Northern Ireland Assembly

Research and Information Service Research Paper

16 November 2011

Tim Moore

Distribution of Food Products to the Most Deprived Persons in the Union.

Subsidiarity Issue

NIAR 797-11

This research paper provides background to and information on a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Council Regulation (EC) No 1290/2005 and Council Regulation (EC) No 1234/2007 as regards distribution of food products to the most deprived persons in the Union in order to support consideration of its compliance with the principle of subsidiarity.

Executive summary

The Food Aid to Most Deprived Persons Scheme originated in 1987, with the goal of stabilizing markets by contributing to reducing surplus (intervention stocks) by providing Europe's most deprived persons with food. Under the programme, surplus stocks of a range of foods have been released on an annual basis to charitable organisations in participating Member States.

With successive reforms of the Common Agricultural Policy and the improvement in world commodity markets, intervention stocks have reduced significantly. The European Commission, therefore, has proposed revision of the programme, putting forward a first proposal in September 2008.

The 2008 proposal, amongst other things, contained a suggested move to two sources of supply for the scheme - food being sourced either from intervention stocks or from the market. The latter no longer being limited to situations of temporary unavailability of intervention stocks. This change has been opposed by a number of Member States and agreement in the Council of the EU was not possible. In 2010 the Commission, therefore, published an amended regulation.

The House of Lords European Union Committee considered the proposal and expressed the view that 'the extent to which purchases from the market contribute to the objectives of the CAP was questionable' and 'that there appeared to be no compelling argument to suggest that the Union was better placed than Member States to ensure a food supply to its most deprived citizens reasoning'. The content of the report formed the basis for a reasoned opinion submitted by the House of Lords in line with the subsidiarity early warning system.

The early warning system enables national parliaments to object to certain proposals from the European Commission on the grounds that they breach the principle of subsidiarity. In broad terms, the principal of subsidiarity means that, except in the areas where it has exclusive powers, the EU should only act where action will be more effective at EU rather than national level. National parliaments are not obliged to but can consult with regions with legislative power on subsidiarity issues.

The European Commission has written to the House of Lord's European Committee to respond its reasoned opinion. It has also responded to reasoned opinions from other national parliaments.

In October 2011, the European Commission published a further amended regulation and staff working to the House of Lords European Select Committee have written to clerking colleagues in the devolved legislatures highlighting that the latest proposal raised a likely subsidiarity point and that the Committee was looking closely at the new proposal and considering whether another reasoned opinion needed to be issued in line with the early warning system.

Contents

1 Introduction

This paper provides information on a recently published EU draft regulation regarding the distribution of food products to deprived persons and a potential subsidiarity issue relating to it.

Section 2 of the paper provides background to the subsidiarity 'early warning system', which was contained within the Lisbon Treaty and which provides a mechanism through which national parliaments can formally object to certain proposals from the European Commission on the grounds that they breach the principle of subsidiarity.

Section 3 provides background to the Food Aid to Most Deprived Persons Scheme which has been operating since 1987 and which the European Commission is seeking to reform.

Section 4 of the paper addresses the draft regulation which represents the latest attempt by the Commission to reform the scheme. The paper highlights subsidiarity concerns which have been raised by the House of Lords European Committee in relation to this proposal and includes information on the European Commission's response to these concerns.

Section 5 concludes the paper by setting out a number of questions which to assist an assessment of whether the draft regulation is justified in accordance with the principle of subsidiarity.

2 Subsidiarity – The Early Warning System

The LisbonTreaty introduced what has come to be known as the subsidiarity early-warning system. This system enables national parliaments to object to certain proposals from the European Commission on the grounds that they breach the principle of subsidiarity. In broad terms, the principal of subsidiarity means that, except in the areas where it has exclusive powers, the EU should only act where action will be more effective at EU rather than national level.

Article 5 of the Treaty on European Union[1] states that national Parliaments shall ensure compliance with the principle of subsidiarity in accordance with the procedure set out in the 'Protocol on the application of the principles of subsidiarity and proportionality'. Article 6 of Protocol itself provides that any national parliament may send a reasoned opinion to the Commission stating how it believes that a draft legislative act does not respect the principle of subsidiarity.

