

Working Group I

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Working Group I on the Principle of Subsidiarity

Subject: **“Making the Subsidiarity principle operational”**
 - **paper by Mr. Hannes Farnleitner and Mr. Reinhard E. Bösch**

Members of Working Group I will find hereafter a paper by Mr. Hannes Farnleitner and Mr. Reinhard E. Bösch, members of the Convention.

Making the Subsidiarity principle operational

Paper from Hannes Farnleitner and Reinhard E. Bösch
Members of the Convention

It is nowadays broadly agreed that the principle of subsidiarity is of central relevance for the delimitation of competences between the national and the European levels as well as for the exercise of non-exclusive powers conferred upon the European Union/Community by the Treaties. In spite of this basic consensus and given that the application of the subsidiarity principle calls for a political judgement, its effective implementation is however sometimes difficult. The current definition of the subsidiarity principle and the present judicial control system allowing for a review of legality exclusively after the adoption of a specific legal act have, in practice, proven insufficient for bringing to bear the underlying purpose according to which the higher level of government should only act when the objective of a specific action cannot be achieved sufficiently at the lower level. This contribution tries to identify possibilities of implementing the subsidiarity principle better with regard to its content and scope as well as to improve the legal control instruments.

I. The application of the principle of subsidiarity at the level of the attribution of competences

The delimitation of competences between the European Union/Community and its Member States is based on the principle of allocation of competences, pursuant to which the former shall only act within the limits of the powers conferred upon it by the Treaties and of the objectives assigned to it therein. In theory, the principle of allocation of competences is a rather precise instrument for determining whether or not the Union/Community has the possibility to legislate in a specific policy domain.

However, certain **competence provisions are very complex and not sufficiently precise** to allow for a clear and predictable judgement on their scope and specific implications. In order to limit the discretionary powers of the Community legislator it will therefore be important to clarify certain provisions at the level of the allocation of competences. The clearer the system of delimitation of competences is designed, the less subsidiarity questions will arise when existing competences are exercised.

Elements for a precision of competence provisions are:

- The different **types of competences should be categorized** (exclusive competences of the Union/Community, shared competences, Member States' competences). For each category it should be made clear what kind of action the Union/Community may take and where the limits of its intervention are.
- Where appropriate, additional **prohibitions to harmonise the laws and regulations of the Member States** could be introduced. In some areas Community action should be limited to **minimum harmonisation measures**.
- Where appropriate, the **available legal instruments should be explicitly limited** to acts interfering in the sphere of the Member States in the least extensive way necessary to achieve the objectives of the relevant policy.
- The **scope of articles 95 and 308 TCE should be clarified**. The former should be focused on projects which primarily and directly affect the achievement and implementation of the internal market, the latter should only apply where a specific measure is absolutely indispensable to attain the objectives laid down in the Treaties.

II. The principle of subsidiarity and the exercise of existing competences

A. A better definition of the subsidiarity principle

As far as the exercise of non-exclusive powers of the Union/Community is concerned, article 5 paragraph 2 of the Treaty establishing the European Community (TCE) stipulates that “*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.*” Paragraph 3 of the same provision adds that “*any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.*” These definitions of the subsidiarity and proportionality principles, introduced by the Treaty of Maastricht, call for a political evaluation and do therefore not allow for an undisputable decision in favour or against Community action in each and every situation. The Convention will not be able to alter the mainly political character of the subsidiarity principle, **it can, however, identify additional criteria and additional procedural obligations** on the Community legislators that would make it easier to determine the admissible scope of Community action. These precisions would give the Community jurisdiction additional elements to sanction the eventual abuse of discretion by the legislators when applying the subsidiarity principle.

In our view, one very useful criterion that should be explicitly mentioned in the Treaties is the advantage of a specific Union/Community act for the **individual citizen**. Apart from efficiency considerations, the **perspective of the Union’s citizens** should therefore be designated as central benchmark for evaluating whether an intervention of the higher level of government is necessary or not. The general rule that decisions should be taken as closely as possible to the citizens of the Union should be mentioned in article 5 TCE. This inclusion would respond to one of the main challenges touched upon in the Laeken declaration on the future of the European Union.

For a proper application of the subsidiarity principle, it is not sufficient to identify the geographically closest level of government with the ability to regulate a specific issue in a satisfactory manner, but we also have to make a thorough inquiry of the **citizens' needs and expectations** concerning the most appropriate level of intervention. Within this context the relevant Eurobarometer surveys dealing with those issues would be very useful. In addition, the Protocol on the application of the principles of subsidiarity and proportionality should be referred to in the Treaty.

