

**Dutch government review of  
subsidiarity and proportionality at European level**

**Position of the Austrian Federal Economic Chamber**

**September 2013**

The Austrian Federal Economic Chamber (WKO) basically welcomes the initiative by the Dutch government.<sup>1</sup> However, it is impossible to make a general statement as to where EU competences need to be shifted back to the Member States or where national competences need to be shifted to EU level, as this depends on each individual thematic area.

Be that as it may, the debate launched by the Netherlands in this review should be as broad as possible, in order to find a sensible and generally acceptable way of dividing competences between the Union and the Member States at European level, such that the focus stays on the issue being regulated. It must be possible to impose effective limitations on action by the Union where, based on closer examination, it is either inadmissible under competence rules or does not comply with the principle of subsidiarity or proportionality.

The economic and financial crisis has demonstrated that Europe faces serious challenges which can only be resolved jointly, at European level. In principle, the WKO is therefore in favour of deeper economic and monetary union (EMU) and greater budgetary and economic policy integration. However, it will only be possible to deepen EMU if the public is on board. Deeper EMU therefore depends on greater involvement of the European Parliament and national parliaments and, above all, of the European and national social partners.

Even from an environmental/energy perspective, the WKO basically sees no reason why the Union should not go further, with the exception of a few individual issues, such as soil protection (there is a coordinated Austrian position against an EU directive) and the European Commission's handling of third-country protests against the aviation ETS ('stop the clock'). Greater latitude for individual adjustments, such as those which are possible and necessary in the water sector, should be allowed for in the specific legal acts, or implemented by the European Commission.

In the direct taxation sector, the WKO considers that EU initiatives would be welcome if they prevented cross-border tax fraud or tax evasion. Otherwise legislation on direct taxes should remain under the jurisdiction of the Member States.

The Dutch view that harmonisation of social security systems is not necessary, is a view that we wholly endorse.

In justice and home affairs, the European Commission's approach to law-making appears to be very inclined to enlarge its areas of responsibility. It is clear from long-standing experience with various issues, especially in the justice sector, that hardly a single proposal is made that is not based (at least) on Article 114 TFEU. The 'internal market' legal basis is used for numerous initiatives, even where there is no obvious link (e.g. regulation of child support by the EU).

However, not everything should be regulated in detail in the internal market sector; where possible the principle of mutual recognition should take precedence. This guarantees the

---

<sup>1</sup> <http://www.government.nl/news/2013/06/21/european-where-necessary-national-where-possible.html>

free movement of goods and services even where the national provisions of the individual Member States are not harmonised. More importantly, it ensures compliance with the principle of subsidiarity, because it avoids the systematic development of cumbersome regulation at Union level and pays greater attention to local, regional and national traditions. At the same time, this helps to maintain the diversity of goods and services. In other words, it is a pragmatic and effective tool for economic integration and helps companies to penetrate markets in other Member States. Greater attention should therefore be paid to the principle of mutual recognition and enhanced market supervision and the transposition and implementation of existing legal acts should take precedence over the adoption of new regulations.

Where regulation is needed, a case-by-case check should be carried out in order to decide which legal instrument (directive or regulation) is most appropriate. In order to avoid differing transposition measures and realise the potential for savings in the legislative sector, that check should focus on where regulations rather than directives can be used. In any event, gold-plating (i.e. exceeding EU requirements) should be avoided when transposing EU directives.

The WKO welcomes all efforts made to achieve a business-friendly regulatory environment through smart regulation at European level. As regards the principle of proportionality, we would note that small and medium-sized enterprises in particular suffer disproportionately from legislative and administrative burdens, because they have limited resources and knowledge when it comes to penetrating the jungle of complex regulations. Over-regulation thus becomes an obstacle to growth and employment and should be avoided at both EU and national level. In light of the current economic situation, the burden on businesses needs to be relieved if growth is to be stimulated. The motto 'think small first' must be at the heart of every debate.

The WKO sets great store by the principles of subsidiarity, proportionality and conferral, so that decisions are taken as close to the grassroots as possible.

