

Working Group I

Working document 12

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

**Subject:**       **“Remarks on the ‘First Proposal for the Conclusions’ (Working Document 09, 29 July 2002)”**  
                  **-       paper by Mr Erwin Teufel**

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

To the  
Chairman of the Subsidiarity Working Group  
Of the European Convention  
Mr Íñigo Méndez de Vigo  
Member of the European Parliament  
Rue Wiertz

1047 BRUSSELS  
BELGIUM

**Working Group I (Subsidiarity)**

**Remarks on the 'First Proposal for the Conclusions' (Working Document 09, 29 July 2002)**

Mr President, dear colleague Méndez de Vigo,

It was with great interest that I studied your Working Document 09 of 29 July 2002. I wish to congratulate you on this impressive and clear synthesis of our work to date. As you suggested, I am adding my own comments on the document. I welcome the fact that you are planning to make further proposals in the form of treaty articles at the next meeting of the Working Group on 9 September 2002. This will facilitate a particularly fruitful discussion.

**I. A comment in advance**

Above all, I would like to point out once again that we should avoid too narrow an understanding of 'subsidiarity monitoring'. I have already commented on this in detail in my document for the Working Group of 9 July 2002 (Working Document 6). As Director-General Piris pointed out at the hearing by the Working Group on 25 June 2002, proper application and monitoring of the subsidiarity

principle (Art. 5 (2) EC-Treaty) can be ensured only in connection with the principle of limited authorisation (Art. 5 (1) EC-Treaty and the principle of proportionality (Art. 5 (3) EC-Treaty). An effective system of competences within the EU, which unfortunately we are unable to discuss in our Working Group, requires that all three of the principles named be observed, not only the subsidiarity principle. The question is one of **competence monitoring, not just of monitoring subsidiarity**. The mandate for our Working Group (CONV 71/02, 30 May 2002, pp. 3 and 5) makes clear, that our task requires this comprehensive approach.

## II. Remarks on the 'Tendencies' (Section 1 of Working Document 09)

I largely agree with the remarks in Section 1. This is especially true in respect to b), where the necessity of a clear delimitation of competences between the Union and the member states within a future constitutional treaty is mentioned, although this does not preclude a certain flexibility for the future. What is important for me is not the word 'catalogue'. What matters is that a solution is found that does justice to what is at issue. The Working Group 'Further Competences' chaired by Mr Christophersen has already made some good proposals here. Our colleague Mr Altmaier, together with others, has presented a first draft of a paper ('The Division of Competences between the Union and the Member States', of 15 July 2002) which makes visible the outlines of a competence system worthy of discussion. The Praesidium should, in due course, combine the results of the Christophersen Group with our work to form coherent proposals for the constitutional treaty.

The largely political character of the subsidiarity principle is pointed out under d). This is true insofar as Art. 5 (2) EC-Treaty contains terms not clearly defined in law. Judicial checks have to take into account the margin for assessment of the legislators during application. Nevertheless Art. 5 (2) EC-Treaty is a legal norm which in principle is subject to not only political monitoring, but also judicial checks. To improve these, the phrasing of this article should be made more precise within a future constitutional treaty. I repeat the suggestion I have already

made in this respect in Working Document 6 (p. 7) of 9 July 2002 (changes to the present phrasing of Art. 5 (2) EC-Treaty 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 facilitate both political monitoring and judicial checks.

### **III. The ‘three axes’ of possible improvements in the application of the subsidiarity principle (Section III/ of Working Document 09)**

I welcome in principle the statement in III/ (in effect probably II) of the document that the application of the subsidiarity principle can be improved on during three different phases of the legislative process, namely:

- During the preparation of the Commission proposal;
- Following the presentation of the proposal before Parliament and Council; and finally
- After a legal act has been passed, but before it has become effective through a new competence chamber of the European Court of Justice.

A word to terminology: One should talk about **‘ex ante’ or ‘preventative’ monitoring and checking**, as the new judicial checks, too, should take place **before** the legal act becomes effective. ‘Ex post checks’ by the European Court refers to checks other than those in competence matters: these remain indispensable and will as in the past be possible only after a legal act has become effective. Unfortunately, the terms ‘ex ante’ and ‘ex post’ are sometimes used in a somewhat muddled fashion in our discussions.

I do not want to go into detail here as regards the first two 'axes' (Sections III a) and b)) of **political** monitoring and checking (during the preparation of the Commission proposal and as an 'early warning system' during the legislative process involving Parliament and Council; pp. 4-6 of Document 09). These Sections contain numerous good ideas and I will take part in their discussion within the Working Group. I especially welcome the thoughts on the early involvement of the national parliaments in the review of competences. We should also not forget here the regional parliaments with legislative competence.

I am sceptical, however, whether a substantial improvement in respect to competence monitoring and checking may be achieved over the present status quo by such a multiform 'early warning system' of political checks with no sanctions. There is a danger that the legislative process may be substantially prolonged, especially if one considers a future Union with 25 or more national parliaments. Problematic here is also that violations of the subsidiarity principle may often result not from the original Commission proposal but are incorporated only in the course of the legislative process.

