

Model grid to assess subsidiarity and proportionality throughout the policy cycle (taken from the report of the Task Force on Subsidiarity, Proportionality and "Doing Less More Efficiently")

Institution*	Offices of the State Government of Vorarlberg, Department for European Affairs and External Relations (PrsE)
Title of the proposal or initiative	New Pact on Migration and Asylum, COM(2020) 610
Institutional Reference(s)	<ul style="list-style-type: none"> - Proposal for a Regulation on asylum and migration management, COM(2020) 610; - Proposal for a Regulation introducing a screening of third country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817, COM(2020) 612; - Proposal for a Regulation establishing a common procedure for international protection in the EU and repealing Directive 2013/32/EU, COM(2020) 611; - Proposal for a Regulation addressing situations of crisis and force majeure in the field of migration and asylum, COM(2020) 613; - Amended proposal for a Regulation on the establishment of Eurodac for the comparison of biometric data, COM (2020) 614.

Purpose and explanation of this assessment grid

This grid aims to provide a shared and consistent approach to assess conformity of a given proposal or initiative with the Treaty-based principles of subsidiarity and proportionality. It is intended to be used by the European Commission when initiating its proposals, the national Parliaments when preparing their reasoned opinions pursuant to Protocol No. 2 of the Treaty on the Functioning of the European Union (TFEU), as well as the European Parliament and the Council as the EU's legislators. The grid is also intended to be used for initiatives from a group of Member States, requests from the Court of Justice, recommendations from the European Central Bank and requests from the European Investment Bank for the adoption of legislative acts (Article 3 of Protocol No. 2).

The subsidiarity principle helps determine whether it is justified for the Union to act within the shared or supporting competences it has been given under the Treaties or whether it is more appropriate that Member States act at the appropriate national, regional or local levels. The two cumulative aspects of EU necessity and EU added value should both be satisfied if the subsidiarity test is to be fulfilled. These are explained further below.

The proportionality principle helps ensure that the intensity of the legislative obligations or policy approach matches the intended objectives of the policy or legislation. This means that the content and form of Union action must not go beyond what is necessary to achieve the intended objectives.

Impact assessments prepared by the European Commission to support its proposals will include an assessment of subsidiarity and proportionality. In addition, each Commission proposal will be accompanied by an explanatory memorandum which also presents the Commission's assessment of subsidiarity and proportionality, as this is a requirement of Protocol No. 2 of the TFEU, together with the requirements to consult widely before proposing a legislative act and to take into account the local and regional dimension of an envisaged action.

While this assessment grid only addresses subsidiarity and proportionality, each institution using it is free to add

elements which are useful for their own internal processes and priorities. For example, the grid could be adapted to include an assessment of the Commission's use of better regulation instruments or political aspects of the Commission's proposals.

** Not all questions in this model assessment grid are relevant for all institutions.*

1. Can the Union act? What is the legal basis and competence of the Union's intended action?

1.1 Which article(s) of the Treaty are used to support the legislative proposal or policy initiative?

TFEU: Article 77(2)(b) and (d); Article 78(2)(c), (d), (e) and (g); Article 79(2)(a), (b) and (c), and (4); Article 87(2)(c); and Article 88(2)(a).

1.2 Is the Union competence represented by this Treaty article exclusive, shared or supporting in nature?

It is Vorarlberg's turn, as the current lead province for the subsidiarity and proportionality test (cf. VSt 5028/144), to submit the initiatives underlying this pact, included in the European Commission's 2020 work programme, to the subsidiarity and proportionality test in accordance with TFEU Protocol No 2, namely the:

- Proposal for a Regulation on asylum and migration management;
- Proposal for a Regulation introducing a screening of third country nationals at the external borders;
- Proposal for a Regulation establishing a common procedure for international protection in the EU;
- Proposal for a Regulation addressing situations of crisis and force majeure in the field of migration and asylum; and
- Amended proposal for a Regulation on the establishment of Eurodac for the comparison of biometric data,

focusing primarily on the initiatives that are relevant from the point of view of provincial legislation or of implementation by provincial authorities.

In all proposed legislation referred to, competence is shared between the EU and the Member States.

Subsidiarity does not apply to policy areas where the Union has exclusive competence as defined in Article 3 TFEU. It is the specific legal basis which determines whether the proposal comes under the subsidiarity control mechanism. Article 4 TFEU sets out the areas where competence is shared between the Union and the Member States and Article 6 TFEU sets out the areas for which the Union has competence only to support the actions of the Member States.

