The Summer Time Directive: an assessment from the angle of *Smart Regulation*

Dr. Werner Vandenbruwaene
research group Government & Law
University of Antwerp, Faculty of Law
wevanden@uantwerpen.be

1. **Evidence based lawmaking**
2. **Legal basis and the justification**
3. **Proportionality**
4. **Subsidiarity**
5. **Ex post evaluation in 2007**
6. **Conclusion**

Mister Chairman,

Dear Members of the European Parliament,

From the perspective of Better Regulation, I wish to highlight four points concerning the Summer Time Directive. I will start with a brief reiteration of the legal importance of the Better Regulation program and the Impact Assessment, and then continue to scrutinize the Directive. First, the legal basis and the justification offered in the explanatory memorandum in 1999. The second and third points concern the compliance with the principles of proportionality and subsidiarity respectively. Fourth, I will address the ex post evaluation of 2007.

1. Introduction: Evidence-based lawmaking

The Commissions' IA procedure is aimed at securing 'a balance between political discretion and enhancing objectivity in law-making'.[1]

IA reports contain the kind of information that is needed for a more rational consideration of the opportunity of EU action, including a review by the ECJ.[2] Through the IA, the Court can review the assessment by the legislator of complex underlying socio-economic indicators, even though granting the EU legislator a large margin of discretion.[3] For instance, in the case *Afton Chemical*[4], the ECJ investigated the manifest error of assessment proposed by the litigant on the basis of the Commission's impact assessment. In that case, the Court noted the broad discretion: The legislature is better equipped than the Court to assess 'highly complex scientific and technical facts'. Afton Chemical submitted that the IA did not support the Commission's conclusions. The Court developed its view on IA: it noted its non-binding character[5] toward other institutions, it observed moreover the 'scientific basis' that the Commission is to take into account[6], the obligation to take new evidence or date into account[7], and reiterated its view on the judicial review of legislative discretion, and I quote the Court here: "the Community institutions which have adopted the act in question must be able to show before the Court that in adopting the act they actually exercised their discretion, which presupposes the taking into consideration of all the relevant factors and circumstances of the situation the act was intended to regulate."

Thus, impact assessments are the main instrument through which the EU legislator can demonstrate the compliance with proportionality and subsidiarity.

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[1] A. MEUWESE, *Impact Assessment in EU Lawmaking* (Kluwer 2008) 91.
[2] See on this topic POPELIER, KEYAERTS and VANDENBRUWAENE (eds.), Special issue: the role of courts as regulatory watchdogs, *Legisprudence* 2012, nr. 3; and POPELIER and MEUWESE (eds.), Special issue: governance and Better Regulation, *European Public Law* 2011, nr. 3.
[3] D. KEYAERTS, *Better Regulation en de EU-rechter: een overbrugbare kloof* (die Keure 2012) 149-172; A. ALEMANNO, 'The Better Regulation Initiative at the Judicial Gate' 15 *European Law Journal* (2009) 400.
[4] Case 343/09, *Afton Chemical* [2010] ECR I-7027.
[5] Para. 30.
[6] Para. 31.
[7] Para. 32.

This particular case predates the Commission's Better Regulation program, of which the Impact Assessment is a crucial element. However, the explanatory memorandum serves the same function, i.e. to ground the EU action in facts and to justify the choice of the legal basis, and compliance with subsidiarity and proportionality as laid down in the Treaty. I will treat these points in that order

2. Legal basis and justification

The legal basis for Directive 2000/84/EC (hereafter: the directive") is the functionally driven and general harmonization clause article 114 TFEU (former article 95 EC).[8] It allows the EU to adopt measures, preferably directives[9], aimed at unifying or harmonizing national measures in order to improve the functioning of the internal market as set out in article 26(2) TFEU.[10]

The ECJ confined the applicability of the approximation of laws by imposing three restrictions: first, that no specific clause in the Treaties covers the proposed measure (priority of the *lex specialis*).[11] Second, that the measure must in fact improve the functioning of the internal market, whereas mere discrepancies between national provisions do not suffice.[12]

[8] Paragraph (1) reads: "Save where otherwise provided in the Treaties, the following provisions shall apply for the achievement of the objectives set out in Article 26. The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market."