[1] Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union . Official Journal of the European Union (2010/C 83/01)
http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:FULL:EN:PDF

> 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.[2]

Whilst Article 6 makes reference to consultation with regional parliaments with legislative powers, the provision is generally interpreted as being 'permissive'. In other words, national parliaments can but are not required to consult with regional parliaments. National parliaments in some member states have nevertheless adopted formal legislative provisions for such consultation. This is not, however, the case in relation to consultation between the UK Parliament and the devolved legislatures.

European committees in the House of Commons and House of Lords do, however, share information with the devolved legislatures on a staff to staff basis, when potential subsidiarity issues arise. The subsidiarity issue which is addressed in this paper was communicated to the Assembly in this way, the Clerk to the House of Lords European Select Committee writing to clerking colleagues in the devolved legislatures to alert them to a likely subsidiarity point in relation to the latest Commission proposal for a regulation on the distribution of food products to deprived persons.

3 Food Aid to Most Deprived Persons in the Union Scheme

The Food Aid to Most Deprived Persons Scheme originated in 1987, with the goal of stabilizing markets by contributing to reducing surplus (intervention stocks) by providing Europe's most deprived persons with food. Under the programme, surplus stocks of a range of foods have been released on an annual basis to charitable organisations in participating Member States. Since the relevant measure was introduced, the European Commission has made some € 2.5 billion available under the scheme and it considers that the measure has contributed to stabilising markets, ensured that supplies reach consumers at reasonable prices, and provided a reliable supply of food for the most deprived. Member States are free to choose whether or not to participate

[2] Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union . Official Journal of the European Union (2010/C 83/01) Protocol (No 2) On the Application of the Principles of Subsidiarity and Proportionality http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:FULL:EN:PDF

in the programme and the UK has not done so since the mid 1990s. Ireland, however, does participate in the scheme.

With successive reforms of the Common Agricultural Policy and the improvement in world commodity markets, intervention stocks have reduced significantly. The European Commission, therefore, has proposed revision of the programme, putting forward a first proposal in September 2008 based on the following elements:

- Two sources of supply. Food would be sourced either from intervention stocks or from the market. The latter would no longer be limited to situations of temporary unavailability of intervention stocks. However, priority would be given to the use of suitable intervention stocks where these are available.
- Wider variety of foods to be distributed and clearer priorities. In order to improve the nutritional balance of the food provided through the scheme, the choice of distributed foods would no longer be limited to those for which intervention applies. Food products would be chosen by Member State authorities in the frame of national food distribution programmes setting out objectives and priorities for food distribution to the most deprived and that would include nutritional concerns.
- Long-term perspective. Food distribution activities require long-term planning and careful preparation by the national authorities and charities. In order to enhance its efficiency, the Union food distribution scheme would be established for three years. The amounts of aid for the second and third years would only be indicative and would have to be subsequently confirmed. Furthermore, a ceiling for the financial contribution of the Union is proposed.
- Co-financing. The introduction of co-financing would underpin the cohesive dimension of the scheme, ensure proper planning and reinforce synergies. To help make for a smooth introduction and a continued high take-up of the Community funding made available, Community co-financing rates would be 75% and 85% in Cohesion Member States for the 2010/12 plan. Subsequently, as of the 2013/15 plan, the Community co-financing rates would be, respectively 50% and 75%.
- Reinforcing monitoring and reporting. Reporting obligations at various levels would be strengthened and include a report from the Commission to the European Parliament and the Council.[3]

No agreement in the Council of the EU could be reached and in 2010 the Commission published an amended regulation which it has been suggested was designed mainly to align it with the Lisbon Treaty and to reflect some of the views raised by the European Parliament.[4]

[3] Proposal for a COUNCIL REGULATION amending Regulation (EC) No 1290/2005 on the financing of the common agricultural policy and Regulation (EC) No 1234/2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation) as regards food distribution to the most deprived persons in the Community. COM(2008) 563 final
http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0563:FIN:EN:PDF

[4] Amended proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Council Regulations (EC) No 1290/2005 and (EC) No 1234/2007, as regards distribution of food products to the most deprived persons in the Union. COM(2010) 486 final.
http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0486:FIN:EN:PDF

