

Working Group I

Working document 10

## **Working Group I on the Principle of Subsidiarity**

**Subject: Intervention of Mr. Dietmar Nickel, Director-General of D.G. for Committees and Delegations of the European Parliament, at the meeting of the group on 17 June 2002**

Members of Working Group I will find enclosed the speaking notes of Mr. Dietmar Nickel at the meeting held on 17 June 2002.

EUROPA-PARLAMENTET  
EUROPÄISCHES PARLAMENT  
ΕΥΡΩΠΑΪΚΟ ΚΟΙΝΟΒΟΥΛΙΟ  
EUROPEAN PARLIAMENT

PARLAMENTO EUROPEO  
PARLEMENT EUROPEEN  
PARLAMENTO EUROPEO

EUROPEES PARLEMENT  
PARLAMENTO EUROPEU  
EUROOPAN PARLAMENTTI  
EUROPAPARLAMENTET



---

**DIRECTORATE-GENERAL FOR COMMITTEES AND DELEGATIONS**  
**- THE DIRECTOR-GENERAL -**

**The principle of subsidiarity and the European Parliament**

There is widespread belief that Parliaments are not good at applying the principle of subsidiarity. This is certainly correct when they act as a public tribune, a function Parliaments exercise amongst others. It is not only correct but also necessary and normal as Members of Parliament represent citizens, and whenever citizens are concerned by a topical issue they rightly expect their representatives to be concerned too.

Matters should be different with regard to legislation in its broader sense. Broader sense meaning that legislation also includes the pre-legislative phase, i.e. Parliament's own initiative reports, green and white papers and Communications from the Commission. It is my main aim to demonstrate to you that the European Parliament does not acquit itself so badly of its tasks, and perhaps, all things considered, even rather well in both (i) theory and (ii) practice. Following that, I will address two out of the different proposals on the table to improve the application of the principle of subsidiarity (iii).

**(i) Theory**

It was the merit of the European Parliament to bring the principle of subsidiarity to the level of constitutional debate in Europe. The "Draft Treaty establishing the European Union" - also known as the "Spinelli Treaty" - adopted on the 14 February 1984, introduced the notion and definition of the principle of

subsidiarity. It is contained in the 9th recital of the preamble, in Article 12 paragraph 2 and in Article 66. Article 12 paragraph 2 reads: "where this Treaty confers concurrent competence on the Union, the Member States shall continue to act so long as the Union has not legislated. The Union shall only act to carry out those tasks which may be undertaken more effectively in common than by the Member States acting separately, in particular those whose execution requires action by the Union because their dimension or effects extend beyond national frontiers.....". Consider the proximity of this formulation to the Treaty Article introduced by the Maastricht IGC (now article 5 paragraph 2 EC).

Article 58 of the European Parliament internal rules reads "during the examination of a legislative proposal, Parliament shall pay particular attention to respect for fundamental rights and the principles of subsidiarity and proportionality....."

The European Parliament regularly draws up reports on the annual reports on subsidiarity adopted by the Commission. This is currently done biennially. The most recent report was by Mr Wuermeling adopted on 10 October 2000 (A5-0269/2000). This brings our discussion to the practice.

#### (ii) Practice

How does the European Parliament apply the principle? There is no formal check list which can be applied in a mechanical way to any text submitted to Parliament for opinion. There is of course a routine verification of the specific justification accompanying the legislative proposal from the Commission. Consider, and this is important, that the referral occurs after long pre-legislative negotiations between the Institutions. The question of the respect of the principle of subsidiarity and, in particular whether there is a need for regulatory intervention has already been addressed throughout the preparatory phases. So there is no new start at the moment of the legislative referral, merely a process of fine-tuning.

The debate which follows the referral occasionally refers to the principle of subsidiarity. This does not necessarily mean that whenever you hear a reference to the word it is really the principle of subsidiarity which is at stake. It may be used for other purposes in the same way in which the argument may be invoked in the internal discussion between directorates general of the Commission working on a draft. What is actually hiding behind the subsidiarity argument is a simple statement: "I don't like it". In this sense a reference to subsidiarity resembles the often-heard reference to a shift in the institutional balance. This too, normally means: "I don't like it".

