

Additionally, both Chambers wish to observe that even if the outlined problems already occur, they can in essence be attributed to differences in the substantive divorce law of the Member States and that it would therefore be logical for any solutions to concern substantive divorce law rather than the national conflict-of-law rules. However, the Community is not competent to take measures that address this matter directly and the present proposal for a Regulation does not therefore affect the substantive divorce law of the Member States.

However, even if there were any competence it would still have to be concluded on the basis of the above considerations that the proposal is contrary to the principle of subsidiarity (see the additional remark in the previous paragraph) and the principle of proportionality (see the first three points in the considerations).

Both Chambers conclude that the Community is not competent in this matter and that action in this field belongs to the competence of the individual Member States.

¹⁰ For the position of the Netherlands Government on questions raised in the Green Paper, see http://www.justitie.nl/images/Groenboek%20inzake%20echtscheiding_5017_tcm34-14913.pdf

Portuguese parliament

SUBSIDIARITY AND PROPORTIONALITY CHECK ON THE COMMISSION PROPOSAL

FOR A COUNCIL REGULATION AMENDING REGULATION (EC) No 2201/2003

AS REGARDS JURISDICTION AND INTRODUCING RULES CONCERNING

APPLICABLE LAW IN MATRIMONIAL MATTERS

B. CONCLUSION AND OPINION

CONCLUSION

1. The procedure adopted by the Portuguese Parliament in analyzing compliance with the principles of subsidiarity and proportionality within the scope of this 2nd pilot project is consistent with the requirements of Law 43/2006, of 25 August 2006, on the *Monitoring, assessment and pronouncement by the Portuguese Parliament within the scope of the process of constructing the European Union*;
2. Article 65 of the European Community Treaty lays down that the Community will adopt measures in the field of legal cooperation on civil matters, to the extent that cross-border issues are involved and as necessary for creating the internal market. Paragraph b) of this article specifies that measures may be adopted to promote the compatibility of the conflicts of law and jurisdiction rules applicable in Members States;
3. There are currently no community rules on the law governing matrimonial issues;
4. This is a matter of the Portuguese Parliament's reserved legislative responsibility, under the terms of Article 165.1 a) (*status and capacity of persons*). It follows that the approval and entry into force of this Regulation will require Portugal to amend its internal law, possibly by adapting the Civil Code;
5. Commission proposal COM (2006) 399 seeks to provide a clear and comprehensive legal framework for marital issues within the EU, specifically as regards legal certainty, predictability, flexibility and access to justice. It amends Regulation (EC) 2201/2003 of the Council as regards jurisdiction and includes provisions which harmonize conflict of laws rules, with spouses enjoying limited possibilities of choosing the applicable law. When no common agreement is reached on the choice, the applicable law is determined in accordance with a scale of connecting elements which will ensure that legal proceedings concerning marital issues are governed by a legal system to which the marriage is effectively and closely related;
6. This proposal is for a cross-border initiative and contributes to creating the internal market, namely by eliminating a potential obstacle to the free movement of persons;
7. The aim in view will be best pursued by the community authorities, as any unilateral steps taken by member States to achieve the same ends will be insufficient. There is therefore **no breach of the principle of subsidiarity**;

8. The proposal **also complies with the principle of proportionality**, as it does not exceed what is necessary to achieve its end;
9. In relation to the pilot project, each Parliament will send the COSAC Secretariat a report on its test results;
10. The Helsinki COSAC (20 and 21 November 2006) will analyze the results of this second pilot project, and share the difficulties encountered;
11. In order to analyze the results of this 2nd Pilot Project, the COSAC Secretariat prepared a standard questionnaire to which all Parliaments were asked to reply. This questionnaire is attached and is an integral part of this Report.

OPINION

In view of the assessments and conclusions above, and in the light of the opinion from the Committee for Constitutional Affairs, Rights, Freedoms and Guarantees, the European Affairs Committee considers that the proposal in question does not breach the principle of subsidiarity, insofar as the end to be achieved will be more effectively attained through community action.