#### **A. COMMENT ON THE NINE RECOMMENDATIONS**

- i) The WKO notes that the Commission's impact assessment guidelines make provision for verification of the principle of conferral, i.e. if the EU has a right to act based on the EU Treaties. Under these guidelines, a problem should be linked to at least one article of the Treaties and the objectives they contain.
- ii) In policy areas in which the EU does not have competence to legislate, occasional non-binding communications or recommendations may make perfect sense from an economic perspective. One example of this in the education sector, in which the EU has supporting and coordinating powers, is the Recommendation of the European Parliament and of the Council on the establishment of the European Qualifications Framework for Lifelong Learning (EQF) adopted at the

Commission's proposal. A topical example of an important and helpful Commission communication is the communication 'Rethinking education: investing in skills for better socio-economic outcomes' (COM(2012) 669).

However, in areas in which the EU has competence to legislate, non-binding communications and recommendations may be highly 'explosive', i.e. they may contain the threat that a legislative act will follow if the points are not transposed promptly [e.g. Commission communication 'Towards a European Horizontal Framework for Collective Redress' (COM(2013) 401), Commission recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union law (C(2013) 3539)]. One especially negative example is the 'second chance' approach in the communication initiated under the Small Business Act entitled 'A new European approach to business failure and insolvency' (COM(2012) 742).

- iii) The WKO considers that the Commission should refrain from further action in a regulated area where the Council has not yet achieved a majority. Particular mention should be made here of the 'made in..' product labelling scheme. This was withdrawn by the Commission in late December 2012, following seven years of unsuccessful debate and failure to reach a consensus in the Council, but has been re-tabled in Article 7 of the Commission proposal on product safety (COM(2013) 78).
- iv) The WKO considers that 'gold-plating' should be avoided at all costs in national transpositions. Care should also be taken to ensure that differing transposition measures do not cause distortions of competition. There should be a clear distinction between directives and regulations, with directives regulating the goal to be attained but dispensing with detail, and regulations formulated so that they can be applied in practice in the Member States.
- v) Commission proposals should pay particular attention to the implementation costs to companies, which should include not only the bureaucratic cost, but also all actual adaptation costs that a company would incur based on the planned regulation. An option should be chosen that involves the smallest financial burden for companies, as identified in a cost-benefit analysis, in order not to undermine their competitiveness.

Reducing the bureaucratic burden of EU regulations could begin, for example, in the environmental sector, with waste laws and waste disposal regulations (packaging, old vehicles, old electrical appliances, batteries) and continue with EU legislation on chemicals which, in the form of the REACH regulation, involves massive bureaucratic costs for small and medium-sized enterprises. Even industrial plant regulations, emissions trading and numerous other laws contain unnecessary notification and recording requirements.

- vi) The WKO welcomes the recommendation that better and more systematic use should be made of impact assessments. If the impact assessment for a particular project

identifies high costs for companies and the Commission presents a proposal nonetheless, the impact assessment could be used as an argument against the Commission proposal.

Impact assessments should contain a solid, mandatory SME test to verify the impact of planned legal provisions and administrative measures on SMEs. The slogan 'think small first' should be the starting point of every debate. Better coordination and coherence between the Commission's Directorates-General would be helpful here.

The use of evaluation clauses in legal acts would allow systematic ex-post evaluation and would be welcomed by the Austrian economy. Under no circumstances should new legal acts be proposed in a specific area of regulation before the transposition and effectiveness of existing regulations has been confirmed.

- vii) It would be a good idea from the point of view of transparency if the Commission involved Member States and relevant European stakeholders when drafting implementing acts (Article 291 TFEU) and delegated acts (Article 290 TFEU). In order to guarantee the practicability and acceptance of proposed regulations, national delegates should include the relevant national stakeholders in the Commission's comitology committees and expert working groups from the outset.

The WKO therefore welcomes the fact that the circular on legal and organisational aspects of EU membership (Federal Chancellery Constitutional Service and BMeiA, March 2013) clarifies that the competent ministries must involve the social partners when preparing for meetings of comitology committees and expert working groups on delegated acts. Also, reports on these meetings must be forwarded to all departments interested or concerned.