There are also cases in which the reference to the principle of subsidiarity truly addresses the question of the added value contained in a proposal. It is, of course,

this added value element which is at the core of the principle of subsidiarity. As you see, it is a question of judgement.

Even more often you will hear interventions concerning the legal basis. The question of the validity or the appropriateness of the legal basis comes from Article 5 paragraph 1 EC laying down the system of specific empowerment (Prinzip der begrenzten Einzelermaechtigung). This is not part of the principle of subsidiarity in its narrow sense, but is normally mentioned when debating subsidiarity. The proximity in the Treaty of the relevant provisions (Article 5) is such that the description of the system of specific empowerment sets the frame for the principle of subsidiarity.

The European Parliament has had a number of experiences with the principle of subsidiarity in its broader sense:

First there was the case called "the Greens". The Bureau of the European Parliament had adopted a decision distributing financial means to the political groups for the purpose of the election campaign. The Greens were of the opinion that their share was too small and challenged the decision before the Court of Justice. The Court on 23 April 1986 annulled the Bureau decision, but not because of an unfair treatment of the Greens. Instead, it ruled that the Bureau decision was without a legal basis in the light of Article 7 paragraph 2 of the Act concerning the election of the representatives of the European Parliament by direct universal suffrage. Article 7 paragraph 2 reads : "Pending the entry into force of a uniform electoral procedure and subject to the other provisions of this act, the electoral procedure shall be governed in each Member State by its national provisions". The Court held that there was no legal basis for a Bureau decision allocating financial means for an electoral procedure. We are confronted with a lack of legal basis.

Then we come to the case of the draft directive on tobacco publicity. This is our model case<sup>1</sup>. It is in the domain of legislation. There was a very intense and hard debate on the draft directive. In the European Parliament it took place in and between the committees as well as in plenary. It does not need to be recalled that the totality of this debate took place in public meetings at all stages and in a totally transparent way. The main question which was discussed concerned the legal basis. Those in favour of the draft directive took the view that the legal basis should be Article 95 EC concerning the establishment of the Single Market, those against considered the main objective of the draft to be a public health issue for

---

<sup>1</sup> another more recent model case could be seen in the directive on lorry drivers, see in the annex a contribution to the convention by Mr Vanhanen and a background note established by Mr Shackleton and Mr Hakala of the European Parliament's conciliation service.

which Article 152 EC only provides for complementary action by the Community but no possibility for a directive. This latter opinion was shared by the majority of the Members of the Legal Affairs Committee in both readings which took place. In favour of the draft directive, i.e. of the validity of Article 95 EC as legal basis, were the three Legal Services of the three political Institutions, the committee responsible (Committee on the Environment, Public Health and Consumer policy) and, ultimately, the plenary as well as a qualified majority of Member States in the Council. On 5 October 2000 the Court of Justice finally ruled that Article 95 EC was not a sufficient legal basis for the directive on tobacco publicity.

We were confronted with a situation in which Parliament performs best. It stimulated and organised a public and transparent debate. This was an extremely positive factor. It is also positive that the Court demonstrated its determination not to bow to the overwhelming political will of the Commission, Parliament and Council. The safeguard worked, even if only in the area of the verification of the legal basis.

The core element of the principle of subsidiarity i.e. is the question of the added value, seems to be intrinsic in the legislative debate without necessarily even being called by its name or being identified as something even concerning subsidiarity. It is the answer to the simple question if a legislative proposal on the table is better than the current situation or any action which might be taken at a level below Community action. In addition one has to bear in mind that this question does not only arise concerning the entirety of the proposal. It arises at the level of detail i.e. concerning any amendment which may be put forward.

One should not expect the Court to walk easily into such a debate. Evidence from the German Bundesverfassungsgericht shows that the principle of subsidiarity in its core element is not judicial.

