

Working Group I

Working document 6

Working Group I on the Principle of Subsidiarity

Subject: **“Effective competence monitoring and checking in the legislative process
of the European Union”**
 - **paper by Mr Erwin Teufel**

Members of Working Group I will find hereafter a paper by Mr Erwin Teufel, member of the Convention.

CONTRIBUTION for the Subsidiarity Working Group
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EFFECTIVE COMPETENCE MONITORING AND CHECKING
IN THE LEGISLATIVE PROCESS OF THE EUROPEAN UNION

I. Preliminary remark

Effective competence monitoring and checking in respect to EU legislation requires that the demarcation of powers between the Union and its member states be as clear as possible. A statement addressing this question will be given elsewhere.

II. Monitoring competence, not just subsidiarity

The aim of our work is to help prevent, from the outset and as far as possible, competence disputes between the Union and its member states as have occurred repeatedly in the past in respect to the passing of legal acts. The concerns of the national parliaments regarding an ever-increasing loss of competences to the EU should be dispelled.

As Director-General Piris showed in the subsidiarity working group on 25 June 2002, this primarily concerns monitoring the adherence to three principles:

- Principle of limited individual authorisation (Art. 5 (1) EC-Treaty)
- Principle of subsidiarity (Art. 5 (2) EC-Treaty)
- Principle of proportionality (Art. 5 (3) EC-Treaty)

The question is thus one of full competence monitoring and not just of monitoring subsidiarity.

III. Preventative monitoring (“ex ante”) is required

The European Court of Justice has always been responsible for an a-posteriori review (i.e. after a legal act has come into effect). This in principle should remain unchanged. However, this kind of control mechanism sets in at the 11th hour and generally requires several years to complete. This is unsatisfactory.

Competence disputes can be avoided if monitoring takes place early and within brief stipulated periods, namely either during the legislative process or at the latest after the passing of a legal act, but before it becomes effective (“ex ante”). Calls for an improvement of this kind to the system have received support from various sides of the Convention and the subsidiarity working group.

IV. Two kinds of preventative competence monitoring are conceivable

Preventative competence monitoring can be applied:

- Either **in the course of the legislative process** through a newly to be created **parliamentary/political committee** (“competence monitoring committee” = CMC),
- Or by means of a **competence senate of the European Court of Justice** through the introduction of a “competence challenge” on completion of the legislative process, but **before a legal act becomes effective** (“French Model”).

There are valid arguments in support of each of these solutions. Opinions still differ. We should discuss these alternatives in depth within the working group before deciding on one of these two solutions.

V. Preventative monitoring by a parliamentary/political competence monitoring committee (CMC)

Convention members Glotz, Hain, Hübner, McSharry and Moscovici have so far opted for this solution in a joint paper, along with members Dini and Jürgen Meyer.

There are various possible options for organising the CMC. Here, the **following model** is put forward for discussion:

Parliamentary/political competence monitoring committee

1. Composition

5 members of the European Parliament (with legal experience being preferable but not a requirement) to be appointed by the European Parliament for a period of 2 ½ years

5 members of national parliaments (with legal experience being preferable but not a requirement) to be appointed by the Council for a period of 2 ½ years, with rotation for the period that follows

1 member of the Council

Altogether 11 members; majority decisions

2. Timing of the appeal to the CMC

Within one month after presentation of the proposal by the Commission

3. Right of appeal

Council; European Parliament; Committee of the Regions; each member state, as well as – depending on its internal constitutional structure – its regions with legislative competence; each national parliament.

4. Censure

Exclusively censure for competence violations (limited individual authorisation, subsidiarity, proportionality)

5. Time limit for decisions

Two months following the appeal

6. Character of the decision

Non-binding opinion (“avis”). In case of a censure for competence violations the Commission is required to review its proposal.