A report from the House of Lords European Union Committee, which was prepared by the Agriculture, Fisheries and Environment Sub-Committee, addressed the 2010 proposed amended regulation and stated the Committee's view was that 'the extent to which purchases from the market contribute to the objectives of the CAP was questionable' and 'that there appeared to be no compelling argument to suggest that the Union was better placed than Member States to ensure a food supply to its most deprived citizens reasoning'. The content of the report formed the basis for the reasoned opinion submitted by the House of Lords in line with the subsidiarity early warning system.[5]

The European Commission responded to the committee stating, amongst other things, that 'Whilst the programme seeks to fulfil the Common Agricultural Policy's Treaty objective of ensuring that food reaches consumers as reasonable prices (in this case, at no charge) it also has a primary role in the disposal of public intervention stocks'. The response went on to state that 87% of the resources devoted to food procurement in the programme's 2010 plan were sourced through intervention stocks, in the plan adopted for 2011 this share will rise to 97%. The Commission added in its response that responsibility for implementing the programme is delegated to Member States in recognition of the subsidiarity principle.[6] A copy of the Commission's response is included as Annex A to this paper.

4 The Current Proposal [COM (2011) 634]

A further amended proposal[7] was made in October 2011 and the following background to it is provided by the House of Common's European Scrutiny Committee:

> 7.9 In April 2011, the General Court (formerly called the Court of First Instance) annulled the provisions of the current distribution plan on the grounds that the Regulation in question did not provide an adequate legal base for significant purchases of food from the market (as opposed to purchases on an exceptional basis when intervention stocks are temporarily unavailable). As this would require the programme in 2012 and 2013 to be sourced mainly from existing intervention stocks, which are currently at a low level, the budget for the 2012 distribution plan was set at €113 million, compared with the annual ceiling of €500 million: and this has led the European Parliament to adopt in July 2011 a further resolution calling for the development of a transitional solution for the remainder of the current financial perspective, in order to avoid such a sharp cutback in food aid.

[5] http://ec.europa.eu/dgs/secretariat_general/relations/relations_other/npo/docs/united_kingdom/2010/com20100486/com20100486_lords_opinion_en.pdf

[6] http://ec.europa.eu/dgs/secretariat_general/relations/relations_other/npo/docs/united_kingdom/2010/com20100486/com20100486_lords_reply_en.pdf

[7] REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Council Regulation (EC) No 1290/2005 and Council Regulation (EC) No 1234/2007 as regards distribution of food products to the most deprived persons in the Union. COM(2011) 634 final http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0634:FIN:EN:PDF

> 7.10 The Commission has therefore put forward this further draft Regulation (document (b[8])), which would maintain the programme for a transitional period until the end of the current multi-annual financial framework in 2013. It also says that it will in due course put forward further proposals for a scheme to be funded from 2014 onwards out of Heading 1 of the Budget (social and cohesion policy), and with a budget of €2.5 billion for the period to 2020. In the meantime, this proposal reproduces without alteration the provisions in document (a),[9] except that it would remove any reference to the need for co-financing by Member States (and hence to a minimum Member State contribution); programmes would have a duration of one year (rather than three); and, in order to emphasize the role of the distribution programme in strengthening the EU's social cohesion, Article 175(2) TFEU is cited alongside Article 42 and 43(2), the intention being to provide a legal base for the sourcing of food from the market as a matter of course, rather than on an exceptional basis.[10]

The European Scrutiny Committee also set out the UK Government's position in relation to the amended proposal.

> 7.11 In his Explanatory Memorandum of 17 October 2011, the Minister of State for Agriculture and Food at the Department for Environment, Food and Rural Affairs (Mr Jim Paice) says that the Government questions whether the Commission's proposal is justified in accordance with the principle of subsidiarity, as set out in Article 5(3) of the Treaty on European Union, pointing out that it would allow for food to be sourced from either intervention stocks or the market, and therefore represents a change from the current scheme under which food can only be purchased on the market where intervention stocks are temporarily unavailable. He adds that the provision of aid in these circumstances is essentially a social measure, and that, as such, the Government remains unconvinced as to the merits or appropriateness of the amended proposal, considering that the EU should only act where there are clear additional benefits from collective efforts or EU added value, compared with action by Member States, either individually or in co-operation.
>
> 7.12 He goes on to note that the UK has not participated in the scheme since the mid-1990s because of its dwindling intervention stocks and the bureaucratic overheads associated with the prevention of fraud. He says that the Government believes that measures of this type are better and more effectively delivered by individual Member States through their own social programmes, and their regional and local authorities, who are best placed to identify and meet the needs of deprived people in their countries and communities, and not at EU level through the EU budget.
>
> 7.13 Finally, the Minister says that the Government will be working with like-minded Member States to oppose an expansion of the scheme, and to ensure that any agreed measure is time-limited given its transitional

