

Working Group I

Working document 4

Working Group I on the Principle of Subsidiarity

Subject: Intervention of Mr. Jean Claude Piris, Legal Adviser to the Council of the European Union and Director-General of the Council's Legal Service, at the meeting of the group on 25 June 2002

Members of the working group will find enclosed the speaking notes of Mr. Jean Claude Piris at the meeting held on 25 June 2002.

SPEAKING NOTE

**STATEMENT BY MR PIRIS ¹ TO THE
WORKING GROUP ON THE PRINCIPLE OF SUBSIDIARITY
OF THE CONVENTION ON THE FUTURE OF THE UNION
(25 June 2002)**

Three themes:

1. Description of the problem
2. Clarification of the three principles involved (Article 5 of the TEC)
 - conferred competence
 - subsidiarity
 - proportionality
3. Application of and methods of monitoring compliance with the principle of subsidiarity:
 - present methods of monitoring within the Council
 - towards additional monitoring in the future?

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¹ Mr PIRIS, Legal Adviser to the Council of the European Union, Director-General of the Council Legal Service, explained that he was speaking entirely in his personal capacity.

DESCRIPTION OF THE PROBLEM

My starting point is the impression some people have of excessive centralisation, over-detailed rules, and indiscriminate and excessively invasive regulation.

This is an undeniable political fact and a recurring problem, despite the addition of principles to the Treaty and many texts on the matter.

This problem is one to be found in all systems in which centralised and decentralised bodies with parallel powers coexist: the decentralised bodies and their citizens sometimes feel powerless when confronted with what they regard as an excessive tendency by the central body to over-regulate, in too much detail, in areas which they believe could be left to local discretion.

This issue is often referred to in general terms as "subsidiarity". In fact, a more precise analysis is needed.

There are at least **three methods** of controlling this phenomenon of perceived excessive centralisation:

- (1) firstly, when **drafting the actual clauses on competence**, the authors of the Treaty (that is you yourselves, and subsequently the future ICG) may limit, define, specify, clarify and impose conditions for the powers which they confer on the Community. They may to some extent incorporate the concepts of subsidiarity and proportionality in the actual provisions concerning competence and powers to act, on a case-by-case basis in the Treaty;
- (2) secondly, for those clauses concerning competence for which the tool of precise and restrictive drafting is not sufficient (or not desirable) because the area is too wide (for example Article 95 on measures concerning the "*establishment and functioning of the internal*

market" or Article 308 on action necessary to attain "*one of the objectives of the Community*"), the obligation to comply with the principle of subsidiarity will moderate the exercise of the competence concerned. The competence exists, but it is not obligatory; it will be used only when something really can be done **better** at a higher level;

- (3) finally, thirdly, when competence exists and the Community legislator has decided, after examining subsidiarity, that it would be better to exercise such competence at Community level, the principle of proportionality will require him not to go beyond what is necessary to achieve the objective pursued.

These three stages have been given concrete form through **three** legally distinct **principles**. For the last ten years, since the Maastricht Treaty, they have been **defined by the three paragraphs of Article 5 of the TEC**: the principle of conferred competence, the principle of subsidiarity and that of proportionality.

However, these three principles are often muddled or confused. It would therefore seem useful, as a preliminary step, **to define them clearly** and especially to distinguish between "compliance with subsidiarity" and "compliance with competence".

DISTINCTION AND CLARIFICATION OF THE THREE PRINCIPLES

Article 5 of the TEC precisely defines three principles:

- the principle of conferred competence (first paragraph)
- the principle of subsidiarity (second paragraph)
- the principle of proportionality (third paragraph).

Under the structure of this provision the question of whether or not an act complies with these three principles must be considered in successive stages, in the order of the three paragraphs of the Article:

1. Conferred competence

The **first paragraph** of Article 5 lays down the principle at the heart of the Treaty's legal system, the principle of "**conferred competence**" whereby the Community may act only if it has the competence to do so.

"The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein".

The question of whether or not the Community has the competence to adopt a legal act, i.e. whether there is a legal basis in the Treaty allowing the act envisaged to be adopted, is always the **first question** which has to be asked when examining a proposal. This is a purely legal question and is open to strict legal control.