2. Subsidiarity Principle: Why should the EU act?

2.1 Does the proposal fulfil the procedural requirements of Protocol No. 2?

- Has there been a wide consultation before proposing the act?
Yes, hearings were carried out.
- Is there a detailed statement with qualitative and, where possible, quantitative indicators allowing an appraisal of whether the can best be achieved at Union level?
Adequate grounds were given for measures to be taken at Union level.

As early as 2015/2016, on the basis of experience with the crisis situation at the time, the Commission put forward sustainable and, in part, well-planned proposals for a reorganisation of the reception and distribution mechanism for newly arrived migrants. At the time, the European Commission conducted high-level and technical consultations with legislative bodies and a wide range of stakeholders. These were carried out again this time, albeit not to the same extent as before.
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2.2 Does the explanatory memorandum (and any impact assessment) accompanying the Commission's proposal contain an adequate justification regarding conformity with the principle of subsidiarity?
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None of the afore-mentioned legislative proposals assessed raise any concerns regarding compliance with the principle of subsidiarity. All grounds and analyses applied to check the plausibility of action at Union level are deemed to be sufficient.

2.3. Based on the answers to the questions below, can the objectives of the proposed action be achieved sufficiently by the Member States acting alone (necessity for EU action)?
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<p>The different interests of individual Member States and groups of Member States (including regions) mean that national measures, which are not therefore coordinated at EU level in relation to all the proposals for legislation examined, would not only <u>not</u> be conducive to the interests of a pan-European asylum and migration system, but would quite frankly undermine it.</p>	
	<p>Are there significant/appreciable transnational/cross-border aspects to the problems being tackled? Have these been quantified?</p>
a)	<p>Yes. A case in point is the fact that the issue of secondary movements of illegally staying migrants remains unresolved. While the Mediterranean countries are overly affected by arrivals by sea and first-line reception due to their geographical location, economically stronger Member States are generally the goals of secondary movements because of their more attractive social systems.</p>
	<p>Would national action or the absence of EU level action conflict with core objectives of the Treaty or significantly damage the interests of other Member States?</p>
b)	<p>The migration crisis five years ago showed that the persistent shortcomings of the EU migration and asylum system cannot ensure a balanced, satisfactory system for all Member States.</p>
	<p>To what extent do Member States have the ability or possibility to enact appropriate measures?</p>
c)	<p>There were, and still are, ad hoc approaches to successful national measures, such as in the field of external border management, with the help of FRONTEX or through financial assistance. However, most of the possibilities for appropriate measures are limited to integration measures, as far as is possible.</p>
	<p>How does the problem and its causes (e.g. negative externalities, spill over effects) vary across the national, regional and local levels of the EU?</p>
d)	<p>The key problems remain at all levels: the unequal burden on Member States, the unresolved issue of dealing with a second mass migration, ineffective external border protection, an inadequate and poorly recognised distribution mechanism for refugees, insufficient control of illegal secondary movements, too few returns of unrecognised (illegal) migrants, etc. As regards major causes such as poor economic prospects for people in other parts of the world or the persistence of various long-standing war zones, the EU and the Member States have only limited influence for improving or solving them on a sustainable, longer-term basis.</p>

e)	<p>Is the problem widespread across the EU or limited to a few Member States?</p> <p>The problem affects the whole EU, though individual Member States and groups of Member States are affected in different ways and to a differing extent.</p>
f)	<p>Are Member States overstretched in achieving the objectives of the planned measure?</p> <p>The challenges of managing asylum and migration can only be met jointly at EU level given the different interests of the Member States and the interdependence and interactions involved. This is also because key aspects of the European Union, such as individual liberty and commitments entered into under international law (Geneva Refugee Convention), set out a legal framework that also necessitates close cooperation between Member States and action at EU level to avoid completely or partially counteracting these key aspects. Each Member State on its own would therefore be overwhelmed.</p>
g)	<p>How do the views/preferred courses of action of national, regional and local authorities differ across the EU?</p> <p>Views differ along a dividing line of competences – responsibilities – costs of addressing challenges arising from asylum and migration issues.</p>
<p>2.4 Based on the answers to the questions below, can the objectives of the proposed action be better achieved at Union level by reason of the scale or effects of that action (EU added value)?</p>	
a)	<p>Are there clear benefits from EU level action?</p> <p>The answer is an unambiguous yes. It can be assumed that using the proposed measures to address the shortcomings of current EU asylum and migration acquis will provide clear added value for the robustness of the principle of the free movement of persons, the management of a potential mass influx of migrants, the (fundamental) rights of refugees and migrants and a fairer distribution of burdens between Member States. It is also stipulated that Member States may choose from a range of measures to meet the special solidarity requirement with regard to asylum and migration. The Member States thus maintain a limited scope for shaping the approach they adopt, at least in one key sub-area.</p>
b)	<p>Are there economies of scale? Can the objectives be met more efficiently at EU level (larger benefits per unit cost)? Will the functioning of the internal market be improved?</p> <p>See a). There is no discernible impact on the internal market.</p>
c)	<p>What are the benefits in replacing different national policies and rules with a more homogeneous policy approach?</p> <p>A uniform system recognised by everyone; the same approach adopted.</p>