This Committee also considers the proposal in question to be fully consistent with the principle of proportionality, as both the content and the legislative instrument to be used are restricted to the declared aim of harmonizing conflict of laws rules in matrimonial issues.

Palácio de São Bento, 28 September 2006

The Reporting Deputy

The Vice-Chairman of the Committee

(Regina Bastos)

(Luís Pais Antunes)

Annexes:

- I. Replies to the questionnaire prepared by the COSAC Secretariat concerning the 2nd Pilot Project on compliance with the principles of subsidiarity and proportionality;
- II. Law 43/2006, of 25 August 2006, English version.

**Questions to be answered concerning the 2nd Pilot Project on compliance
with the principles of subsidiarity and proportionality, within the scope
of the 6th COSAC Biannual Report**

Procedures:

17. Which committees were involved in examining the Commission proposal for a Regulation on the applicable law and jurisdiction in divorce matters and what role did each committee play?

The European Affairs Committee coordinated the process, and requested an opinion from the Committee for Constitutional Affairs, Rights, Freedoms and Guarantees.

18. Was your Plenary involved?

Law 43/2006, of 25 August 2006, on the *Monitoring, assessment and pronouncement by the Portuguese Parliament within the scope of the process of constructing the European Union*, requires the Plenary to take part in monitoring European legislative proposals in three situations:

- when the AR is required to pronounce on matters which fall within the scope of its reserved legislative powers (Article 2);
- when an opinion is required on compliance with the principle of subsidiarity (Article 3);
- in assessment of proposals for Community acts of a normative nature (Article 7);

As regards Articles 2 and 3, which apply to the case in hand, the Law states that in duly substantiated urgent situations, an opinion from the European Affairs Committee, stating due grounds, will suffice. In view therefore of the tight deadline for replying to the Pilot Project questionnaire, this was the procedure adopted.

19. Were any other administrative services of your parliament involved in the process?

No.

20. Could you describe the procedure used for the examination from start to finish with regard to the committees involved and other actors and the chronology of their involvement?

- 5 September 2006: the European Affairs Committee (EAC) decides to refer the proposal for an opinion from the Committee for Constitutional Affairs, Rights, Freedoms and Guarantees (CCARFG), which is competent in respect of the issues involved;
- 6 September, the CCARFG appointed Deputy Helena Terra, of the PS, as the Reporting Deputy;
- 19 September, the EAC appointed Deputy Regina Bastos, of the PSD, as Reporting Deputy for the 2nd COSAC Pilot Project;
- 20 September 2006, the CCARFG discussed and approved the Report and Opinion on this matter;
- 26 September, debate on the CCARFG Report at EAC meeting, with participation by the CCARFG Reporting Deputy, Helena Terra (PS);

- 3 October, the EAC discussed and voted on this opinion on the compliance of the Commission's proposal with the principles of subsidiarity and proportionality, in keeping with the requirements of the questionnaire drawn up by the COSAC Secretariat for the Pilot Project.

21. Did your government provide any information as part of the scrutiny process?

It was impossible to hold any hearings of the relevant members of Government, due to time constraints. Information was therefore exchanged with the Government on an informal basis.

22. Did your national parliament consult regional parliaments with legislative powers?

No. Under Article 229.2 of the Portuguese Constitution, *Bodies that exercise sovereign power shall always consult the regional self-government bodies in relation to such issues as fall within their own responsibilities and concern the autonomous regions.*

This requirement does not apply to the matters involved here, and it was therefore not necessary to consult the Legislative Assemblies of the Autonomous Regions.

23. Were any other external actors involved in the examination?

No.

24. In case of a bicameral system, did you coordinate your examination with the other parliamentary chamber?

Not applicable.

25. Was the procedure used for this project in accordance with the procedure your parliament plans to use following the Constitutional Treaty's entering into force?

The procedure adopted was that laid down in Law 43/2006, of 25 August 2006, on the *Monitoring, assessment and pronouncement by the Portuguese Parliament of the Republic within the scope of the process of constructing the European Union* (attached to this report).

In any case, this Committee considers that the question should not be posed in these terms at this stage, as it has not received confirmation of the procedure to be adopted within the framework of a future Constitutional Treaty.