It is therefore a question which the Council Legal Service automatically examines. Many of the opinions which it delivers to the Council and its preparatory bodies during the examination of a legislative text concern this question of compliance with competence. Similarly, many judgments of the Court of Justice state whether or not the Community had the competence under the terms of the Treaty to adopt a particular act, and on the basis of which Article of the Treaty (more or less restrictive or permissive). Ensuring the proper application of the Treaty is one of the reasons for the Court's existence (Article 220).

For example, the famous "tobacco advertising" Directive was annulled by the Court in October 2000 because of the lack of a correct legal basis, i.e. because it had been adopted *ultra vires*, without the existence of the necessary competence. The Court annulled the Directive on the basis of an objective analysis of the powers conferred by the Treaty.

The question of compliance with competence is **an objective question of a legal nature**: whether or not the Treaty confers competence, and if so of what kind? There is no scope for subjective choice. The control exercised by lawyers and judges is therefore significant and effective. The more precisely and clearly the Treaty is drafted, the more precisely it defines competence conferred

on the Community in a particular area, the less room it leaves for interpretation or discretion.

Given that control of compliance with competence is effective and objective, one of the best **means of avoiding slippages in competence** is therefore to define the scope of the powers conferred on the Community by **careful and precise drafting of the actual clauses on competence**. The authors of the Treaties can, **at the stage of the drafting the articles of the Treaty, apply the principles of subsidiarity and proportionality** by building them into the actual powers to act.

For example, the articles added by the Maastricht Treaty which confer **complementary competence** on the Community in areas such as employment, education, vocational training, culture, industry, etc., clearly state that the Community may only adopt measures which encourage or complement the activities of the Member States, and, for four of these areas, exclude the adoption of measures harmonising national laws. This would theoretically have been possible under the previous Treaty (Article 308).

The authors of the Treaty deliberately circumscribed and limited areas of competence which until then had been exercised either on the basis of the "internal market" Article (95) or by means of Article 308. The authors of the Treaty have therefore already, in those articles, applied the principle of subsidiarity, deciding that in the areas in question legislative action at national level was sufficient and could not be better carried out at Community level, with the Community restricting itself to encouraging the activities of the Member States by means of non-legislative action (through aid, exchange, cooperation programmes, etc.).

Similarly, the authors of the Treaty have often predetermined the intensity of Community action. Thus, some articles provide that the Community may only adopt minimal harmonisation measures (social policy (Article 137(2)); the environment (Article 176), or mutual recognition measures

(diplomas, Article 47)). Others limit the choice of the type of act by stipulating that only Directives (freedom of establishment, Article 44) or Recommendations (culture, Article 150) may be adopted.

In certain delicate areas, where even attempts to draft the most cautious of texts were not sufficient to reassure them, the authors of the Treaty (i.e. the Member States) preferred a broad formulation for competence while keeping the rule of **unanimity** as the ultimate and in their view, absolute safeguard, against any risk of slippage (tax, social security).

Thus, it is for the authors of the Treaty themselves to set clear and precise limits for the competence they confer on the Community. The incorporation of criteria or conditions in the clauses on competence themselves means that compliance with those criteria or conditions will be analysed at the stage of examining competence, which is an objective analysis. Actions based on those articles must of course still comply with the principles of subsidiarity and proportionality, but the Community legislator's room for manoeuvre will from the start, in the very definition of the power to act, be deliberately circumscribed by the authors of the Treaty.

2. Subsidiarity

The second paragraph of Article 5 of the TEC, which is of particular interest to us, is the one which lays down the **principle of subsidiarity** in the proper sense of the term, according to which when the Community has competence (a necessary pre-condition) it may only exercise it if the objective may be **better** achieved by the Community than by the Member States.

*"In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be **better** achieved by the Community."*

This principle is therefore intended to **regulate the exercise of competence** and not to state whether competence exists in a particular area. The principle of subsidiarity is not a principle of the allocation of competence. It is the Treaty itself which grants competence. The principle of subsidiarity does not make it possible to call competence in a particular area into question. Competence has first to exist for it to be possible then to examine whether, by virtue of the principle of subsidiarity, it is appropriate for it to be exercised in a particular case. This principle applies in all the cases where the Community has non-exclusive competence, i.e. shared competence and complementary competence.²

As revealed by the use of the word "better", which presupposes a value judgement, subsidiarity is an **essentially political and subjective principle**; to apply it, the Community institutions must, throughout the procedure for examining a proposal for a legislative act, exercise their powers of political discretion, weighing up the advantages and disadvantages.