[9] Declaration of the conference of representatives of the government of the Member States, included in the SEA Final Act, 1986, p. 4. http://www.eurotreaties.com/seafinalact.pdf

[10] "The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured … ."

[11] Case 338/01, *Commission v. Council* [2004] ECR I-4852, paragraphs 59-60.

[12] Case 378/98, *Germany v. Parliament and Council* [2000] ECR I-2247, paragraphs 83-84:
"[…] the measures referred to in Article 100a(1) of the Treaty are intended to improve the conditions for the establishment and functioning of the internal market. To construe that article as meaning that it vests in the Community legislature a general power to regulate the internal market would not only be contrary to the express wording of the provisions cited above but would also be incompatible with the principle embodied in Article 3b of the EC Treaty (now Article 5 EC) that the powers of the Community are limited to those specifically conferred on it.

Moreover, a measure adopted on the basis of Article 100a of the Treaty must genuinely have as its object the improvement of the conditions for the establishment and functioning of the internal market. If a mere finding of disparities between national rules and of the abstract risk of obstacles to the exercise of fundamental freedoms or of distortions of competition liable to result therefrom were sufficient to justify the choice of Article 100a as a legal basis, judicial review of compliance with the proper legal basis might be rendered nugatory."

Third, this improvement must be stated in terms of the elimination of an appreciable distortion of competition[13] or the prevention of the emergence of future obstacles.[14]

As the Court summarized in *Vodafone*: "the object of measures adopted on the basis of Article 95(1) EC must genuinely be to improve the conditions for the establishment and functioning of the internal market. While a mere finding of disparities between national rules and the abstract risk of infringements of fundamental freedoms or distortion of competition is not sufficient to justify the choice of Article 95 EC as a legal basis, the Community legislature may have recourse to it in particular where there are differences between national rules which are such as to obstruct the fundamental freedoms and thus have a direct effect on the functioning of the internal market or to cause significant distortions of competition. Recourse to that provision is also possible if the aim is to prevent the emergence of such obstacles to trade resulting from the divergent development of national laws. However, the emergence of such obstacles must be likely and the measure in question must be designed to prevent them."[15]

Though attractive, the qualifiers imposed by the Court, "direct effect for internal market" or "appreciable distortion", are not easily interpreted.[16] An analogy can be drawn to the judicial control of the concurrent competences in the German federal system, where similar qualifiers were added to establish the constitutionally required 'necessity' for a federal measure in the realm of concurrent competences.[17] In order to construe the appreciable effect required, the *Bundesverfassungsgericht* expects the federal legislator to demonstrate the actual effects or

[13] C-378/98, at para 106: "[…] In examining the lawfulness of a directive adopted on the basis of Article 100a of the Treaty, the Court is required to verify whether the distortion of competition which the measure purports to eliminate is appreciable."

[14] C-378/98, at para 86: "[…] the aim is to prevent the emergence of future obstacles to trade resulting from multifarious development of national laws. However, the emergence of such obstacles must be likely and the measure in question must be designed to prevent them."

[15] Case 58/08, *Vodafone* [2010] ECR I-4999, paragraphs 32-33 (internal citations omitted).

[16] See critically S. WEATHERILL, "The Limits of Legislative Harmonization Ten Years after *Tobacco Advertising*" in *German Law Journal* (2011) 833.

[17] See W. VANDENBRUWAENE, "The Judicial Enforcement of Subsidiarity: the Comparative Quest for an Appropriate Standard" in POPELIER, MAZMANYAN & VANDENBRUWAENE (eds.), *The Role of Constitutional Courts in Multilevel Governance* (Cambridge, Intersentia, 2013) 131-164.

potential negative consequences. The legislator has to meet the burden of evidence. This evidence has to meet, according to the German Court, standards of clarity, inclusion of all relevant options and elements, exclusion of irrelevant elements, and methodological consistency. The crucial matter is thus the evidence put forward by the Impact Assessment and the explanatory memorandum.