While we should nevertheless seek to develop such procedures for political monitoring and checking ex ante, they are no substitute for quick and legally binding competence checks by the Court.

#### **IV. Court review ex ante by a newly to be established 'competence chamber' of the European Court (Section III/ c) of Working Document 09)**

##### **1. Preliminary remarks**

Document 09 on p. 6 rightly seizes on the idea of establishing, within the Court, a special 'Competence chamber' which would resolve quickly, on request, after the passing of a legal act but before it comes into effect (within two months?) any competence issues arising. In this way, the legislative process would not be held up. In case of a competence censure, the planned legal act would be dropped. If competence is confirmed – which as

experience tells us is the case in most instances – the legal act can come into effect quickly, with the competence question already having been decided definitively.

It is well known that this ‘French model’ based on the Conseil Constitutionnel has already found **a number of supporters**. Alain Lamassoure developed this proposal in his report on the delineation of competences, which the European Parliament accepted on 16 May 2002 (PE 318.651, 8.2). The contribution by Elmar Brok, Jacques Santer, Alain Lamassoure, Aloiz Peterle and others (Document CONV 213/02, 24 July 2002) recently called for the creation of such a competence chamber. I also signed this contribution because, during the deliberations of our Working Group, I have become increasingly convinced that quick judicial checks are the best solution in competence matters. It would be desirable if our Working Group made a recommendation to that effect in its final report.

## **2. Model of a ‘competence chamber’ at the European Court**

In my Working Document 6 of 9 July 2002 for the Working Group (pp. 5f.) I already outlined how such preventative review by a competence chamber of the Court might be structured. Mr President, since you are planning to incorporate in the final report of the Working Group sketches for treaty articles, I hereby include one such proposal for the preventative judicial competence review. These are basic formulations which require further consideration and specification.

### **Art. X 1**

- (1) Actions concerning Treaty violations in the passing of a legal act of the Union which are based on one of the following exclusively, namely:
  - Instances where the Union is exceeding the powers conferred upon it (previously: Art. 5 (1) EC-Treaty);
  - The non-observance of the subsidiarity principle (previously: Art. 5 (2) EC-Treaty);

-The non-observance of the principle of proportionality (previously: Art. 5 ( 3) EC-Treaty)

will be decided by a competence chamber of the Court.

(2) The competence chamber of the Court consists of:

- Five judges of the Court, to be appointed by the Court for a period of six years;
- Five judges or former judges of the highest constitutional court of their respective countries, to be appointed by the governments of the Member States by mutual agreement for a period of six years;
- The President of the Court, who would preside.

The make-up of the competence chamber should, in an appropriate way, reflect the geographic spectrum of the Member States in their entirety. Elections and appointments should take place on the basis of rotation. Details are to be regulated by the Statutes of the Court.

(3) Decisions by the competence chamber shall be made by simple majority.

**Note:** The size of the competence chamber of 11 members is a concrete proposal that could be varied. The chamber should be small enough to make decisions within brief stipulated periods (see below Art. X 3).

The admission of national members into the competence chamber is a matter of natural justice insofar as decisions on the delimitation of competences between the Union and its Member States are concerned. These should be decided together by judges from both sides.

An alternative to the appointment of national judges of constitutional courts could be the appointment of persons who have held highest political or judicial offices in the Member States, following the model of the French Conseil Constitutionnel.

## **Art. X 2**

(1) Actions can be brought before the competence chamber by:

- Any Member State of the Union;
- The parliaments of the Member States;
- A qualified majority of the European Parliament;
- The Committee of the Regions;
- Regions with legislative competence within the context of the provisions of the constitutions of the Member States.

- (2) Actions can be brought before the competence chamber within 30 days after the passing of a legal act by the legislative organs of the Union. A legal act will not become effective before the decision of the competence chamber has been delivered.

### **Art. X 3**

- (1) The competence chamber decides within sixty days after action has been brought. The details of the proceedings before the competence chamber are to be regulated by the Statutes and Rules of Court of the Court.

**Note:** It needs to be examined whether the Advocates-General should be involved in the proceedings before the competence chamber.

- (2) The decision of the competence chamber in respect to the causes of action named in Art. X 1 is final. This does not affect any other rights or competences of the parties or the Court.

**Note:** If the chamber upholds a competence censure, the legal act is void. If the chamber confirms the competence of the Union to pass the legal act, such act will become effective and cannot further be challenged on the basis of a competence censure. This does not affect the present a posteriori review of the Court in accordance with the general provisions.

In my opinion, such preventative court review would allow for the quick, simple and effective protection of the competence system of the Union. It would also meet the requirements of Nice and Laeken to strengthen the role of the national parliaments.

Mr President, I would appreciate it if you would incorporate such or a similar concept in your draft for the final report of the Working Group so that we can further discuss it.

Sincerely

(signed) Erwin Teufel