[8] Document b refers to the 2011 draft Regulation COM (2011) 634
[9] Document a refers to the 2010 draft Regulation COM (2010) 486
[10] Documents considered by the Committee on 26 October 2011 - European Scrutiny Committee http://www.publications.parliament.uk/pa/cm201012/cmselect/cmeuleg/428-xxxix/42809.htm

> nature. Additionally, it will seek to ensure that the proposal reflects the Common Understanding on delegated acts reached between the EU Institutions.[11]

Clearing both the 2010 and 2011 draft regulations in line with its scrutiny reserve, the European Scrutiny Committee noted that whilst the October 2011 draft regulation differed in a number of ways from the amended proposal put forward in 2010, including not least the use of Article 175(3) TFEU as a means of justifying the routine sourcing of food from the market, it:

> …does in the main replicate the essential elements of the existing arrangements for distributing food to deprived persons, and, to that extent, it gives rise to similar issues, and similar concerns on our part, including those relating to competence and subsidiarity. Consequently, although it would clearly be right to draw it to the attention of the House, we do not think further consideration at this stage would shed any fresh light, bearing in mind that the issues in question were debated in January 2009 in the context the Commission's original proposal. We are also conscious that what is currently in prospect relates only to 2012 and 2013, and that the Commission has said that it will in due course put forward proposals for a scheme to be funded from 2014 onwards out of the budget heading relating to social and cohesion policy. We are therefore clearing both documents.[12]

On 24th October 2011, staff working to the House of Lords European Select Committee wrote to clerking colleagues in the devolved legislatures highlighting that the latest proposal raised a likely subsidiarity point. The correspondence further stated that the Committee was looking closely at the new proposal and was considering whether another reasoned opinion needed to be issued in line with the early warning system.

5 Subsidiarity Assessment

Article 5 of the Consolidation Version of the Treaty on the European Union, which enshrines the principles of subsidiarity and proportionality in European law making, states that:

> Article 5
>
> 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.

[11] As above
[12] As above

> 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 he Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality.[13]

Guidance prepared for the House of Lords European Union Select Committee identified two sets of questions which can be derived from Article 5 to address the issue of subsidiarity. The first set of questions addressing what is referred to as a necessity test and the second set to what is referred to as an efficiency test.[14]

> *1) Is action by the EU needed to achieve the objective? Can the objective of the proposed action only be achieved, or only achieved to a sufficient extent, at EU level?*
>
> *2) Would the objective be better achieved at EU level – i.e. would it provide greater benefits than action by Member States?*

Addressing the distinction between competence, proportionality and subsidiarity the guidance states :

> 9. Subsidiarity is different from competence. Competence refers to the power of the Community to act. If the Community has no competence to act in a particular case, then the principle of subsidiarity has no application.
>
> 10. Subsidiarity is different from proportionality. The principle of proportionality is defined in Article 5(4) TEU:

[13] Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union . Official Journal of the European Union (2010/C 83/01)

http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:FULL:EN:PDF

[14] House of Lords European Union Select Committee – Subsidiarity: Assessing and EU Proposal

http://www.parliament.uk/documents/lords-committees/eu-select/subsidiarity/apply-subsidiarity.pdf

> 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.
>
> Subsidiarity is about who should take action; proportionality is about the nature of any action there should be. The subsidiarity check comes first. If a proposal complies (or if it is an area of exclusive competence – see paragraph 12 below), the principle of proportionality can then be considered as part of normal scrutiny. In practice, the two concepts are closely related.

The guidance also highlights that whilst subsidiarity is a legal concept its assessment depends essentially on policy judgements.

Annex A

Response from European Commission to the House of Lords European Committee reasoned opinion.