The principle of subsidiarity is of course enshrined in the Treaty and it is therefore a matter for the Court of Justice to check that it has been complied with. However, it is more for the politician than the judge to say whether action by the Community would be "better" than action by the Member States. In the last ten years, the Council Legal Service has only rarely expressed doubts about compliance with the principle of subsidiarity, although this has happened on occasion. Above all, the Court of Justice, which monitors compliance with the principle, has never annulled an act on the grounds of infringement of the principle of subsidiarity, although it has been invoked in certain cases, admittedly only a small number. More often the Court examines the principle from the point of view of the grounds adduced, checking that the legislator has properly shown in the recitals

² Article 5, including the principle of subsidiarity, applies also to institutions acting within the framework of the TEU (see the end of the second paragraph of Article 3 of the TEU).

giving the reasons for the legislative act that Community action was appropriate to ensure the proper functioning of the internal market and avoid distortions of competition.

Compliance with this principle cannot be examined in an artificial and theoretical way, just by looking at the title of an act; one has to look in depth at all the aspects, which are often very technical, of the dossier of the legislative act in question. As stated by the interinstitutional agreement of October 1993 on procedures for implementing the principle of subsidiarity, checking that action envisaged complies with the principle of subsidiarity "must form an integral part of the substantive examination".

3. Proportionality

The third paragraph of Article 5 of the TEC lays down the **principle of proportionality**, under which the means used by the Community must be appropriate to attain the objective pursued, without going beyond what is necessary to achieve it.

"Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty".

As in the case of the principle of subsidiarity, the principle of proportionality is therefore intended to **regulate the way in which competence conferred by the Treaty is exercised** by the institutions, and more particularly **the scope and intensity of action by them**. This principle applies to all the types of competence, including exclusive competence. In the case of shared and complementary competence, it will be applied third, i.e. once it has been determined that the Treaty has granted the Community power to act (paragraph 1), and once the Community legislator has decided that the objectives of the action can be achieved better at Community level and that it is therefore appropriate to act at that level (paragraph 2), the question will be examined of how and how intensively to act, limiting action to what is strictly necessary (paragraph 3).

Before it was even incorporated in the Treaty, the principle of proportionality had already been developed by the Court in firmly established case-law, according to which "*it is necessary to verify whether the means which [the provision of Community law] employs are appropriate to achieve the objective pursued and whether or not they go beyond what is necessary to achieve it*"³. When there is a choice between several appropriate measures, "*recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued*"⁴. Thus, the principle of proportionality already belonged to the general principles of the law considered to be part of the legal corpus to be upheld by the Court. Compared with the principle of subsidiarity, which is essentially one of political appropriateness, the principle of proportionality is better suited to judicial control and therefore to normal scrutiny by the Court of Justice.

To give a typical example of the principle of proportionality, one might cite cases where, when the objective of a measure is to protect consumers, a decision might be taken that the composition of a product must be properly indicated on the labelling rather than requiring the details of its composition to be harmonised, which would be tantamount to banning certain kinds of production. Another example is that of certain very localised products, the production and sale of which are authorised in one or two Member States, but which the others do not want to be sold in their territory. Rather than banning such products, it might be specified that they cannot be exported to the other Member States but are reserved for local consumption (e.g. "snus", chewing tobacco used in Sweden and Finland).

³ Judgement of 18 March 1987, Case 56/86 *OBEA* [1987] ECR 1449, point 28.

⁴ Judgement of 13 November 1990, Case C-331/88 *FEDESA* [1990] ECR I-4063, point 13.

APPLICATION OF AND METHODS OF MONITORING COMPLIANCE WITH THE PRINCIPLE OF SUBSIDIARITY

1. Present application and methods of monitoring within the Council

At present, application of and monitoring of compliance with the subsidiarity principle is the task of the institutions with legislative powers (the Commission, which proposes legislation and also adopts much legislation, using powers delegated by the legislator; the Council and the European Parliament, which adopt Community legislation) and, after adoption, of the Court of Justice.