Findings:

26. Did you find any breach on the subsidiarity principle?

The aim in view will be best pursued by the community authorities, as any unilateral steps taken by member States to achieve the same ends will be insufficient. There is therefore no breach of the principle of subsidiarity.

27. Did you find any breach on the proportionality principle?

The proposal in question is also consistent with the principle of proportionality, as both the content and the legislative instrument to be used are restricted to the declared aim of harmonizing conflict of laws rules in matrimonial issues.

28. Did you adopt a reasoned opinion for non-compliance? (If yes please enclose a copy with your report to the COSAC secretariat)

Not applicable.

29. Did you find the Commission's justification with regard to the subsidiarity principle satisfactory?

Yes.

14. Did you find the Commission's justification with regard to the proportionality principle satisfactory?

Yes.

15. Did you encounter any specific difficulties during the examination?

The greatest difficulty encountered had to do with the scheduling of the Pilot Project, as the proceedings of the 2nd Legislative Session of the current Legislature only began on 15 September. Considering that the deadline for returning the Questionnaire to the COSAC Secretariat was 27 September, some steps of the procedure could not be conducted with the depth desirable in a test of this nature.



Warszawa, dnia 19 września 2006 r.

THE 5TH SEJM OF
THE REPUBLIC OF POLAND

The European Union Affairs Committee

**Report on
the test on conformity to the principle of subsidiarity of
the “Proposal for the Council (EC) regulation No. 2201/2003 on jurisdiction, and
introducing the principles of the law on
matrimonial matters (COM(2006) 399)”**

In order to implement the decisions made in Vienna in February 2006 by the chairmen of the Community and European Affairs Committees, the Polish Sejm’s European Union Affairs Committee, at its meeting on 6th September 2006, scrutinized conformity to the principle of subsidiarity of the “*Proposal for the Council (EC) regulation No. 2201/2003 on jurisdiction, and introducing the principles of the law on matrimonial matters (COM(2006) 39.)*” At the same time, the Committee considered the above COM(2006) 399 proposal for a legal instrument under the procedure of Article 6 para. 3 of the Act of 11th March 2004 on Cooperation of the Council of Ministers with the Sejm and the Senate in Matters Related to the Republic of Poland’s Membership in the European Union, published in the *Dziennik Ustaw* (Journal of Laws) 2004, No. 52, item 515 (scrutiny procedure), and expressed its position on these two questions in the opinion No. 38. The report on that scrutiny was based on the recommendations of the COSAC presidency, presented in its *Aide-memoire*.

Procedures:

- 1. Which committees were involved in examining the Commission proposal for a Regulation on the applicable law and jurisdiction in divorce matters and what role did each committee play?**

The European Union Affairs Committee, being the organ of the Sejm competent to take care of the Community matters, was.

- 2. Was your plenary involved?**

No plenary discussion was held on the above matter at a Sejm sitting. It was the European Union Affairs Committee who gave its opinion on the matter. On the basis of the Act of 11th March 2004 on Cooperation of the Council of Ministers with the Sejm and the Senate in Matters Related to the Republic of Poland’s Membership in the European Union, the

Committee is the organ of the Sejm competent to take care of the matters concerning Poland's membership in the EU.

3. Were any other administrative services of your parliament involved in the process?

Yes, representatives of the Legal Team of the Sejm Research Bureau worked on and presented their opinion on conformity to the principle of subsidiarity). The European Information and Documentation Centre, too, prepared information materials.

4. Could you describe the procedure used for the examination from start to finish with regard to the committees involved and other actors and the chronology of their involvement?

As soon as we received the proposal, two deputies-co-reporters were assigned to prepare their respective opinion on that proposal, primarily from the point of view of the need to examine it under the procedure provided for in Article 6 para. 3 of the Act on Cooperation (scrutiny), but also from the point of view of its conformity to the principle of subsidiarity. Moreover, also the Sejm Research Bureau experts were assigned to prepare an opinion on conformity of the above proposal to the principle of subsidiarity.