We would propose the following wording of article 5 TCE:

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

*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 **and under strict observance of the principle that decisions should be taken as closely as possible to the citizens of the Union**, be better achieved by the Community.*

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

The conditions and requirements for the application of the principles of subsidiarity and proportionality are laid down in the Protocol on the application of the principles of subsidiarity and proportionality annexed to this Treaty.”

B. The application of the subsidiarity principle

As far as the **procedural obligations** are concerned, substantive progress has already been made by the Protocol on the application of the principles of subsidiarity and proportionality annexed by the Treaty of Amsterdam to the Treaty establishing the European Community.

This protocol emphasizes the obligation of each institution to ensure a proper application of the subsidiarity and proportionality principles, being understood that for any disagreement between them the regular decision making and conciliation procedures (including the convening of the Conciliation Committee provided for in article 251 TCE) apply. The protocol further provides for a certain number of subsidiarity requirements, like the necessity to state reasons on which a proposal is based in terms of the subsidiarity principle or to ensure that the financial and administrative burden is as light as possible and in proportion to the pursued objective. On the one hand these requirements aim at an enhanced control of subsidiarity by the legislators themselves. On the other hand they offer certain elements to the institution charged with the review of legality of Community action.

With a view to the deliberations in the Working Group on the Principle of Subsidiarity there seem to be some possibilities to further improve and define more precisely the subsidiarity criteria contained in the Amsterdam protocol:

- We agree with a majority of Members of the Working Groups on national Parliaments and on the principle of subsidiarity that national Parliaments should be given the possibility to **receive legislative proposals, strategy planning documents, green and white papers as well as the Commissions' annual work programme directly and at the same time as the Member States' governments**. According to the respective constitutional provisions of the Member States they would thus have the opportunity to influence the legislative process at an early stage.
- We equally support the proposal made by the representatives of the Council of European Municipalities and Regions that the Commission shall, when proposing a Community measure, take into due account the need for any burden upon the Community, national governments, local authorities, economic operators and citizens not only to be minimised, but also **for the necessary resources to be provided for** (cf. the current article 9 third indent of the Protocol).
- In addition to these proposals as well as to the obligations imposed by existing Community law and without prejudice to the delimitation of competences, the institutions should be obliged to examine and explain in detail the impact of a specific Community measure on the

cultural and social **specificities of the Member States** and their sub-entities as well as on their educational systems, their administrative and judicial structures, their systems of local self-government, their activities concerning services of general economic interest or their systems of social security.

- The institutions should, when applying the subsidiarity principle, equally be obliged to assess whether a specific legal act would concern only very **limited territorial entities**. They have to ensure that no measures are taken that would lead to the identical treatment of situations differing from each other on account of certain **regional particularities**.

III. Monitoring the application of the principle of subsidiarity

A. Deficits of the current monitoring mechanisms

It is clear that article 5 TCE constitutes an integral part of the Treaty and therefore that questions concerning its interpretation are subject to judicial review by the Court of Justice of the European Communities (ECJ). However, the principle of subsidiarity has not been invoked very often before the Court and not one single act has been annulled on the grounds of a violation of the subsidiarity principle. Apart from the fact that the ECJ cannot substitute its own assessment to that of the legislators and therefore only annuls an act in the case of a manifest error of appraisal by the political institution, we would see two main reasons for the limited role of the subsidiarity principle in the current mechanisms of judicial review:

First of all, with the notable exception of the possibility to obtain an opinion from the Court provided for in article 300 paragraph 6 TCE, the **current legal monitoring mechanisms only operate once a legal act has entered into force**. Neither a preliminary ruling pursuant to article 234 TCE nor a decision of annulment pursuant to article 230 TCE can be obtained before a specific act causes legal effects. It is clear that the Court is less likely to overturn Community action that forms already part of the *Acquis communautaire* and is already being applied by the Courts and authorities of the Member States, than a legislative project without legal consequences at the moment of its examination. In the latter case the Court is more likely to take a detailed look at

the factual evidence underlying the legislator's claim that the objective of the act cannot be achieved at the level of the Member States.