The institutions have produced many texts to achieve effective application of the subsidiarity principle. In **Edinburgh in December 1992**, the European Council adopted **guidelines** on the application of the subsidiarity principle by the Council, under which "*the examination of the compliance of a measure with the provisions of Article 3b [now Article 5] should be undertaken on a regular basis; it should become an integral part of the overall examination of any Commission proposal and be based on the substance of the proposal*". This examination should also be applied to "*any change in the proposal envisaged by the Council*". The Council must decide "*on the subsidiarity aspects (...) at the same time as the decision on substance and according to the voting requirements set out in the Treaty. Care should be taken not to impede decision-making in the Council and to avoid a system of preliminary or parallel decision-making*".

Subsequently, the European Parliament, the Council and the Commission concluded **in October 1993** an **Interinstitutional Agreement** on procedures for implementing the principle of subsidiarity ⁵, under which "*any amendment which may be made to the Commission's text, whether by the European Parliament or the Council, must, if it entails more extensive or intensive intervention by the Community, be accompanied by a justification under the principle of subsidiarity*". In addition, the Agreement provides that "*the three institutions shall, under their internal procedures, regularly check that action envisaged complies with the provisions concerning*

⁵ OJ C 329, 6.12.1993, pp. 135 and 136.

subsidiarity as regards both the choice of legal instruments and the content of a proposal. Such checks must form an integral part of the substantive examination".

Furthermore, the **1997 Treaty of Amsterdam** added a **Protocol** on the application of the principles of subsidiarity and proportionality, to which a statement included in the Final Act of the IGC also refers. The protocol states that "*in exercising the powers conferred on it, each institution shall ensure that the principle of subsidiarity is complied with*" and that the principle of subsidiarity provides "*a guide as to how these powers are to be exercised at the Community level*". As in the Interinstitutional Agreement, it is laid down that examination of the consistency with Article 5 of proposals and amendments made to them by the Council and the European Parliament is "*an integral part of the overall examination of Commission proposals*".

The Protocol further lays down, as does the Interinstitutional Agreement, that the Council must, in its statements of reasons for its common positions (under the codecision procedure), explain its position to the European Parliament on the question of subsidiarity and inform the European Parliament of cases in which it partially or wholly rejects a Commission proposal as being contrary to the subsidiarity principle.

In practice, the question of compliance with the subsidiarity principle often arises in the Council without reference to the term itself, but rather by means of calls for a draft instrument to be amended so as to make it less detailed or to leave more options open to the Member States in implementation. Like Molière's Monsieur Jourdain, who spoke in prose without realising it, the members of the Council practise subsidiarity more often than they specifically refer to it.

With regard to verification of subsidiarity, it is nevertheless important to refrain from harbouring certain illusions and to have a full understanding of the complex **mechanisms operating in the establishment of an internal market** between the Member States, within which there is free movement of people, goods, services and capital. This can only occur if there is between the Member States which open their frontiers a **level of trust** in proportion to the level of openness desired.

Each of the Member States has within its territory a whole series of legislative provisions on conditions for persons setting up in business, technical standards for products which may be sold (standards relating to safety, hygiene, the environment, consumer protection, etc.), conditions for provision of services, terms of payment, etc., which it considers important and which it will only agree to modify where it feels that their level is not detracted from as a result.

This attitude obviously has an impact on the level of detail of Community legislative provisions. The representatives of the Governments of the Member States will have a tendency, on the one hand, to protect their national legislation by restricting the amendments entailed by a Community instrument and, on the other hand, to demand that the level of protection in Community legislation should not lower their national level of protection. To achieve a sufficient level of mutual trust between States, the tendency will therefore be on the whole to **add together** national requirements in Community legislation rather than to establish a minimum platform of Community requirements.

Such an attitude is of course open to criticism, as it sometimes leads to excesses. Nevertheless, it must also be understood that we cannot limit ourselves to stating that we only need to trust each other and that the level of development of all the Member States in 2002 is such that we can content ourselves with applying the principle of mutual recognition whereby, if a product or service is approved in one Member State, it can move freely in the other Member States without need for legislation at Community level. This would be a vision of the ideal perhaps, but it does not correspond to reality.