At the Committee meeting on 6th September 2006, an opinion on the above proposal's conformity to the principle of subsidiarity was given by a representative of the Sejm Research Bureau, by a representative of the Justice Ministry and by the deputies-co-reporters. The ensuing discussion concerned both the proposal's conformity to the principle of subsidiarity as well as to Article 6 para. 3 of the Act of 11th March 2004 on Cooperation of the Council of Ministers with the Sejm and the Senate in Matters Related to the Republic of Poland's Membership in the European Union (*Dziennik Ustaw*, 2004, No. 52, item 515). Next, the draft opinion presented by the Committee Chairman was put to a vote. Ultimately, the Committee passed the opinion No. 38 (you will find enclosed).

5. Did your government provide any information as part of the scrutiny process?

Yes, it did. An undersecretary of State from the Ministry of Justice came to the Committee meeting and presented and substantiated the government's position on the conformity of the proposal discussed to the principle of subsidiarity.

6. Did your national parliament consult regional parliaments with legislative powers?

There are no regional parliaments in Poland. The existing regional representative organs are in the nature of local government bodies.

7. Were any other external actors involved in the examination?

At the Committee meeting present were employees of the Sejm Research Bureau, representatives of the government and of the European Commission Representation in Poland.

8. In case of a bicameral system, did you coordinate your examination with the other parliamentary chamber?

No, we did not. The two chambers of the Polish parliament (the Sejm, and the Senate) carried out the subsidiarity test independently of each other.

9. Was the procedure used for this project in accordance with the procedure your parliament plans to use following the Constitutional Treaty's entering into force?

The Constitutional Treaty is a dead letter. There is however the obvious need for the adoption of another treaty that will change the founding treaties. As regards the subject matter, at present it is difficult to answer this question. The question has not been ultimately resolved yet. But it is to be expected that an applicable, lasting procedure will not differ much from the one adopted to carry out this test.

10. Did you find any breach of the subsidiarity principle?

No, we did not. The Committee found the proposal discussed to be in conformity to the principle of subsidiarity.

11. Did you find any breach of the proportionality principle?

No, we did not. In its opinion, the Committee did not take a position on this particular issue. From the preceding discussion it results however that the Committee did not discern any irregularities in this regard.

12. Did you adopt a reasoned opinion for non-compliance? (If yes, please enclose a copy with your report to the COSAC secretariat.)

Does not apply.

13. Did you find the Commission's justification with regard to the subsidiarity principle satisfactory?

Yes, the European Commission's explanation given in the proposal should be recognized as consistent and sufficient.

14. Did you find the Commission's justification with regard to the proportionality principle satisfactory?

Yes, the European Commission's explanation given in the proposal should be recognized as consistent and sufficient.

15. Did you encounter any specific difficulties during the examination?

No, we did not.

16. Any other comments?

No, no other comments.

/-/ Karol Karski

Chairman of the European
Union Affairs Committee



Report

on the pilot project to check the Commission proposal for a Council regulation amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters (COM (2006)399),

based on:

the Protocol on the application of the principles of subsidiarity and proportionality, and the Protocol on the role of national parliaments in the European Union accompanying the Treaty of Amsterdam

Introduction

At the XXXIV meeting in London in October 2005, the Conference of Community and European Affairs Committees of Parliaments of the European Union (COSAC) decided to encourage national parliaments to carry out subsequent pilot projects following the pilot project on the examination of the 3rd railway package in 2005. The Conference stated that “within two weeks after the examination by national parliaments of the European Commission’s annual work programme, as envisaged in the initiative “Raising European Awareness”, participating national parliaments should inform the COSAC Presidency of the proposals they wish to be subject to the subsidiarity and proportionality check“. The Conference also specified the procedure of conducted so-called ”pilot projects“. The procedure should be based this time¹¹ on the provisions of the Treaty of Amsterdam, particularly on its *Protocol on the role of national parliaments in the European Union* and *Protocol on the application of the principles of subsidiarity and proportionality*.