In the present case of the Summer time directive, the explanatory memorandum seems to rely heavily on the results of the consultation where economic operators generally argued in favor of the harmonization of summer time. Relying on the outcome of the consultation process has indeed sufficed in the past to convince the Court of disruptive legislative diversity in the sense of article 114 TFEU.[18] I will return to this consultation process in a subsequent section. Let me first address the question of proportionality

3. Proportionality

The duty to comply with proportionality consist of three points: the scope of the measure, the nature of the measure, and a weighing of costs and benefits, in particular referring to the financial and administrative burdens for states, enterprises and individuals.[19]

The form of the measure, i.e. a regulation, is the least-intrusive means of approximation, as I said before.

Proportionality also serves as a catalyst for evidence-based lawmaking. However, the relative balancing of the costs and benefits of the directive as it is presented in the explanatory memorandum is not entirely convincing. The Commission based its assessment on a independent consultancy report, that drew on various existing studies and materials. The conclusions of this consultancy report are neither paramount nor decisive, as the Commission admitted in the memorandum on various occasions.

[18] See e.g. C-154/04 and 155/04, *Alliance for Natural Health* [2005] ECR I-6451 at para 37.
[19] See also the IA Guidelines, o.c., p. 30.

For instance, with respect to agriculture, the Memorandum noted that "no clear conclusions could be drawn" and that the agricultural activity is impervious to the timing arrangements in force. With regards to the environment, the EM stated "at the present state of the art and know-how it seems difficult, if not impossible, to draw valid, universal conclusions as regards any direct impact of summer time on the environment." The impact of the Summer Time Directive on Health, Energy, and Road Safety were difficult to assess for reasons of lack of data or contradictory evidence. It must be noted that this evidence mostly concerned the issue of Summer Time by its on merits, and not the harmonization of the timetable, which is the central objective of the EU dimension.

It appears that leisure and tourism, and transportation were the main drivers for the harmonization of the summer time arrangements. However, with regards to transportation, a detailed assessment was merely based on one hypothetical report in France in 1996.

As the ECJ requires individual appellants to provide qualitative and profound data when challenging an EU measure for a breach of proportionality[20], the same duty applies conversely to the EU legislator. The Court can only verify proportionality if the legislator offers substantive and sufficient data.[21] This duty applies conversely to the Member States when derogation from EU law.[22]

It must be noted at this point, that although the evidence seems unconvincing, in order for the Court to actively take issue with the legislator's assessment it requires a manifest error standard. At the very least, the preparatory work does not convince to justify a large margin of appreciation for the legislator.

[20] Case 344/04, *IATA* [2006] ECR I-403, para. 89.
[21] See e.g. Case 558/07, *SPCM* [2009] ECR I-5783, para. 64-71.
[22] Case 73/08, *Bressol* [2010] ECR I-2735, para. 71-74.

4. Subsidiarity

The justification in terms of EU subsidiarity as laid down in article 5(3) TEU, requiring added value of EU action and the inability of MS action, is offered in the explanatory memorandum accompanying the proposal for the Directive.[23] In paragraph 4.1, the memorandum states: "In accordance with the principle of subsidiarity the Union's task consists of laying down provisions concerning the application of summer time in order to ensure that the internal market functions properly and, more especially, that barriers to the free movement of goods services and persons be removed. Conversely, it should be stressed that laying down the time arrangements normally in force in the Member States, or in other words those applying outside summer time, continue to be solely the purview of the Member States and thus, in the event, is governed by a purely national decision taken at individual Member-State level."

This is exemplary of the unconvincing and circular reasoning that dominated subsidiarity justifications in the past. While the ECJ has been more permissive in its early interpretation of subsidiarity, such permissiveness fortunately has been abandoned.[24] And, as the opinion of AG Maduro in *Vodafone* suggests, the impact assessment may prove crucial. The AG in that case noted that, and I quote again "neither the objective pursued by the Regulation nor the intent of the legislator is decisive for the purposes of assessing compliance with the principle of subsidiarity. First, the judgment to be made under the principle of subsidiarity is not about the objective pursued but whether the pursuit of that objective requires Community action. Certain Community objectives (which in themselves justify the existence of a Community competence) may be better pursued by the Member States (with the consequence that the exercise of that competence is not justified). Second, the intent of the Community legislator is not sufficient to demonstrate compliance with the principle of subsidiarity. The latter requires