- viii) We disagree with the Dutch recommendation that, where the Court of Justice interprets European legislation in a way not intended by the legislature, the legislation on which the Court based its judgment should where possible be modified. Decisions should continue to be predicated on individual cases.
- ix) Participation is vital: it makes sense to involve the Member States and stakeholders in the European Commission's work programme if existing legislation is to be revised more sensibly and planned on a more participatory basis in future.

## **B. POINTS FOR ACTION**

- ***General Affairs***

### **3. EU agencies**

The added value of a new EU agency should be clearly demonstrated and attention should be paid to minimising travel costs in order to safeguard cost efficiency.

#### **4. EU budget**

The WKO shares the view that programmes funded from the EU budget need to have demonstrable added value if they are to be seen as sensible and practicable. Also, national budgetary and fiscal developments need to be taken into account when preparing the EU budget. The principle of a balanced EU budget should also be strictly complied with in future.

Elements included in the multiannual financial framework (MFF) 2014-2020, such as the guarantee platform, COSME, Horizon 2020 and the structural funds, are important instruments in creating growth and employment. A midterm review of the MFF and the composition of the elements included in it would be welcome, if that would help to increase efficiency and improve output.

- ***Competitiveness (Internal Market, Industry, Research and Space)***

#### **8. Intrastat Regulation**

The WKO has highlighted the enormous cost to companies of collating statistics under the Intrastat Regulation on numerous occasions at European level. The SIMSTAT (Single Market Statistics) project initiated by Eurostat in 2011 should simplify the collation of intra-Union trade statistics considerably and, more importantly, significantly reduce the burden on the companies providing that information. One proposal suggests that Member States' reports should continue to include both imports and exports (two-way procedure). However, the WKO abides by the view that a binding, qualified, one-way procedure for all Member States, which allows import data to be extrapolated from trading partners' export data, is the most appropriate procedure in terms of attaining the objective of SIMSTAT (to reduce the Intrastat burden on companies by 50 %). A binding timetable for creating the legal and technical platform needs to be presented sooner rather than later.

#### **9. Construction Products Regulation**

The Construction Products Regulation imposes an above-average burden on SMEs in particular. Any effort to simplify the regulations and, more importantly, reduce the administrative burden, is welcomed.

- ***Economic and Financial Affairs***

#### **10. Financial Transaction Tax**

The question of taxation of pension funds and other pillar 2 and 3 retirement instruments needs further discussion in the Council working group; an exemption should be considered for this sector.

#### **11. 'Shock absorption fund' for euro countries**

The WKO is critical of the idea of having one central budget (fiscal capacity) with a 'shock absorption function', for the following reasons:

Firstly, we need to see how the short- and medium-term reform measures are working. In any event, one joint fiscal capacity is no substitute for better fiscal discipline or economic policy governance. On the contrary, improving the competitiveness of individual Member States through structural measures should continue to be the top priority, so that they are better prepared for future shocks. Creating one joint fiscal capacity would pave the way for a transfer union. Fiscal policy solidarity without sufficient conditionality might harbour a serious moral hazard or promote free-riding within EMU (especially as regards the southern periphery states), which is problematic for net contributors. More accurate evaluation of fiscal capacity only makes sense once the selected approach has been planned in detail.

Generally speaking, implementation of the necessary reforms, consistent consolidation of budgets at national level and compliance with existing economic governance instruments (Stability and Growth Pact, Fiscal Compact) are indispensable to the functioning of the euro and the euro area.

## **12. Direct taxation**

EU initiatives in the field of direct taxation are welcome if they prevent cross-border tax fraud or tax evasion. Otherwise, legislation on direct taxes should remain the preserve of the Member States.

## **13. Non-harmonised indirect taxation**

The Member States should continue to cooperate in this area, subject to the Treaties.

## **14. Tax-related infringement proceedings**

Differences in direct taxes between the Member States should not be rectified through infringement proceedings. Adverse effects (including budgetary effects) can best be remedied under bilateral treaties.

## **15. Insurance of natural and man-made disasters**

We consider that European legislation with a view to mandatory insurance is unnecessary.

## **16. Insurance guarantee schemes**

There would appear to be no need for any such legislation and this should be examined further.