Decisions included in these protocols were supplemented by agreements set out in the Conclusions of the XXXIV COSAC meeting in London. In particular, those agreements stated that the six-week period in which participating national parliaments should seek to complete their scrutiny of compliance of European Commission projects with the principles of subsidiarity and proportionality would begin when these projects have been published in all official languages of the European Union¹².

¹¹ With respect to the first pilot project, COSAC decided that the 3rd railway package should be scrutinized as if the *Protocol on the application of the principles of subsidiarity and proportionality* accompanying the Constitutional Treaty had come into force.

¹² The *Protocol on the role of member-state national parliaments in the European Union* accompanying the Treaty of Amsterdam states that “a six-week period shall elapse between a legislative proposal or a proposal for a measure to be adopted under Title VI of the Treaty on the European Union being made available in all languages to the European Parliament and the Council by the Commission and the date when it is placed on the Council agenda for decision either for the adoption of an act or for adoption of a common position pursuant to Article 189b or 189c of the Treaty establishing the European Community, subject to exceptions on grounds of urgency, the reasons for which shall be stated in the act or common position.”

The Austrian Presidency received written proposals from 18 EU national parliaments or parliamentary chambers (from 14 EU member states). On that basis, the chairmen of delegations to the COSAC meeting in Vienna in February 2006 decided to scrutinize compliance with the principles of subsidiarity and proportionality of two European Commission projects mentioned most often in those proposals:

- *Proposal concerning the Commission regulation on the applicable law and jurisdiction in divorce matters (2005/JSL/187); and*
- *Proposal for the full accomplishment of the Internal Market for Postal Services (2006/MARKT/006).*

On 17 July 2006, the European Commission adopted the **proposal on the Commission regulation amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters** (COM (2006) 399). In late July early August the proposal was translated into all official EU languages, hence the check of compliance with the principles of subsidiarity and proportionality of these two European Commission proposals should be completed by mid-September of this year at the latest.

This report constitutes a fulfilment of arrangements made by chairmen of European affairs committees and representative of the European Parliament at the Vienna meeting in February 2006.

The structure of the report takes into account COSAC presidency recommendations submitted to EU national parliaments in an aide-mémoire prepared by the COSAC Secretariat.

1. PROCEDURES APPLIED IN THE PILOT PROJECT TO CHECK COMPLIANCE WITH THE PRINCIPLES OF SUBSIDIARITY AND PROPORTIONALITY OF THE EUROPEAN COMMISSION PROPOSAL FOR A COUNCIL REGULATION AMENDING REGULATION (EC) NO 2201/2003 AS REGARDS JURISDICTION AND INTRODUCING RULES CONCERNING APPLICABLE LAW IN MATRIMONIAL MATTERS (COM (2006) 399)

1.1. Which committees participated in the pilot project and what role did they play?

Three standing Polish Senate committees took part in the project: European Union Affairs Committee, Family and Social Policy Committee and Human Rights and the Rule of Law Committee.

1.2. Was the pilot project subject to a debate by the Senate plenary assembly?

No.

1.3. Did other parliamentary services participate in the pilot project?

Yes, the Senate Proceedings Office, the Legislative Office and the Information & Documentation Office of the Polish Senate Chancellery.

1.4. Please describe the course of the entire procedure of checking compliance of the European Commission proposal with the principles of subsidiarity and proportionality account taken of the role played by each committee and other participants, and the chronology of events.

- At a meeting held on **2 August 2006**, the European Union Affairs Committee discussed the procedure involved in the pilot project to check compliance of the European Commission proposal with the principles of subsidiarity and proportionality as decided at the COSAC forum. The Committee:
 - Decided to hold a joint session concerning the pilot project with the Family and Social Policy Committee and the Human Rights and Rule of Law Committee;
 - Appointed the senator-rapporteur;
 - Initiated the process of selecting experts and commissioning expert opinions on compliance of the European Commission proposal with the principles of subsidiarity and proportionality.
- Participants in a joint session of the European Union Affairs Committee, Family and Social Policy Committee and Human Rights and the Rule of Law Committee held on **6 September 2006** evaluated the European Commission proposal from the perspective of its compliance with the principles of subsidiarity and proportionality. They heard the opinions of government representatives, senator-rapporteur and members of the participating Senate committees. In summing up the session, the chairman of the European Union Affairs Committee submitted a motion to recognize the European Commission proposal for a Council regulation amending Regulation (EC) No. 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters (COM (2006) 399) as compliant with the principles of subsidiarity and proportionality. The motion was adopted by acclamation.