[23] COM(2000)302, *OJ* C 337, 136–37 (28/11/2000).
[24] ECJ C-176/09, *Luxemburg v. Parliament and Council* [2011] ECR I-3755 at para. 73-83; ECJ, C-58/08, *Vodafone* [2010]; and the Opinion of AG Poiares Maduro of 1 October 2009 in re *Vodafone*, para 30 and following.

that there be a reasonable justification for the proposition that there is a need for Community action. This must be supported by more than simply highlighting the possible benefits accruing from Community action. It also involves a determination of the possible problems or costs involved in leaving the matter to be addressed by the Member States. In requiring this, the Court is not substituting its judgment for that of the Community legislator but simply compelling it to take subsidiarity seriously."[25]

In that case, the AG and the Court nevertheless found the regulation in conformity with subsidiarity, because of the cross-border elements of the issue at hand, and the special suitability of the EU legislator when compared to the National lawmakers.

Returning to the Summer Time Directive, none of the elements in its subsidiarity justification mentioned delivers an answer to the five questions set out in the Impact Assessment Guidelines.[26] These questions, in a nutshell, inquire into the transnational aspects of the problem at hand, the possible actions taken by the Member States, and the clear benefits produced by action at the EU level.

For instance, nowhere in the explanatory memorandum is shown exactly to what extent and between which MS summer time is applied in an diverging manner before the First Directive. Furthermore, it is not clear why MS cannot coordinate this issue by themselves, although the EM mentions the opposition of one MS.

The substantive criteria on subsidiarity to which I refer, were already developed in the 1992 Edinburgh Guidelines, resulting in the Amsterdam Protocol, and subsequently disappeared in the Lisbon version, and were put in the IA Guidelines. This reallocation of these more substantive criteria to the realm of soft law, the guidelines, and away from binding primary law (Treaties and Protocol), coincides with the emphasis on political and procedural

[25] Opinion AG *in re Vodafone*, para. 30.

[26] SEC(2009) 92 at 23. See on this W. VANDENBRUWAENE, "Multi-tiered political questions: the ECJ's mandate in enforcing subsidiarity", 3 *Legisprudence* (2012) 321-346.

enforcement of the principle of subsidiarity as developed in the IGC working group on subsidiarity.[27]

Applying these criteria to the reasoning of the EU legislator in the present case, the added value consists of the simple act of harmonization, and the inability of the MS is not even mentioned. Both the IA guidelines, and the more recent judgments of the ECJ would require a better justification.

5. The ex post evaluation in 2007

As obliged in the Directive, the Commission provided an ex post evaluation in 2007.[28]

This evaluation consisted of reports from the Member States, some stakeholder groups, an overview of new studies, and some indications of public opinion. The results are rather mild: no MS called for a change to the current arrangement, of those who responded, no stakeholder group reported an unduly burden, and some new studies calculated energy savings. The public opinion polls were inconclusive.

The ex post evaluation is a mere collection of reports received, and since the original objective in terms of approximation is rather static (i.e. to produce a harmonized timetable), progress indicators are hard to distinguish.

Nevertheless, the question might conceivably be raised whether for instance technological advance would reduce the economic costs associated with cross-border activity, whether the hurdles to the internal market are due to the lack of harmonization or the actual difference in time zones? Such questions should have been assessed in either the 1999 EM or the 2007 ex post evaluation.

[27] CONV 286/02, 1.
[28] COM(2007)739.

6. Conclusion

The Summer Time Directive predates the Commission's Better, now Smart, Regulation program. It offers an example of the impetus to this very program. The justification in terms of choice of legal basis, proportionality and subsidiarity is unconvincing. That the Court would consider these justifications to violate the standards of manifest error seems unlikely. Given the legislative history of the Directive, i.e. the limited time frame of the first eight directives on this issue, a higher standard of ex post evaluation and this perhaps on a returning basis, could be expected. On the other hand, the lack of political opposition does indicate the low salience and general acceptance of the directive.

I thank you for your attention.