

Working Group I

Working Document 09

## Working Group I on the Principle of Subsidiarity

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from :	Chairman of Working Group I on the Principle of Subsidiarity
to :	Members of Working Group I on the Principle of Subsidiarity
Subject:	Initial proposals for conclusions

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The members of Convention Working Group I on the Principle of Subsidiarity will find attached, in accordance with the commitment given by Chairman Mendez de Vigo, initial proposals for conclusions of the Group's proceedings, to be discussed at the next meeting on 9 September 2002. With this in mind, members are asked to forward any comments or proposed amendments as soon as possible to the Secretariat of the Group (Ms Marta Arpio or Mr Etienne de Poncins).

Insofar as these initial conclusions meet with sufficiently broad support within the Group, the Chairman intends subsequently to draw up more precise proposals on this basis, in the form of Treaty articles.

## **I. Tendencies emerging from the Group's discussions**

The hearings (see Annex) and debates held within the Group highlighted certain tendencies:

- (a) It emerged that the principle of subsidiarity, although already being examined by the Institutions taking part in the legislative procedure and the subject of *ex post* judicial review by the Court of Justice, can and must be improved upon, as regards both application and monitoring.
- (b) The Group considered that certain general measures, detailed examination of which would, however, have exceeded its terms of reference, could facilitate application of the principle of subsidiarity. Of these measures for improving the general context, the Group identified:
  - clarification and delimitation of competences as between the Union and the Member States. Although the Group, as, indeed, the Convention itself, considered that it would be neither possible nor desirable to arrive at a rigid and set allocation of competences ("catalogue"), a large majority nonetheless felt that progress could be made towards greater clarification of competences, which would help to reduce the likelihood of disputes arising on the basis of the principle of subsidiarity;
  - the creation of a genuine hierarchy of legislative acts and clarification of instruments according to their "intensity" in terms of Community action, as well as restricting their number, would also promote better compliance with subsidiarity. They would, in particular, make it possible to determine more easily what was a matter for a legislative act and what was a matter for implementation by the Community or by the Member States.
- (c) Certain improvements to the Treaty, and particularly to the Protocol on the application of the principle of subsidiarity, were deemed necessary in order to improve the latter and facilitate its monitoring.

- (d) The majority of the Group considered that as this was a principle of an essentially political nature, implementation of which involved a considerable margin of discretion (considering whether shared objectives could "better" be achieved at European level or at a lower level), "*ex ante*" monitoring should be of an essentially political nature.
- (e) Some members of the group also mentioned the possibility of a mechanism for "*ex ante*" monitoring of application of the principle of subsidiarity, of a judicial and not a political nature, which would take place between adoption of the act and its entry into force. This monitoring would only concern the question of subsidiarity, the Court would have a period of one month to give its ruling, and its rulings would not be subject to appeal.
- (f) As regards political monitoring of application of the principle of subsidiarity, in the view of most members of the Working Group priority should clearly go to strengthening monitoring by national parliaments in relation to their governments. This approach appears also to be broadly shared by the Convention Working Group on national parliaments, chaired by Ms Stuart, with which the Group on the Principle of Subsidiarity held a joint meeting, and which is considering the drafting of a Code of Conduct on the matter. However, a majority of members of the Working Group on the Principle of Subsidiarity considers that "*ad hoc*" arrangements should be set to enable national parliaments to be directly involved in monitoring compliance with subsidiarity, while ensuring that the monitoring mechanism set up is flexible, does not increase the length of the legislative process and does not lead to creating a new bureaucracy.
- (g) The majority of the Group considered that "*ex post*" monitoring of subsidiarity should, on the other hand, be of a judicial nature, and that in this respect the conditions for referral to the Court of Justice should be broadened.

### **III. Proposals to be examined by the Group on the Principle of Subsidiarity**

To improve application of the principle of subsidiarity and its monitoring, the Chairman of the Group considers that proposals focusing on the following lines could be put to the Convention:

- (a) reinforcing application by all the institutional players of the principle of subsidiarity;
- (b) setting up an "early warning system", enabling national parliaments to participate directly in monitoring compliance with the principle of subsidiarity;
- (c) creating a subsidiarity chamber within the Court of Justice.

#### **(a) reinforcing application by all the institutional players of the principle of subsidiarity:**

In the drafting phase of a proposal by the Commission, the obligations concerning justification with regard to subsidiarity should be reinforced. Thus, any legislative proposal should comprise circumstantiated aspects enabling an appraisal of compliance with the principle of subsidiarity ("subsidiarity" sheet). Consideration could be given to having, within the Commission, a "Mr or Ms Subsidiarity" or a Vice-President specifically responsible for ensuring the relevance and coherence of these justificatory aspects, who would necessarily receive any proposal of a legislative nature and would provide an outside view of the departments which drafted it. This Vice-President could, if necessary, be given a hearing by national parliaments.