1.5. Did your government prepare any information on compliance of the European Commission proposal with the principles of subsidiarity and proportionality?

Yes, the government prepared a position and a justification thereof.

1.6. Did your national government consult regional parliaments which have legislative powers?

Polish provincial councils do not operate as “regional parliaments” and, hence, they were not consulted by the Polish Senate within the framework of the process of checking compliance of the European Commission proposal with the principles of subsidiarity and proportionality.

1.7. Where there any outside participants in the process of checking compliance of the European Commission proposal with the principles of subsidiarity and proportionality?

Yes, government representatives participated in the joint session of the European Union Affairs Committee, Family and Social Policy Committee and Human Rights and the Rule of Law Committee held on **6 September 2006**. In addition, two expert opinions were submitted in writing.

1.8. If your parliament has a bicameral system, did the two chambers coordinate their work?

Sejm and Senate of the Republic of Poland did not cooperate with each other in the process of checking the conformity of the above proposal of the European Commission with the principles of subsidiarity and proportionality.

1.9. Is the procedure applied in the pilot project compliant with the procedure that your parliament intends to apply after the Constitutional Treaty comes into force?

It is too early to answer this question.

2. CONCLUSIONS OF THE PILOT PROJECT TO CHECK COMPLIANCE WITH THE PRINCIPLES OF SUBSIDIARITY AND PROPORTIONALITY OF THE EUROPEAN COMMISSION PROPOSAL FOR A COUNCIL REGULATION AMENDING REGULATION (EC) NO 2201/2003 AS REGARDS JURISDICTION AND INTRODUCING RULES CONCERNING APPLICABLE LAW IN MATRIMONIAL MATTERS (COM (2006) 399)

2.1. In your opinion, was the principle of subsidiarity violated?

At their joint session, the European Union Affairs Committee, Family and Social Policy Committee and Human Rights and Rule of Law Committee decided that the European Commission proposal was compliant with the subsidiarity principle.

2.2. Was the principle of proportionality violated in your opinion?

At their joint session, the European Union Affairs Committee, Family and Social Policy Committee and Human Rights and Rule of Law Committee decided that the European Commission proposal was compliant with the proportionality principle.

2.3. Did you prepare a justified opinion on non-compliance of the European Commission proposal with the principle of subsidiarity? (If yes, please attach its copy to the report submitted to the COSAC Secretariat)

This question does not apply to the Polish Senate as the three joint Senate committees recognized the European Commission proposal as compliant with the principles of subsidiarity and proportionality.

2.4. In your opinion, is the justification of compliance with the principle of subsidiarity presented by the European Commission sufficient?

The three joint Senate committees - European Union Affairs Committee, Family and Social Policy Committee and Human Rights and Rule of Law Committee – recognized the justification of compliance with the principle of subsidiarity presented by the European Commission as sufficient.

2.5. Did you come across any particular problems during the work?

No, while checking compliance of the European Commission proposal for a Council regulation amending Regulation (EC) No. 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters (COM (2006) 399), the three joint Polish Senate committees - European Union Affairs Committee, Family and Social Policy Committee and Human Rights and Rule of Law Committee – did not come across any particular problems.

Prepared by St. Puzyna

Approved by:

/ - /

Edmund Wittbrodt
Committee Chairman

Procedures:

1. Which committees were involved in examining the Commission proposal for a Regulation on the applicable law and jurisdiction in divorce matters and what role did each committee play?

