



Constitutional and Legislative Affairs Committee Subsidiarity Report

Proposal for a Regulation of the European Parliament and of the Council on measures to reduce the cost of deploying high-speed electronic communications networks (COM(2013)147)

This report is laid following consideration by the Constitutional and Legislative Affairs Committee under Standing Order 21.8 of aspects of the proposed Regulation drawn to its attention by Assembly officials. The report forms the basis of representations to be made by the National Assembly for Wales to the relevant committees of the House of Commons and House of Lords under Standing Order 21.9.

Legal Context

The principle of subsidiarity is enshrined in Article 5 of the Treaty on European Union:

“Article 5

(ex Article 5 TEC)

- 1. The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality.*
- 2. Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.*
- 3. Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.*

The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol.

4. Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.

The institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality.

EN C 83/18 Official Journal of the European Union.”

Its application is governed by the Protocol on the Application of the Principles of Subsidiarity and Proportionality, the relevant part of which for our purpose is the first paragraph of Article 6:

“Any national Parliament or any chamber of a national Parliament may, within eight weeks from the date of transmission of a draft legislative act, in the official languages of the Union, send to the Presidents of the European Parliament, the Council and the Commission a reasoned opinion stating why it considers that the draft in question does not comply with the principle of subsidiarity. It will be for each national Parliament or each chamber of a national Parliament to consult, where appropriate, regional parliaments with legislative powers [Our emphasis].”

Commission Proposals

The proposal for a Regulation of the European Parliament and of the Council on measures to reduce the cost of deploying high-speed electronic communications networks (“the proposed Regulation”) was published by the European Commission on 26 March 2013. The Assembly subsequently received a copy of the Department for Culture, Media and Sport’s Explanatory Memorandum, which set out the UK Government’s views of the proposal, on 24 April 2013. In its consideration of subsidiarity, the Memorandum states as follows:

“The UK Government has concerns that the Regulation is not justified in accordance with the subsidiarity principle. The measures supported by the Regulation – infrastructure sharing, information provision, street works coordination and in-built broadband equipment in buildings – would all be implemented at a local level. There is little prospect of these measures having a cross-border market effect, as the issues the Regulation seeks to address are not applicable to the core network that crosses Member State borders. The Government believes that the

Regulation's intended aim – to support superfast broadband rollout by lowering the cost of civil engineering works – would be best achieved by action at Member State level [Our emphasis].

The Memorandum states that the UK Government's key concern "is the use of a Regulation as the vehicle to implement these measures" that would "enforce a prescriptive approach, no matter what the current policies, regulations and structures are in a particular location". The Memorandum adds that:

"Many of the policy objectives behind the Regulation could, in theory, be supported at the EU level if they were proposed in a different way using a different legal instrument."

On 13 May 2013, the House of Commons' European Scrutiny Committee published a draft Reasoned Opinion on the proposed Regulation which reiterated a number of the points raised in the UK Government's Memorandum. In particular, the draft Reasoned Opinion states that:

"the Regulation's intended aim – to support superfast broadband rollout by lowering the cost of civil engineering works – would be best achieved by action at Member State level."

The draft Reasoned Opinion adds that:

"the House of Commons believes that the measures proposed should be taken at national level but that if the Commission persists in EU-level action, the measures should be modified and contained in a Directive rather than a Regulation [Our emphasis]."

We agree with the the House of Commons' European Scrutiny Committee and the UK Government that the proposed Regulation's aim would be best achieved by action at Member State level, and that the measures supported by the proposed Regulation – such as infrastructure sharing, information provision, street works coordination and in-built broadband equipment in buildings – would all be best implemented at a local level.

This would, in particular, facilitate effective action in countries such as the UK that have devolved systems of government. We note that similar arguments have been made by the German state parliaments of Baden-Württemberg and Thüringen.

We also agree that the proposed legislation should be modified and contained in a Directive rather than a Regulation, if the Commission continues with EU-Level action.