

Working Group I

Working document 14

Working Group I on the Principle of Subsidiarity

Subject: CEMR position paper

Members of Working Group I will find hereafter a paper by Dr Heinrich Hoffschulte, First Vice-President of the Council of European Municipalities and Regions (CEMR)

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CONVENTION ON THE FUTURE OF EUROPE

WORKING GROUP ON SUBSIDIARITY

CEMR POSITION PAPER

**proposed for the meeting on 10 July 2002 in Brussels by Dr Heinrich Hoffschulte,
First Vice-President of the Council of European Municipalities and Regions (CEMR)**

One of the major objectives of the forth-coming reforms of the European Union is to ensure clarity regarding the competences of the European Union and its organs on the one hand and of the member States with its sub-divisions on national, regional and local levels on the other. Clarity is also be a vital prerequisite for greater transparency and proximity to ensure understanding and identification by Europe's citizens with their Union.

Clearly, the principle must be promoted that the European Union should exercise only the competences stemming from treaties (i.e. those which were conferred on the European Union by conventions signed by the member States) and that all other responsibilities remain in principle exercised by the member States, their regions and municipalities¹.

Furthermore, regulations through lists of competences² in treaties or in a new constitutional treaty would run a major risk of inflexibility and exercise pressure to amend prior treaties in the event that the community's requirements changed. Such a risk would be unavoidable, as has been raised several times by the Convention³.

Discussions within the Convention consequently asserted the **principle of subsidiarity** which would acquire capital importance, should lists fail to create reasonable limits⁴. The application of the principle of subsidiarity is based on the principle of citizen proximity which is emphasised in Article 1 of the Treaty of the European Union in which all decisions must be taken 'as close as possible to the citizen'⁵. The wording whereby all competences remains at a lower level in respect (insofar as they were not conferred by means by treaty, constitution or statute immediately above), stems from the principle of subsidiarity⁶.

¹ V. Giscard d'Estaing stated at the Seville European Council meeting on 21 and 22 June 2002: "With regard to the option of drawing up two lists, one of the exclusive competences of the Union, and one of the competences of the member States, the convention appears to have achieved a consensus in preference of asserting that the competences of the Union result exclusively from treaties and that all other forms of competences are those of the member States".

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³ Cf. "Eléments de Langage du Rapport Oral présentés par Président Giscard d'Estaing" referred to above.

⁴ Such lists are an integral part of the constitutions of central and eastern European countries. For example, this is the case of the new constitution of the Russian Federation. In these cases, however, the initial position is one of former centralism with an attempt at gradual decentralisation ("top-down approach"). In contrast, the European Union applies a transfer of competences from the bottom upwards ("bottom-up approach").

⁵ European Union Treaty, article 1: "as close as possible to the citizen".

⁶ Thus, the fathers of the German 1949 "Basic Law" (constitution) admittedly avoided the term 'subsidiarity', which at the time was rarely used. They did, however, devise the principle of municipal autonomy in the same meaning as subsidiarity by using the wording "Allzuständigkeit" (complete competences) which has greater authority over the next highest level (i.e. competences exercised by the Länder or the federal government). Article 28 of the Basic Law: "Communities must be

Where lists are of little use, the principle of subsidiarity becomes increasingly important to limit competences and tasks. The current debate on the future of the European Union should therefore address:

- **strengthening the principle of subsidiarity**
- developing suitable criteria to **define, add precision and apply** the principle of subsidiarity
- mechanisms to ensure **political and/or legal checks and balances** to guarantee compliance with the principle of subsidiarity.

In its struggle to strengthen and guarantee local autonomy within the Council of Europe and the European Union, the Council of European Municipalities Regions (RGRE / CEMR / CCRE) has long been committed to strengthening the principle of subsidiarity. These activities result in the establishment of appropriate bodies and organs to uphold these rights. These include “the Congress of Municipalities and Regions within the Council of Europe with its two chambers for municipalities and regions, as well as the Consultative Committee of Municipalities and Regions to the European Union Commission, the predecessor of the current “(Consultative) Committee for local and regional authorities”, as per articles 263 to 265 of the European Union Treaty⁷. However, the main result of this work on the issue of subsidiarity on a European scale was the Council of Europe Charter of Local Autonomy in 1985-86. This charter, signed by 15 EU member States and ratified to date by 13⁸, with all candidate nations for EU membership having ratified it recently, can now be justifiably considered part of the *acquis communautaire* of the European Union.