To give concrete form to these proposals, the Group might recommend certain amendments to the Protocol on subsidiarity currently annexed to the Treaty, or even propose articles on subsidiarity to be inserted directly into the Treaty.

**(b) setting up an "early warning system" allowing national parliaments to participate directly in monitoring compliance with the principle of subsidiarity.**

The Group could propose:

1. initiating examination of compliance with the principle of subsidiarity as from the phase at which the legislative act is devised.

The principle of subsidiarity would be applied all the better the earlier it is taken into account in the legislative process. This is why presentation by the Commission of its annual legislative programme would seem to be the key moment. All parties involved in or concerned by subsidiarity should be enabled to debate this, i.e., as at present, the Council and the European Parliament, but also national parliaments. To enable the latter to take part in the debate, either an *ad hoc* meeting of COSAC, or a discussion within a "Congress of the People of Europe", as proposed by the Chairman of the Convention, could be considered.

2. creating a new *ex ante* political monitoring mechanism involving national parliaments.

A mechanism directly enabling national parliaments to ensure correct application of the principle of subsidiarity by the Institutions taking part in the legislative process ("early warning system") could be set up. In practical terms, it would be proposed that the Protocol on national parliaments be supplemented in such a way as to:

- stipulate that the Commission should address directly to each national parliament, at the same time as it does to the Community legislator (Council and European Parliament), its proposals of a legislative nature (the Protocol on national parliaments currently entrusts this task to governments);

- set a period of time, before the legislative procedure proper is initiated, during which each national parliament would have the possibility of issuing a reasoned opinion or detailed comments regarding compliance with the principle of subsidiarity by the proposal concerned: this contribution, which would be forwarded to the Commission, the President of the Council and the President of the European Parliament, could be of a general nature or concern only one particular provision of the proposal in question. It could also alert the Community legislator to the possibility of a violation of the principle of subsidiarity if one or other provision were to be amended in some way during the legislative examination;
- define the consequences to be drawn from these contributions for the continuation of the legislative procedure. These could be as follows (certain proposals could be taken together):
  - either the legislator would be asked to give further specific reasons for the act with regard to subsidiarity;
  - or the legislator would have to hold a debate specifically devoted to examining the contributions received from national parliaments on the question of subsidiarity in order to take them into account and to resolve the objections expressed ("prior debate");
  - or the Commission would have to reconsider its proposal in order to take account of the objections expressed by national parliaments.

Such an "early warning system" would make it possible to encourage national parliaments to examine European legislative proposals with regard to the principle of subsidiarity and to ensure that the concerns that they might be led to express further to that examination would be taken more fully into account by the European legislator (Council and Parliament), while avoiding the risk of compromising legal certainty. At the same time, by obviating the creation of a new body, it would heed the warnings voiced within the Working Group against the risk of making the institutional architecture and the legislative procedure more cumbersome or the further development of a weighty bureaucracy.

**(c) creating a subsidiarity chamber within the Court of Justice**

The *ex post* judicial review carried out by the Court of Justice concerning compliance with the principle of subsidiarity could be enhanced by proposing to extend to national parliaments which made comments under the "early warning system" described above, and to the Committee of the Regions, the right of referral to the Court of Justice for violation of the principle of subsidiarity. For this purpose, the creation within the Court of a Chamber specifically devoted to questions of subsidiarity could be considered.

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## Hearings held.

The Group held a number of hearings of experts on matters relating to the application and monitoring of the principle of subsidiarity:

- Mr Michel Petite, Director-General of the Commission Legal Service, on application of the principle of subsidiarity by the Commission.
- Mr Dietmar Nickel, Director-General of the European Parliament's Directorate-General for Committees and Delegations, on the application of the principle of subsidiarity by the European Parliament;
- Mr Jos Chabert, Minister and former President and member of the Committee of the Regions, Mr Henrich Hoffschulte, first Vice-President of the CEMR (Council of European Municipalities and Regions) and Mr Jeremy Smith, Secretary-General of the CEMR, on the application of the subsidiarity principle in relations between decentralised entities and states.
- Mr Jean-Claude Piris, Legal Adviser and Director-General of the Council Legal Service, on the application of the principle of subsidiarity by the Council.
- Mr Francis Jacobs, Advocate-General at the Court of Justice, on monitoring by the Court of Justice of the principle of subsidiarity.
- Mr Jacques Arrighi de Casanova, Council of State Member, on monitoring by the French Council of State (*Conseil d'Etat*) and Constitutional Court (*Conseil Constitutionnel*) of compliance with the principle of constitutionality in France.
- Mr Andreas Maurer, Associate Professor at the University of Cologne, on how national parliaments scrutinise the subsidiarity principle.

After each hearing, the Group held a discussion on the various issues raised by the speakers.