	Do the benefits of EU-level action outweigh the loss of competence of the Member States and the local and regional authorities (beyond the costs and benefits of acting at national, local and regional levels)?
d)	Yes. The tighter provisions on handling procedures and managing borders, and more coordinated international action to improve the return of migrants who arrive or stay illegally, restricts to some extent the Member States' discretionary powers in the operational implementation of asylum and migration management in their respective countries. Similarly, the establishment of a coordinated joint contingency plan for a massive influx of migrants will limit the scope for drawing up national contingency plans. However, these restrictions will be offset in different ways by the newly proposed approach to bearing the burden, in particular taking in refugees in accordance with the specific principle of solidarity enshrined in the TFEU. Given the great diversity of interests involved, this new concept of "solidarity in action" that Member States can shape within certain limits could even be the key to overcoming the shortcomings of the existing EU asylum and migration system.
e)	Will there be improved legal clarity for those having to implement the legislation? It is to be hoped this will be the case, but it is not yet possible to give a definitive answer at this stage.

3. *Proportionality: How the EU should act*

3.1. **Does the explanatory memorandum (and any impact assessment) accompanying the Commission's proposal contain an adequate justification regarding the proportionality of the proposal and a statement allowing appraisal of the compliance of the proposal with the principle of proportionality?**

The grounds for and evidence of the proportionality of the legislative proposals examined are included, but in certain respects do not go into enough depth. In particular, there are the following concerns regarding proportionality:

- There are proportionality concerns regarding the proposal for a Regulation on asylum and migration management, in so far as Article 6(3) imposes an obligation on Member States to define national asylum and migration strategies.
- The proposal also raises proportionality concerns in so far as the basic indicators of the distribution key for solidarity contributions referred to in Article 54 do not take into account an existing "preload" burden on States which have had to deal with a disproportionate number of applications for international protection in recent years or have generally been subject to particular pressure from mass influxes of refugees. This is particularly so for Austria.
- The proposal for a Regulation establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU addresses proportionality concerns in that the 20 % recognition rate threshold provided for in Article 40(1)(i) and (5)(c) seems to be set too low to help curb secondary movements. However, any increase should take into account the fact that individual special situations which, in keeping with commitments under international and European law, indicate a specific risk of persecution, must be given appropriate consideration.

3.2 Based on the answers to the questions below and information available from any impact assessment, the explanatory memorandum or other sources, is the proposed action an appropriate way to achieve the intended objectives?

a)	<p>Is the initiative limited to those aspects that Member States cannot achieve satisfactorily on their own, and where the Union can do better?</p> <p>In principle, yes, but subject to the reservations set out above.</p>
b)	<p>Is the form of Union action (choice of instrument) justified, as simple as possible, and coherent with the satisfactory achievement of, and ensuring compliance with, the objectives pursued (e.g. choice between regulation, (framework) directive, recommendation, or alternative regulatory methods such as co-regulation, etc.)?</p> <p>In principle, yes.</p>
c)	<p>Does the Union action leave as much scope for national decision as possible while achieving satisfactorily the objectives set? (e.g. is it possible to limit European action to minimum standards or use a less stringent policy instrument or approach?).</p> <p>Presumably, yes.</p>
d)	<p>Does the initiative create financial or administrative cost for the Union, national governments, regional or local authorities, economic operators or citizens? Are these costs commensurate with the objective to be achieved?</p> <p>There are unanswered questions regarding whether costs are appropriate for two sub-areas:</p> <p>a) For the "national asylum and migration management strategies" to be drawn up at national level, including the contingency plans, there is a lack of quantifiable information regarding the expected costs of the capacity that needs to be in place. Appropriateness and proportionality can only be assessed once additional documentation (partial impact assessment) is available that also includes the local and regional levels.</p> <p>b) The planned extension of the "accelerated procedure" to third-country nationals from countries where the average recognition rate is under 20% has to be analysed with a critical eye, with a view to using resources appropriately and concentrating them on applications that are likely to be justified.</p>
e)	<p>While respecting Union law, have special circumstances applying in individual Member States been taken into account?</p> <p>Individual groups of countries rather than individual Member States.</p>