In this context, the paramount importance of asserting the principle of subsidiarity, particularly for eastern and central European countries should be noted. There is an increased feeling in eastern and central European countries, especially in the run-up to full membership of the European Union, that they had only just come out of Soviet-inspired centralism and thus a greater fear of losing reacquired freedom to the far too centralised structures of the European Union. A clear objective of subsidiarity, enshrined in the Constitutional Treaty, to protect municipalities and regions which had recently become democratically autonomous, could assuage rising fears from current discussions within the European Union on clarifying competences. With the principle that ‘decisions must be taken as closely as possible to the citizen’ (article 1 of the European Union Treaty), subsidiarity is a major factor in creating confidence about a decentralised autonomous future within the European Union, in particular for recently established democracies, most of which are far from implementing basic democratisation objectives, but which all have without exception committed themselves to the principle of strong local and regional autonomy. They have all signed and ratified without exception the Council of Europe’s Charter of Local Autonomy, broadly transposed its provisions in their domestic legal systems and passed the corresponding domestic laws.

As an association representing some 100,000 local and regional authorities in the European Union member States (and now covering 30 nations within the Council of Europe), the CEMR⁹ speaks for elected, democratic local authorities and regions. In contrast to private organisations known as ‘non-governmental organisations’ (NGO’s), the CEMR represents

guaranteed the right to regulate on their own responsibility all the affairs of the local community within the limits set by law...”

⁷ Formerly article 198, paragraphs a to c of the Maastricht Treaty.

⁸ Only France and Belgium have yet to ratify the charter, although the procedure has started.

⁹ Cf. Position Papers of the CEMR drafted and submitted to the ‘European Union Convention of the Future of Europe’ meeting on 25 June 2002.

various administrative bodies corresponding to “levels” or “spheres of government”¹⁰. In the four-tier Europe (European Union, national member States, regions and municipalities), these levels represent the authorities, democratic policies and the administrative bodies which are the closest to citizen.

If the European principle of subsidiarity and the European Union’s fundamental rules are to be observed, this basic level must not be placed on a par with NGO’s but must be considered a partner to carry out public missions and should be involved in the decisions not just of nation States but also of the Union. The CEMR has noted with satisfaction the assertion by the European Parliament which emphasised that a constitution for the European Union could no longer overlook the role played by regions and municipalities as ‘specific partners’ in the European construction, because they contribute not only to the success and effectiveness of EU policies but also to putting citizens more in contact with European integration¹¹.

In the UN, recognition of the democratic and state legitimacy of municipalities and regions has increasingly emerged since the Habitat II conference in Istanbul (1996), as shown by the issue of ‘government at all levels, including local authorities’¹². It is time that the European Union also incorporates in clear wording an approach in which municipalities and bodies should be acknowledged as their ‘closest partner’, not just as a means of implementing European policy and legislation¹³.

A. Strengthening the principle of subsidiarity

The CEMR indicated various options to strengthen the principle of subsidiarity in drafting a new European Union treaty or constitution, which has been defined to date in particular in article 5, paragraph 2 of the EU treaty. The proposals are as follows:

- integration of the EU commitment to greater proximity as stipulated in article 1 of the EU treaty in the new constitutional treaty, whereby ‘decisions must be taken as close as possible to the citizen’. Municipalities are convinced that proximity is above all a matter for the bodies of democratically legitimate municipalities and regions in application of European law
- integration of the Nice Charter of Fundamental Rights, in particular the wording of the preamble which includes the relationship of the European Union and its bodies with member States, in particular their ‘national, regional and local forms of organisation’. The EU cannot overlook this highly important standard in a constitutional treaty if it wants its commitment to proximity and subsidiarity to remain credible
- one of the EU’s underlying principles is the authority of democracy. This also includes a guarantee of democratic autonomy for the citizens of local and regional authorities. The CEMR therefore proposes applying the principle of local democracy in treaties according to the meaning of subsidiarity by a specific commitment to the principles of the Charter of Local Autonomy, either by drafting a separate chapter in the constitutional treaty including the main points of the Charter or by

¹⁰ Admittedly, the concept of a four-tier Europe suffers from the criticism that the third, autonomy at regional level, may be lacking. In contrast, every State has a long tradition of municipal unity.

¹¹ Lamassoure report to the European Parliament.

