



European Scrutiny Committee

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From: Mr William Cash MP

29/04/2014

Dr Chris Fearne
Chairman Of The Committee Of Foreign And European Affairs
Kamra Tad-Deputati
Parliament of Malta
Valletta VLT 1115
Malta

Dear *Dr Fearne,*

Article 5 of Protocol 2 on the Application of the principles of Subsidiarity and Proportionality; the obligation for the Commission to provide a detailed statement.

I am writing to seek your view, and that of your Committee, on a particular aspect of the operation of Protocol 2 on the Application of the Principles of Subsidiarity and Proportionality.

Since the coming into force of the Lisbon Treaty my Committee has been concerned that the draft legislative acts put forward by the Commission have not, as required by Article 5 of the Protocol, contained a detailed statement justifying the proposal with regards to subsidiarity and making it possible to appraise compliance with the principles both of subsidiarity and proportionality. In particular there has been no statement dealing with all the specific matters referred to in this Article.

In some cases the Commission has relied for this purpose on its impact assessment. An example can be found in the Commission's general response to the yellow card in respect of the proposal on the establishment of the European Public Prosecutor's Office¹. In this document the Commission indicated that the reasons provided in its explanatory memorandum and accompanying legislative financial statement to explain why action by the Member States is insufficient "are supplemented by the impact assessment, mentioned in a number of reasoned opinions, which by its nature is much more detailed." Further it recalled "that in the *Vodafone* case the Court of Justice referred to an impact assessment of the Commission to justify respect

¹ COM (2013) 851. The original proposal is COM (2013) 534.

for the principle of proportionality¹ and considered that the impact assessment report was also relevant to the principle of subsidiarity.²

We believe that the Commission should not rely on, or simply refer to, its impact assessment because this document is not translated into all languages. The detailed subsidiarity statement should be found in the Commission's proposal or explanatory memorandum, which is translated into all languages.

Furthermore we do not consider that the *Vodafone* judgment supports the Commission's reliance on its impact assessment. That case was brought to the Court before the Lisbon Treaty entered into force (although the judgment was delivered after), and different considerations apply to the principle of subsidiarity, which is subject to the formal reasoned opinion procedure.

Against this background I should be grateful if you could let me know whether your Committee or Chamber has considered or intends to consider this issue, and - if so - whether you consider that failure to provide the detailed statement justifying subsidiarity in the draft legislative act itself, as required by Article 5 of Protocol 2, constitutes a potential breach of an essential procedural requirement rendering the subsequently adopted decision liable to be declared invalid by the Court of Justice.

Yours,
Bill Cash

CHAIRMAN

¹ Case C-377/98.