

Working Group I

Working document 13

Working Group I on the Principle of Subsidiarity

**Subject: Paper by Daniel Valtchev,
Member of Bulgarian Parliament,
to the Convention Working Group on Subsidiarity**

Members of Working Group I will find hereafter a paper by Mr Daniel Valtchev,
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Member of Bulgarian Parliament,
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The principle of subsidiarity has both political and instrumentary implications for the distribution of competencies between the Member States and the Union. Its political dimension stems from the need to tackle democratic deficit, strengthen the link between the citizen and the decision-making authority. Answering the public need to take decisions concerning EU citizens at the closest possible level, when formulating the subsidiarity principle Article 5(2) of the Treaty subjects the choice of level of competence to a utilitarian test on whether shared objectives could be better achieved at European level or national.

Apart from political considerations underlining the principle of subsidiarity, it has instrumentary significance for establishing the legal preconditions for avoiding democratic deficit.

Because of the political nature of the issue of subsidiarity the rethinking of this specific and legalistic conception must be situated within the more general framework of the changing EU polity, of choosing one or other vision for the future of Europe. Subsidiarity is part of the more general problem – the discrepancy between the two conceptions for Europe – one arguing for stronger role of national governments and parliaments (supported by the so-called sovereignists) and the other, which demonstrates a more federalist tendency (the so-called federalists). The debates so far show that the latter thesis has larger support and a Union based on the federal model is preferred. The EU will be able to act as a single entity in foreign and monetary policy, and its citizens will enjoy common fundamental rights.

Positive is the idea for wider application of the Community method, which forms the very essence of the integration mechanism and should be applied in balance with the forms of intergovernmental and/or interparliamentary co-operation in areas, which require support from the Member States. The delimitation of competencies on European and national level should not lead to deprivation of the Union of some of its competencies and to “re-nationalisation” of certain policies. The principle of gradual transfer of competencies from national to community level should be maintained.

There are two approaches for regulating the subsidiarity principle in the future Treaty of the European Union:

- the first is to maintain the present wording and to keep subsidiarity only as a general guiding principle, with which EU institutions will have to comply when performing their functions – i.e. beyond the powers allocated to them, the institutions may intervene only if and insofar the Member-States alone are unable to achieve the objectives of the proposed action.
- the second approach is to provide subsidiarity with detail and even casuistic regulation in the new Treaty.

We can readily find arguments supporting both approaches: The first allows for greater flexibility when applying the subsidiarity principle, gives possibility for assessment on a case-by-case basis and thus - greater chance for making the right choice for competence. This is extremely important since the subsidiarity principle stems from the aims of the Union proclaimed in Article 2 of TEU. Its introduction created the legal preconditions for taking the decisions that affect EU citizens at the level closest to them. This flexibility, however, may assume a negative touch, which would be an argument in support of the second approach (precise delimitation). Too broad scope for interpretation inevitably raises the question for the assessment and the reasoning behind choices of political discretion. This problem was posed by some representatives of the institutions heard by the working group: despite traditional criticism of the current system referring to the excessive intervention of the EU in some areas, quite often the Member States alone relinquish their competence and leave the question to be dealt with on Community level.

The reasons behind this could be found in the unwillingness of the national government or parliament to take up the negatives of an unpopular decision. In such cases political discretion would drift away from the need to take decisions at the closest possible level and trigger public alienation. And while in view of maintaining the flexibility of the Community system, a "catalogue" of Union competencies would be inadvisable, overextension of the "grey area" is the underlying reason for democratic deficit and may jeopardise the achievement of Union objectives by separating its institutions from its citizens. Another argument in favour of the approach for a more precise regulation of the principle of subsidiarity is the mandate given to the Convention. The Laeken Declaration asks the Convention to look into the question of establishing a more precise delimitation of competence between the European Union and the Member States, and mechanisms for creating more democracy, transparency and efficiency. Even if the new Treaty gives preponderance to one of the two conceptions of the Union, the maintaining the general nature of the provisions on subsidiarity will fail to offer radical changes and improvement in the institutional framework.

The answer to the question of subsidiarity cannot be separated from the question of control over its application. The control mechanism should include both "*ex ante*" and "*ex post*" control. "*Ex ante*" control may have both legalistic and political dimension: legal review before the adoption of the respective provision, coupled with political control providing assessment and solutions for possible disputes over the level of regulatory competence for the issue in question. A possible form for such political control is a parliamentary committee on subsidiarity, composed of MEPs and national parliamentarians. In case this idea is supported, the establishment of this controlling body must be taken up very responsibly and its working methods defined exhaustively, in particular the conditions and terms of referral and decision making, as well as the character of its rulings must be laid down in the Treaty in a manner excluding the possibility of unnecessary delay or even blocking of the legislative process. Therefore it is advisable to consider the idea for placing "*ex-ante*" control within the framework of existing institutions. The idea for having a "Mr or Ms

Subsidiarity” within the Commission is interesting but however such measure might be insufficiently radical and perhaps incapable of improving upon the monitoring mechanism for compliance with the principle. The emphasise should be on the role of national parliaments – to introduce prior consultations on proposed legislative actions with national parliaments and more possibilities for direct influencing the decision making process when non-compliance with the principle is established.

A suitable working mechanism for “*ex ante*” political control for monitoring the application of the principle of subsidiarity is the key for striking the balance between extended application of the community method and strengthening the role of national parliaments.

National parliaments may be involved in “*ex post*” control as well. In this respect it is essential to provide for a possibility for national parliaments for referral to the Court of Justice in case non-compliance with the principle is established, and also – in case the “parliamentary” model of “*ex ante*” control is opted for – when in prior consultations the national parliament has given a negative opinion.

The *ex post* judicial review should continue to be carried out by the Court of Justice.