- **European Affairs Committee (the leading committee)**
- **Constitutional and Legal Affairs Committee (after being asked by the EAC it adopted the draft position concerning respective proposal for legal act)**
- **Committee for Social Affairs and Housing (after being asked by the EAC it adopted the draft position concerning respective proposal for legal act)**
- **Committee for Human Rights, Minorities and Status of Women (after being asked by the EAC it adopted the draft position concerning respective proposal for legal act)**

2. Was your plenary involved?

- **No**

3. Were any other administrative services of your parliament involved in the process?

- **Department for European Affairs (working under the EAC) was involved as well.**

4. Could you describe the procedure used for the examination from start to finish with regard to the committees involved and other actors and the chronology of their involvement?

1.

By adopting its resolution (the EAC resolution No 10 adopted on 4 August 2006) the EAC agreed on the proposal made by the EAC chairman Mr. Milan Urbani to get involved in the 2nd subsidiarity and proportionality test dealing with the subsidiarity and proportionality check for the Proposal for a Council Regulation amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters. The above mentioned EAC resolution asked Constitutional and Legal Affairs Committee, Committee for Social Affairs and Housing and Committee for Human Rights, Minorities and Status of Women for a draft position concerning respective proposal for legal act till 7 September 2006

2a.

After being asked by the EAC Constitutional and Legal Affairs Committee agreed on the draft position concerning respective proposal for legal act by adopting its resolution No 10 on 4 September 2006

2b.

After being asked by the EAC Committee for Human Rights, Minorities and Status of Women agreed on the draft position concerning respective proposal for legal act by adopting its resolution No 9 on 4 September 2006

2c.

After being asked by the EAC Committee for Social Affairs and Housing agreed on the draft position concerning respective proposal for legal act by adopting its resolution No 5 on 5 September 2006

3.

On the basis of the drafts of the positions received from respective committees the EAC adopted on 13 September 2006 the final resolution concerning the subsidiarity and proportionality check for respective proposal for legal act

5. Did your government provide any information as part of the scrutiny process?

- In accordance with the §58a of the amended Rules of Procedure of the National Council of the Slovak Republic (Law No 350/1996 Coll.) an authorized member of the government (minister for justice) referred the preliminary position concerning respective proposal for legal act to the EAC

6. Did your national parliament consult regional parliaments with legislative powers?

- Irrelevant within the context of the Slovak Republic

7. Were any other external actors involved in the examination?

- No

8. In case of a bicameral system, did you coordinate your examination with the other parliamentary chamber?

- Irrelevant within the context of the Slovak Republic

9. Was the procedure used for this project in accordance with the procedure your parliament plans to use following the Constitutional Treaty's entering into force?

- This question has not been decided yet. However, it is likely to refer to this procedure in the future while making subsidiarity check for the EC/EU proposals for legal acts.

Findings:

10. Did you find any breach on the subsidiarity principle?

- No

11. Did you find any breach on the proportionality principle?

- No

12. Did you adopt a reasoned opinion for non-compliance? (If yes please enclose a copy with your report to the COSAC secretariat)

- No

13. Did you find the Commission's justification with regard to the subsidiarity principle satisfactory?

- Yes

Department for European Affairs
Chancellery of the National Council of the Slovak Republic

14. Did you find the Commission's justification with regard to the proportionality principle satisfactory?

- **Yes**

15. Did you encounter any specific difficulties during the examination?

- **Some problems were experienced with regard to the short time limit for the scrutiny for proposal for legal act**

16. Any other comments?

-

No

UK House of Commons

Subsidiarity and Proportionality Check on the Commission proposal for a Regulation on the applicable law and jurisdiction in divorce matters

The Finnish Presidency has asked for the following points to be covered in the reports from national parliaments:

Procedures:

30. Which committees were involved in examining the Commission proposal for a Regulation on the applicable law and jurisdiction in divorce matters and what role did each committee play?

In line with the standard procedures of the House of Commons for scrutinising EU legislation, the proposal was considered by the European Scrutiny Committee which agreed to hold the document under scrutiny and request further information from the Government. A report on the document was agreed by the Committee.

31. Was your plenary involved?

No.

32. Were any other administrative services of your parliament involved in the process?

No.

33. Could you describe the procedure used for the examination from start to finish with regard to the committees involved and other actors and the chronology of their involvement?