### (iii) Possible improvements

It is said that the room for improvement is the biggest room in the world. Even if I think that the debates inside the European Parliament show the necessary attention for the respect of the principle of subsidiarity one has to explore possibilities to improve the current situation. Out of the numerous proposals, and all their variations currently on the table, I will address only two.

(a) Part of the academic world and - as I understand now - some politicians come out in favour of the creation of a new parliamentary body on the application of the principle of subsidiarity. As it should be a body composed of members of the national parliaments such a proposal has the undoubted charm of offering

something to the national parliaments who are said to be somewhat frustrated given that their impact on community legislation via their governments seems to be limited.

When considering this proposal one has to address a certain number of questions:

- first, one may wonder if national parliaments would like to authorise limited delegations to intervene on these issues. They may feel that these questions should only be addressed by the full house. It is in this sense that the speaker of the Finnish Eduskunta, Madam Uosukainen, in a contribution to the "Speakers conference in Rome" 22-24 September 2000, made it quite clear that she could not imagine delegating such a question to a necessarily small representation of the house.
- one will have to clarify the composition of such a body, which should be relatively light. Take into account that today there are fifteen National Parliaments with twenty four chambers and in the near future - after the next enlargement round - there will be twenty five Parliaments with forty chambers to which one could either add the European Parliament or not. Even the COSAC with six representatives per Member State plus the European Parliament adds up to 156 members.
- it will have to be decided if such a body would produce an opinion or a decision. In the latter case the Treaty based procedure for the establishment of legislation would be radically changed.
- a difficult question is to find out when such a body should make up its mind on a specific proposal for a legislative act. As already mentioned the subsidiarity issue is addressed all along the pre-legislative phase. The first concrete text to look at is the Commission proposal, but this text more often than not is amended by the European Parliament and the Council. As we know each individual amendment has to be vetted for subsidiarity; a verification of the Commission proposal seems therefore premature. The first text which has seen the intervention of the European Parliament and the Council - (in a normal legislative procedure) is the common position of the Council. There is one shortcoming insofar as - since the Amsterdam Treaty, Council and Parliament can reach agreements at first reading - (so called fast track procedure). This means that there would not be a common position but already an adopted legislative act. There is another element concerning the choice of the appropriate moment for a document to be checked for subsidiarity. The common position is backed by at least a qualified majority in the Council. Even if there is no perfect parallelism between governments and their parliaments they still live in the same political world and participate in the same political debates and especially so if the scrutiny of the governments in the Council by the national parliaments is performed well.

It is therefore somewhat unlikely that a text which has found the qualified majority in the Council is not sharing the same degree of support in the parliamentary body. This would mean that the parliamentary body, with the exception of very rare cases, would not produce any added value and therefore, create more frustration.

(b) A different proposal based on the model of the French Constitutional Court, foresees subsidiarity control by the European Court of Justice at the stage between the adoption of an act by the legislative authority and its coming into force. The lapse of time available is not very long. Therefore the Court of Justice would have to organise some fast-track procedure, maybe via the creation of a special chamber.

This proposal goes back to two resolutions adopted by the European Parliament in 1990 on the basis of two reports by President Valéry Giscard d'Estaing. The second resolution of 21 November 1990 contains a concrete proposal for an additional Treaty Article 172A (which today would be 229A EC). It reads:

i) *"The Council, the Commission, Parliament or any Member State may, after the definitive adoption of an act and before its entry into force, request the Court of Justice to verify whether this act does not exceed the limits of the powers of the Community. At the request of an institution or a Member State, the Court shall give its judgment by urgent procedure, which shall suspend the act's entry into force".*

ii) *"Should the Court's judgment be adverse, the procedure for amendment of the Treaty provided for in Article 236 of the EEC Treaty shall apply to the said act".*

It would of course have to be adapted as it should allow certain minorities representing national parliaments and, maybe, the European Parliament to lodge such cases. The European Parliament has confirmed this idea in its recent Lamassoure report.