## **17. Directive on payment accounts**

We support the Dutch government's view that the EU legislature needs to hold back on the draft directive on the payment account package (COM(2013) 266). No European legislative initiative is needed, especially not on the comparability of fees relating to payment accounts, because comparability of fees relating to payment accounts is hard to achieve at European level, as circumstances – and price levels in particular – vary from one Member State to another.

We also consider that the improved access to payment accounts sought in the draft directive is a national issue with no cross-border implications, which is why we welcome the initiative by the Dutch government. For the rest, the planned ‘basic bank account’ project conflicts with the due diligence required under Section 39(1) of the Banking Act, which requires the overall revenue position of the credit institution to be taken into account.

- ***Justice and Home Affairs***

The Dutch list does not include ‘collective legal protection’. EU competence in this area is open to doubt at the very least (see comprehensive position statements by the WKO).

**19. Directive on the admission and residence of third-country nationals for the purposes of research, studies and pupil exchange, paid or unpaid interns, volunteers and au pairs**

We do not share the Dutch government’s criticism that pupils in exchange programmes, paid or unpaid interns and au pairs should be excluded from this directive. We consider that granting access to these groups of persons establishes an initial connection with the EU and may increase the chances of long-term immigration by qualified third-country nationals.

**21. Proposals to harmonise substantive criminal law**

We agree that criminal law is primarily a matter for the Member States. However, crime is increasingly crossing national borders. Bilateral or multilateral treaties are admissible; EU competence only applies in exceptional cases.

- ***Agriculture and fisheries***

**23. Inclusion of forestry**

We believe that the Dutch position is not widely supported, as Austria also uses resources in forestry under the rural development programme.

**24. Implementing Regulation on marketing standards for olive oil**

In our view, this implementing regulation is a good example of ‘overarching regulation’ by the Commission and we support the Dutch position.

**25. EU programme for school milk**

We support the Dutch view; the regulatory and bureaucratic cost of these EU programmes is disproportionately high.

- ***Environment***

**26. Environmental Noise Directive**

The WKO raised doubts about the need for Union regulation (which already exists and has been transposed in the form of the Noise Directive) when the directive was proposed in 2000 and these have not been dispelled. Noise is clearly a local nuisance and should be regulated locally. The costs of mandatory EU measures are considerable and do not equate



1:1 to the benefits. However, we hold that it is unlikely that an EU directive and national transposition measures will be withdrawn.

## **27. Environmental impact assessments**

Impact assessments should not be watered down: less detailed assessments would be easier for the economy to handle, but this not come at the expense of the quality of their content. The quality of impact assessments should be improved (especially their readability and structure), but this does not mean that their contents (as opposed to the number of pages in them) should be reduced. The impact of environmental legal acts on the competitiveness and innovativeness of the European economy is often neglected or investigated and explained in too little detail in impact assessments.

## **28. Water Framework Directive**

Greater account should be taken of diffuse inputs and the quantity of water present; we share the Dutch view here that more leeway is needed in transposition. We argued during the recent review of the Environmental Quality Standards Directive that the more obvious industrial dischargers should not be expected to take the rap for inputs which are not of clearly identifiable origin. Also, whether the country has abundant water, like Austria, or is arid, like Spain, plays a very important role when transposing and applying the EU Water Framework Directive, especially in connection with fees for water usage.

## **29. Air Quality Directive**

More leeway for Member States and fewer EU limit values in air quality: the very ambitious targets in EU anti-air pollution legislation ('CAFE' Air Quality Directive) put too much of a burden on the overwhelming majority of Member States. Due to its location, Austria (like the Netherlands) has a high level of imported pollutants. We would therefore go one step further than the Netherlands and demand both more leeway for the Member States and a stop on limit values. The EU is required to take efficient Union-wide measures (e.g. enhanced cooperation on cross-border pollution, aid for switching to low-emission technologies) in order to ease the burden on the regions. An anti-air pollution policy with a sense of proportion must use a mix of polluter pays measures in order to ensure that the European economy is not disproportionately burdened and literally does not run out of steam.

## **31. Soil Framework Directive**

Soil protection without an EU directive makes more sense; we support the Dutch position against a Soil Framework Directive, which the Commission appears determined to push through, regardless of the blocking minority in the Council. We still see the overall Austrian position (including the position of the states) as 'no EU Directive'.