The proposal was deposited in the UK Parliament by the Government on 26 July 2006. The UK Government together with the Scottish Executive submitted an Explanatory Memorandum (EM) to Parliament on the proposal on 6 September. The proposal and the EM were considered by the European Scrutiny Committee on 11 October a report paragraph on the proposal was agreed by the Committee.

34. Did your government provide any information as part of the scrutiny process?

Yes. They submitted an Explanatory Memorandum.

35. Did your national parliament consult regional parliaments with legislative powers?

Yes. The Scottish Parliament submitted an opinion to the European Scrutiny Committee.

36. Were any other external actors involved in the examination?

No

37. In case of a bicameral system, did you coordinate your examination with the other parliamentary chamber?

There was no formal coordination, but the officials of the European committees of the two Houses exchanged information.

38. Was the procedure used for this project in accordance with the procedure your parliament plans to use following the Constitutional Treaty's entering into force?

The procedure for this check was part of the standard procedures of the European Scrutiny Committee for scrutinising EU legislation.

Findings:

The EU Committee will report its findings to COSAC in due course.

UK House of Lords

Subsidiarity and Proportionality Check on the Commission proposal for a Regulation on the applicable law and jurisdiction in divorce matters

The Finnish Presidency has asked for the following points to be covered in the reports from national parliaments:

Procedures:

39. Which committees were involved in examining the Commission proposal for a Regulation on the applicable law and jurisdiction in divorce matters and what role did each committee play?

In line with the standard procedures of the House of Lords for scrutinising EU legislation, the proposal was first considered by the Chairman of the EU Committee. He sifted the proposal to Sub-Committee E (Law & Institutions) of the EU Committee for examination. The Sub-Committee is scrutinising the proposal and will prepare a report, which will be adopted by the EU Committee.

40. Was your plenary involved?

No.

41. Were any other administrative services of your parliament involved in the process?

No.

42. Could you describe the procedure used for the examination from start to finish with regard to the committees involved and other actors and the chronology of their involvement?

The proposal was deposited in the UK Parliament by the Government on 26 July 2006. The Scottish Parliament, the Welsh Assembly and the UK Local Government Association were notified.

The UK Government submitted an Explanatory Memorandum (EM) to Parliament on the proposal on 6 September.

The proposal and the EM were considered by the Chairman of the House of Lords EU Committee, who sifted them to Sub-Committee E (Law & Institutions) on 6 September for examination.

The Sub-Committee wrote to interested parties inviting them to submit written evidence on the proposal to the Sub-Committee.

The Sub-Committee first considered the dossier on 18 October.

The Sub-Committee took oral evidence on the proposal from the Government on 18 October.

The Sub-Committee is scheduled to consider a draft report on the proposal on 1 November.

The EU Committee is scheduled to consider the Sub-Committee's draft report on 7 November. The Committee's report will be published shortly thereafter.

43. Did your government provide any information as part of the scrutiny process?

Yes. They submitted an Explanatory Memorandum and gave oral evidence to the Committee.

44. Did your national parliament consult regional parliaments with legislative powers?

Yes. The EU Committee notified the Scottish Parliament, the Welsh Assembly and the Local Government Association.

The Scottish Parliament submitted an opinion to the House of Lords EU Committee.

45. Were any other external actors involved in the examination?

Yes. The Sub-Committee received written evidence from:

- Professor Adrian Briggs, St Edmund Hall, Oxford;
- Resolution (formerly the Solicitors Family Law Association of England and Wales);
- The Law Society; and
- Panorama Legal Services.

46. In case of a bicameral system, did you coordinate your examination with the other parliamentary chamber?

There was no formal coordination, but the officials of the European committees of the two Houses exchanged information.

47. Was the procedure used for this project in accordance with the procedure your parliament plans to use following the Constitutional Treaty's entering into force?

The procedure for this check was part of the standard procedures of the EU Committee for scrutinising EU legislation.

The House of Lords has no current plans to change its procedures for scrutinising EU legislation.

Findings:

The EU Committee will report its findings to COSAC in due course.