Secondly, actions for annulment can only be brought by Member States, the Council, the Commission, the European Parliament (after the entry into force of the Treaty of Nice not only to protect its prerogatives), by the Court of Auditors and the ECB (both institutions only as far as the protection of their prerogatives is concerned) as well as by natural and legal persons, if the incriminated act is of direct and individual concern to them. **National parliaments, the Committee of the Regions and Regions given legislative powers** by the Constitutions of Member States, who are, in practice, **primarily concerned by violations of the subsidiarity principle, are not entitled to institute legal action** under the existing monitoring mechanisms. This is without any doubt another reason for the relative inactivity of the ECJ as far as subsidiarity questions are concerned.

B. Reform proposals

To address the deficits of the current monitoring system, we propose the creation of a mechanism to be used **prior to the entry into force** of an act that would, on the one hand, ensure a more systematic and effective supervision of compliance with the subsidiarity principle and, on the other hand, neither delay the legislative process nor jeopardise the uniform application of Community law.

It has been argued that the principle of subsidiarity is a political principle and that the control of this principle should therefore be exclusively political. However, the creation of a new “political monitoring body” would involve the participation of an additional institution in the legislative process and thus render it even more complex than it is now. Moreover, such a political body would in any case require its own administrative infrastructure and would be very difficult to organise, given that it would have to consist of members exercising other functions at a national or European level. Its composition would make it impossible to be permanently operational, which is why its compulsory consultation would necessarily delay the whole legislative process. The creation of a political monitoring body would, in addition, raise serious questions concerning representativity and accountability.

Eventually, an additional element of political control could be ensured by a **stronger involvement** of the **European Parliament** and the **Committee of the Regions** as well as the **Economic and Social Committee** in areas where they do not have a significant role yet, like in the decision-making process pursuant to article 308 TCE. Their participation would multiply the institutions charged with a political evaluation of subsidiarity issues and thus create additional political control.

Instead of a new political control instrument that would only shift the subsidiarity judgement to another institution, we consider that an **additional judicial review mechanism**, easy to initiate and based on existing structures, to be the most appropriate instrument for enhancing the control of compliance with the principle of subsidiarity. This mechanism would basically consist of a new type of action before the Court of Justice that could be brought within the period **from the formal proposal of a legal act until the moment of its promulgation** in order to censure **any violation of article 5 paragraphs 1 to 3 TCE**. The **national parliaments**, the **Committee of the Regions** as well as **Regions given legislative powers** by the Constitutions of the Member States should be entitled to introduce such an action. The Court of Justice would have to **decide within a specific delay**, which could be shortened in urgent cases on the request of at least one of the institutions at the origin of the act. A promulgation of the act would not be possible before the decision of the ECJ is passed.

The opinion of the Court would be **unappealable** and could not be overturned in a subsequent ruling pursuant to articles 230 or 234 TCE. The legal force of such a ruling would however be limited to the *res iudicata* and would not exclude that other issues concerning the principle of allocation of competences, the principle of subsidiarity or the principle of proportionality are being invoked.

The proposed mechanism would have the following advantages:

- It would **not require a new body** and the administrative infrastructure necessarily linked to such a creation;
- It would operate at a stage where a legal act has not yet entered into force and the **prejudicial consequences of a negative opinion of the ECJ would therefore be limited**;

- It would **not unduly delay the legislative process**;
- It would **not make an artificial distinction** between competence questions and questions concerning subsidiarity or proportionality;
- It would **not endanger the uniform application of Community law**;
- It would, at an early stage, give the **bodies primarily concerned** by violations of the subsidiarity principle an efficient instrument to monitor the compliance of Community action with this principle;
- It would be based on a very successful model of preventive control exercised by the French **Constitutional Council**, without **restricting the existing mechanisms of subsequent legal review**. Within this context we would like to note that the deletion of the word “*and individual*” in article 230 paragraph 4 TCE would **improve the possibilities of individuals to invoke the subsidiarity principle before the Court of Justice** and thus create an additional control element.
- It would create an additional incentive for the Member States’ governments to take the views of their respective Parliament into due consideration when deliberating within the Council.

Some Members of the Convention have expressed misgivings that any monitoring of the principle of subsidiarity by the ECJ before a legal act came into force would “politicise” the action of the latter and could be taken to mean that the Court was participating in the legislative procedure. In our view those misgivings are unfounded. The fact that the Court examines a specific act before its entry into force **does not in any way alter its appreciation criteria**. Moreover, the existing *ex ante* – review procedure on the conformity of international agreements provided for in article 300 paragraph 6 TCE has worked well so far.