### **33. Biofuels**

The WKO does not see eye to eye with the Netherlands on the issue of biofuels. Obviously, from the WKO's point of view, a transition to 2<sup>nd</sup> and 3<sup>rd</sup> generation biofuels makes sense, but only under the right technical and economic conditions. However, the security of investments in plants for 1<sup>st</sup> generation biofuels must be guaranteed.

- ***Education, Youth Affairs, Culture, Sport***

### **34. Media freedom and pluralism**

We must clearly agree with the Dutch government that the recommendations by the High-Level Group on Media Freedom and Pluralism went beyond its remit. The Commission appears to have deliberately overlooked the fact that the EU Treaties basically do not grant it powers to regulate the media sector in the stated fields (limits on culture clause, freedom of Member States to organise their regulatory authority). Thus it has cleverly construed the need for action with a European dimension based on individual problem cases in the media sector in individual Member States and suggested that European media regulation is the only way forward. This approach must be rejected, especially as there is no sign of any genuine debate of possible alternatives in the present consultation. The limits on competence laid down in the European Treaties must be complied with, especially in the media sector (watchword: conferral), before considering any subsidiarity and proportionality issues.

- ***Transport, telecommunications, energy***

There are definitely dossiers in the transport sector where greater harmonisation is needed from an economic perspective. They include, for example, the call for a review of Regulation (EC) No 561/2006. There is a strong demand here for central, harmonised regulation for all Member States (and thus less latitude for national regulation), based in the main on the importance of a level playing field in legislation on driving times.

### **37. Fourth Railway Package**

We assume from the way in which it is worded that the Dutch government's criticism is levelled directly at the proposal to amend Regulation (EC) No 1370/2007 on the opening of the market in domestic passenger transport services by rail. Greater precision is needed here, because the EU's Fourth Railway Package contains a total of 6 legislative proposals. While more simplification and thus EU specifications basically make perfect sense for large parts of the proposals contained in the Fourth Railway Package, the question that arises in connection with the proposal to amend Regulation (EC) No 1370/2007 in terms of the opening of the market in domestic passenger transport services by rail, including from the WKO's point of view, is whether this is in keeping with the principles of subsidiarity and proportionality.

### **38. Preference for global legislation over EU legislation**

- **Ex.: Aviation ETS:** the aviation ETS (which has already been transposed throughout the EU, including for third-country airlines entering Europe) is one of the areas mentioned under this point. In the WKO's opinion, merely removing third-country flights (to and from Europe) from emissions trading and continuing to charge flights within the EU is a dubious reaction to the third-country blockage via the ICAO (especially by the US, Russia, China and India). Generally speaking, an EU scheme such as the aviation ETS is unsuitable for the purpose of global 'mission work' (decided in 2008). We therefore support the Dutch position: global legislation (such as that being attempted by the ICAO, albeit with little prospect of success) should come before European legislation.
- **Ex.: Global climate policy:** the EU is the trailblazer but will be on its own on climate protection at least until 2020; at the same time, it is adopting increasingly strict targets and forcing the rest of the world to 'follow suit' in international negotiations, at a time when the proportion of EU emissions is sinking towards 10 %. This concept has failed to take off so far and should therefore be questioned.

### **39. Telecom package**

We agree with the Dutch government that the veto right anchored in the telecom package (Articles 7 and 7a of the framework directive) gives the European authorities considerable potential to interfere in the regulation of national markets, especially as the Commission makes frequent use of its veto right, thereby effectively restricting the national regulatory authorities' ability to take due account of the attributes of national electronic communication markets. Calls for the Commission's powers to be extended, which have become more and more frequent recently, therefore need to be addressed with caution (even the resumption of the old call for an EU regulator for the electronic communications sector needs careful examination).

### **42. Directive on the energy performance of buildings**

Incentives, rather than increasingly strict mandatory measures, are needed in the Buildings Directive. Incentives, especially to improve the thermal insulation of old buildings, are a WKO priority for the purpose of climate protection, energy efficiency and stimulating the economy. Austria is endeavouring to achieve a rate of thermal refurbishment of 3 % per annum up to 2020 (currently approx. 1 %).