7. Competence of the European Court of Justice

As previously, a-posteriori review of the legal act after it has become effective

The **advantage** of a competence decision by a parliamentary/political committee lies in the fact that the opinion is given at a very early stage. Moreover, this control mechanism would not be a strictly legal one, but could also incorporate political assessments. This would be especially important in monitoring subsidiarity, because the principle of subsidiarity of Art. 5 (2) EC-Treaty in its current form is litigable only to a very limited extent (Advocate-General Jacobs pointed this out in the working group on 25 June 2002).

A **disadvantage** of the parliamentary/political solution would be that the CMC could only deliver non-binding opinions (“avis”). It would depend on the quality of the content of these opinions how often the European Court would have to engage in a-posteriori review.

VI. Preventative review of EU competence by the European Court of Justice (“French model”)

Amongst others, the “Lamassoure Report” of the European Parliament favours court review, as do members Altmaier, Brok, Hänsch and Würmeling. Also the EU Committee of the German Bundestag is in favour of judicial review.

Examples of preventative judicial checks would be Art. 300 (6) EC-Treaty (binding opinions of the Court concerning planned international agreements of the Community) and Art. 61 and 62 of the French constitution (preventative review by the Conseil Constitutionnel within one month of laws which have been passed, but have not yet come into effect).

A possible **model** of preventative review by the European Court of Justice might look as follows:

Preventative competence review by a competence senate of the European Court of Justice

1. Composition of the competence senate

5 judges of the European Court (to be appointed by the Court for a period of five years)

5 judges serving on the highest constitutional courts of their respective countries (to be appointed by the Council for a period of five years, with rotation among the member states for the period that follows)

President of the European Court of Justice (presiding)

Altogether 11 members; majority decisions

2. Timing of the appeal

Within one month after the passing of a legal act by Council and Parliament, but before it comes into effect

3. Right of appeal

Each member state, as well as – depending on its internal constitutional structure – its regions with legislative competence; the Committee of the Regions; a qualified minority of the European Parliament; each national parliament

4. Censure

Exclusively censure for competence violations (limited individual authorisation, subsidiarity, proportionality).

5. Time limit for decisions

Two months following the appeal.

6. Character of the decision

Binding and final decision in competence matters. If competence is denied, the respective legal act is null and void. If the EU's competence to pass the legal act is confirmed, such competence is permanently established.

7. A-posteriori review by the European Court

If the competence senate negates the competence of the EU, there is no a-posteriori review because the legal act is null and void. If the EU's competence is confirmed, a-posteriori review remains in place in accordance with the general provisions of the Treaty. The competence of the EU to pass the respective legal act in accordance with Art. 5 EC-Treaty however can no longer be questioned.

The **advantage** lies in an early and binding competence decision by the Court. The competence question is resolved before the legal act comes into effect. The principles of limited individual authorisation (Art. 5 (1) EC-Treaty) and proportionality can be reviewed judicially, making effective checking here possible.

A **disadvantage** would have to be expected in respect to the review of subsidiarity matters if the present version of Art. 5 (2) EC-Treaty remains unchanged. The phrasing of Art. 5 (2) EC-Treaty ("not sufficiently"..."better"...) contains terms not at all clearly defined in law. It is to be expected that the Court here would generally follow the legislators' political evaluation and not object to the respective legal acts (see the statement by Advocate-General Jacobs in the working group on 25 June 2002). In support of a more effective review in subsidiarity matters the phrasing of Art. 5 (2) EC-Treaty would have to be made more precise, as in the following (changes **in bold**):

"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 a better regulation, by reason of its scale or effects, would have to be taken at a Community level.**"

This or a similarly more precise phrasing would allow for more effective judicial review in respect to the principle of subsidiarity.

VII. Closing remark

All in all, on the basis of these assumptions a **judicial solution to the competence question** would seem preferable, as this would allow a quick and final resolution to be reached in each instance. However, we should first review both these possible solutions in depth within the working group to come to a convincing recommendation.