MAROŠ ŠEFČOVIČ
VICE-PRESIDENT OF THE EUROPEAN COMMISSION

B-1049 BRUSSELS

Brussels, 22 FEV. 2011
C/2011/ 1084 final

Lord Roper
Chairman of the European Union
Select Committee
House of Lords

Dear Lord Roper,

I would like to thank you for forwarding the reasoned opinion of the House of Lords on the Commission proposal for a Regulation of the European Parliament and of the Council amending Council Regulations (EC) No 1290/2005 and (EC) No 1234/2007, as regards the distribution of food products to the most deprived persons in the Union {COM (2010) 486 final}.

The report notes the increasing reliance of this scheme on market purchases following the decline in intervention stocks and emphasises its social dimension, claiming that this falls within the remit of Member States. It states that there is no compelling argument to suggest that the European Union is better placed than Member States to ensure a food supply to its most deprived citizens and, building on this, concludes that the proposed Regulation does not comply with the principle of subsidiarity.

In responding to your report, I would like to draw your attention to the following elements:

First, the Commission takes very seriously the Treaty obligation (article 5 of Protocol 2) to motivate its proposals in light of the subsidiarity and proportionality principles. In preparation of this proposal the Commission carried out an impact assessment in 2008[1], in which it analysed subsidiarity in terms of value added and the necessity for the intervention by the EU in this field.

The purpose of the European Programme of Food Aid for the Most Deprived Persons is two-fold. While it certainly seeks to fulfil the Common Agricultural Policy's Treaty objective of ensuring that food reaches consumers at reasonable prices (in this case, at no charge) it also has a primary role in the disposal of public intervention stocks of agricultural products.

In fact, 87% of the resources devoted to food procurement in the programme's 2010 plan were sourced through intervention stocks. In the recently adopted plan for 2011, this share will rise to 97%.[2]

While the days of butter mountains and wine lakes are long gone, intervention remains an important market stabilisation tool, offering a safety net against price volatility. The management of intervention at EU level is entirely the responsibility of the European

---

[1] http://ec.europa.eu/agriculture/markets/freefood/fullimpact_en.pdf

[2] Commission Regulation (EU) No 945/2010

Commission. Under the aegis of the Common Agricultural Policy, the food aid programme for the most deprived offers the perfect foil for this mechanism and remains the single largest outlet for intervention stocks.

It is therefore the Commission's view that the proposal's merits lie in its dual contribution to two of the objectives of the Common Agricultural Policy as enshrined in the Treaty, namely, market stabilisation and ensuring that supplies reach consumers at reasonable prices. In this scheme, both goals go hand in hand and cannot be considered separately.

The 2008 impact assessment considered various options for the programme's future, ranging from the maintenance of the status quo to the termination of the programme.

The report on the impact assessment's work noted the scale of the food insecurity problem within the European Union. It emphasised that the food aid programme did not seek to replace or substitute private or national actions, but rather to complement and underpin them. It is our experience in many participating Member States, in particular those where no food distribution previously existed, that the initiation of the EU programme has had what could be described as a snowball effect, enabling the development of various types of locally-based social aid programmes.

This view was largely supported by the internet-based public consultation referred to in your report and the NGO community across participating Member States.

I would also like to emphasise the extent to which responsibility for implementing the Programme is delegated to the participating Member States, in recognition of the subsidiarity principle.

First, it is entirely the responsibility of the Member State concerned to identify the target population to which it wishes to direct the food aid. This they usually do in consultation with charities or public authorities with the appropriate local knowledge.

Second, the Commission agrees entirely with the report's statement (paragraph 8) that "there is no reason why the Union is better placed to organise the purchase of products from the market than Member States." I would emphasise that the Union has no role in purchasing products from the market; this is entirely the responsibility of the Member States.

Finally, it is true that social structures and support mechanisms for the most needy are widely divergent among the Member States. Some, like the United Kingdom, have well-developed networks, with a tradition of providing food to those in need. In many others, particularly in the younger Member States, no such structures existed. In these cases, the Programme has been instrumental in enabling appropriate support structures to be established. For the Commission this programme is a good example of the practical demonstration of solidarity between Member States in addressing a common problem.

The Commission appreciates the efforts of the House of Lords in producing this report and looks forward to continuing the policy dialogue in future on this and other subjects.

Yours sincerely,

2