### **43. Energy efficiency**

Energy efficiency needs to be achieved through incentives, not mandatory measures. The failed transposition of the EU's Energy Efficiency Directive in Austria illustrated this year that overly rigid quantitative targets and associated measures are counterproductive. Incentives, grants and awareness-raising need to be demanded, especially in the field of energy efficiency, rather than mandatory quantitative targets and rigid mandatory measures.

- *Employment, Social Policy, Public Health, Consumer Affairs*

#### **44. European Globalisation Adjustment Fund**

As the fund will help self-employed persons and SME owners in the forthcoming programming period, we disagree with the critical stand taken by the Netherlands. Austria profited from the European Globalisation Adjustment Fund in seven cases in the current programming period.

#### **45. External dimension of social security coordination**

The Dutch government's criticism of this initiative is hard to understand: uniform rules on the external dimension of social security can help to make Europe an interesting labour market for third countries, which would benefit those Member States already facing a lack of skilled labour or likely to do so in the near future. However, bilateral social security agreements should not result in abuse; therefore, any such agreements must govern cooperation between the administrative authorities of the EU and the third country concerned, electronic data comparison and associated controls and sanctions.

#### **46. Social security systems**

We agree fully and completely with the Dutch view that harmonisation of social security systems is unnecessary.

#### **47. Fund for European Aid to the Most Deprived**

We thoroughly endorse the Dutch government's criticism of this fund; we too feel that there is no need to extend what was originally food aid from intervention stocks of agricultural products. More importantly, we see no reason why every Member State should have to prepare an operational programme in order to distribute goods to the most needy. We consider that it would make better sense to use these resources within the framework of the European Social Fund (ESF) in order to integrate the neediest people into the job market.

#### **48. Gender balance among non-executive directors**

We agree with the Dutch criticism; we too feel that there is no need for European regulation, as self-regulation is much more in keeping with the practices of individual Member States. We also consider that this proposal for a directive conflicts with the principles of subsidiarity and proportionality.

#### **50. Portability**

Unlike the Netherlands, we also oppose the new version of this proposal for a directive; we see no need for far-reaching intervention in the second pillar of pension insurance by regulating waiting and entitlement periods. The exemption for direct defined benefits which we requested and which is not supported by any other Member State will have a massive impact on supplementary pensions in Austria.

### **51. Safety, health and welfare legislation**

We find the Dutch stand hard to understand. Although we agree that much of this legislation is too detailed, a level playing field in this sector is vital in helping to prevent distortions of competition. Therefore, whether or not laying down European principles and leaving the sectors to self-regulate on that basis suffices must be decided on a case-by-case basis. However, we do concur that agreements concluded within the framework of European social dialogue that are to be translated into *erga omnes* legislation under directives should be subject to an impact assessment, taking account of compliance costs to companies.

### **53. Directive on extending maternity leave**

We too are opposed to the idea of extending maternity leave from 18 (European Commission and Council) to 20 weeks (European Parliament).

## CONTACTS

### AUSTRIAN FEDERAL ECONOMIC CHAMBER/EU COORDINATION UNIT

MMag. Christian Mandl

E: [Christian.Mandl@wko.at](mailto:Christian.Mandl@wko.at)

T: +43 590 900 - 4315

Wiedner Hauptstrasse 63

A-1045 Vienna

[www.wko.at/eu](http://www.wko.at/eu)

### WKO EU OFFICE AT PERMANENT REPRESENTATION OF AUSTRIA TO THE EU

Mag. Markus Stock

E: [Markus.Stock@eu.austria.be](mailto:Markus.Stock@eu.austria.be)

T: +322 286 5880

Avenue Cortenbergh 30

BE-1040 Brussels

#### Legal notice:

Austrian Federal Economic Chamber  
1045 Vienna, Wiedner Hauptstrasse 63  
T: +43 590 900 - 4315

W: [www.wko.at/eu](http://www.wko.at/eu)

E: [eu@wko.at](mailto:eu@wko.at)

EU Coordination Unit

Author: MMag. Christian Mandl

Editor: Mag. Yasmin Soetopo M.E.S.

© 2013 Austrian Federal Economic Chamber

No liability accepted for accuracy of contents