The reality is that a product which some States consider fit for their market is not so considered by others, which will prohibit its sale: Camembert made from raw milk, much appreciated in France, is not necessarily considered to be without danger to consumer health by the authorities of some Northern countries. Other examples are less amusing: in the case of BSE it has been realised that Community standards on beef and veal had not perhaps been stringent or detailed enough and that they had left Member States too much liberty as to the checks to be carried out, while obliging others to accept the sale of such meat within their territory. The Governments of the Member States are obviously inclined to take account of their national public opinion in these cases.

To a greater or lesser degree, common standards and harmonisation are thus indispensable in an integrated market such as the Community. This does not always mean following the whims of bureaucrats. It means at times the protection of legitimate and important interests such as product safety (cars, lifts, toys and medicines), environmental protection (prohibition of asbestos, standards on engine noise and noxious gas emissions), consumer protection (misleading advertising, product labelling and the level of protection in cross-border services) and worker protection (commercial drivers' working time), etc.

It also means allowing enterprises to manufacture their products in the confident expectation that they will only have to adhere to a single, Community standard, rather than to fifteen different national standards, so that they can sell their product throughout the internal market; allowing them to enter the market in the confident expectation that others will not take advantage of distortions of competition created by less stringent standards. There are huge economic interests at stake for the enterprises of our Member States, for those they employ and for consumers.

2. Towards additional monitoring in the future?

From the various contributions put forward, it appears that several **models are envisaged for organising further monitoring of the principle of subsidiarity:**

- judicial, political or judicial-political monitoring?
- *ex ante* monitoring (when the Commission submits its proposal) or *ex post* monitoring (just before or just after adoption by the Community legislator, but before the entry into force of the instrument)?
- monitoring by a new body or by the present institutions, or in some decentralised manner?

In view of my earlier remarks on the largely subjective nature of subsidiarity, exclusively judicial monitoring of whether it would be "better" or not to make use of existing Community competence would not be very suitable. It exists but has not produced any major results so far, because the principle has rarely been invoked before the Court and because it depends to a large extent on a subjective assessment involving political expediency. We should avoid politicising judicial control and should not require the Court of Justice, or another court to be set up, to rule on subsidiarity over and above normal verification of the consistency of instruments in force with the Treaty.

As for the **time** when such monitoring might take place, the most logical course would be for it to take place only **after** the work of the legislator is done (*ex post* monitoring). *Ex ante* monitoring would serve little purpose, as the Community legislator, the European Parliament and the Council, often makes considerable amendments to proposals submitted by the Commission. Furthermore, both the European Parliament and the Council have legal services which attend discussions at all levels and advise them throughout the procedure. The European Parliament in addition has a Legal

Committee. Additional monitoring of subsidiarity might thus be of value at the end of the Council's and the European Parliament's discussions.

As for the **type of body** or method, several options have been suggested:

- a body modelled on the French "Constitutional Council", ⁶ the nine members of which (often experienced lawyers) are appointed by the two legislative assemblies and the Head of State, and the decisions of which are legally binding;
- a body made up of representatives of the national parliaments or bringing together representatives of different authorities (national parliaments? regions? governments?).

The creation of a new body would raise sensitive questions:

- **its composition** (should each Member State – 15, soon to be 25 – be "represented" in it? Should the European Parliament and the Commission also be "represented"?)
- **within what deadline should** the question to be settled in order not to prolong procedures excessively?
- **what form of decision?**
- **who could refer matters** to it (arrangements to prevent a minority from unduly delaying the entry into force of an act)?

⁶ The Constitutional Council intervenes immediately after the adoption of a law by parliament, but before its promulgation and entry into force, on referral by 60 members of parliament. However, it should be noted that the French system, unlike the Community system, has no provision for verifying the constitutionality of laws. A French judge cannot annul a law as being in breach of the constitution, while the Court of Justice can annul a Community legislative act which is in breach of the Treaty.

- finally, perhaps the most politically sensitive question: will this body be restricted to giving **advisory opinions** or will it take **binding decisions**, in which case it may find itself censuring what the Community legislator, benefiting from a twofold democratic legitimacy, has done?

Instead of a new Community-level body, one might conceive of a decentralised system, such as a Mr or Ms "Subsidiarity" to assist each Head of State or Government (and the Presidents of the European Parliament and the Commission), standing outside the system of sector ministries, who would have the task of alerting the Head of State or Government or the President concerning any problems with regard to subsidiarity in texts under discussion within the Council and the European Parliament.