¹² Cf. among others, article 32 of the Habitat agenda

¹³ Cf. No. 12 of the Istanbul declaration at the UN Habitat conference in 1996: Recognising local authorities as our closest partners”

- enshrining such in European Union constitutional law by referring to the Charter, following the example of Article 6 of the EU treaty (formerly article F of the Maastricht Treaty) which incorporated the Council of Europe Human Rights Convention in treaties
- considerable strengthening of the principle of subsidiarity could be ensured by an amendment to the current article 5 of the EU treaty on subsidiarity to add municipalities and regions to the member States already mentioned. This would match the wording in the preamble to the Charter of Fundamental Rights referred to above and would introduce the Charter in concrete terms in the definition of article 5. This would require the EU and its bodies to take account of the fact that the competences of member States have priority in their specific activities not only at national level but also at local and regional levels, and that the EU should restrict itself to framework or supplementary laws if the principle of subsidiarity is to be rigorously observed.

B. Criteria for defining, ensuring precision and applying the principle of subsidiarity

The CEMR has also devised proposals for wording that would relate to current treaties to ensure a clearer definition of the principle of subsidiarity:

- we have already mentioned the advantages of greater precision by including municipalities and regions with States in article 5 of the EU treaty
- the same result was be ensured using the wording in the preamble (see above)
- greater precision in the principle of subsidiarity could be obtained through the principle of proportionality as given in article 5, paragraph 3 of the EU treaty¹⁴. In all cases, the rule of proportionality should be included in the constitutional treaty, given that it is one of the vital factors in subsidiarity. However, it should be worded with greater precision in my opinion. For example, ‘the measures of the Union... must not exceed the requisite measure to ensure the objectives of this constitutional treaty *or in its legal*¹⁵, *organisational*¹⁶ and *financial*¹⁷ intensity, or in its duration¹⁸
- the obligation of substantiation¹⁹ stipulated in the Amsterdam protocol for actions undertaken by the community also includes the obligation of measurement with a view to transparency and possible controls. The obligation should therefore be enshrined in

¹⁴ With regard to the principle of proportionality in interventions, cf. the European Charter of Local Autonomy, in particular article 8, paragraph 3 concerning the State control. The principle applies in particular to cases of intervention in local matters.

¹⁵ The Amsterdam protocol to apply the principles of subsidiarity and proportionality already describes the legal limits resulting from these principles in No. 1: “any action of the Community shall not go beyond what is necessary to achieve the objectives of the Treaty...”.

¹⁶ The Amsterdam protocol formally stipulates that the administrative consequences resulting from actions and constituting administrative burdens must be taken into account. Cf. No. 9.

¹⁷ Cf. No. 9 of the Amsterdam protocol, which stipulates the Commission’s obligation “to take duly into account the need for any burden, whether financial or administrative, falling upon the Community, national governments, local authorities, economic operators and citizens, to be minimised and proportionate to the objective to be achieved”.

¹⁸ Cf. with regard to time limits, the “protocol on the application of the principles of subsidiarity and proportionality” instituted by the Amsterdam Treaty, No.3: “Subsidiarity is a dynamic concept... It allows community action within the limits of its powers to be expanded where circumstances so require, and conversely, to be restricted or discontinued where it is no longer justified”.

¹⁹ Cf. Amsterdam protocol on subsidiarity and proportionality, Nos. 4 and 5: “the reasons for concluding that a community objective can be better achieved by the Community must be substantiated by qualitative or, wherever possible, quantitative indicators...”.

the new treaty as a vital component. The Amsterdam protocol specifically stipulates that proposals by the Commission (which must be substantiated in detail) must also be monitored by the Parliament and Council for compliance with article 5 of the EU treaty²⁰. The protocol goes as far as to require Parliament and the Council to use the same instruments of transparency and measurement when they themselves submit amendments or proposals during discussions²¹. This confirms the idea that transparency enables genuine control of compliance with the principle of subsidiarity and proportionality.

- This precision would prevent too many regulations, would restrict in principle the Union to framework legislation and would also limit economic and financial intervention to the bare minimum. In parallel, it would lay down criteria to terminate EU intervention and actions²² within the framework of specific discussions on re-nationalisation.
- With regard to additional competences, ideas about proportionality are also part of the principle whereby current competences at national, regional and local levels can be better observed if the European Union truly restricts its actions to “complementarity”. The Union already frequently intervenes in a complementary manner in specific fields to reduce deficits or financial omissions without changing any of the original aspects of national, regional or local competences. Similarly, the instrument of ‘community missions’ used by some nations²³ is such a complementary approach which does not affect the original competences or for which legislation should ensure that corresponding EU standards should be restricted to general principles²⁴. Furthermore, this principle must apply before the principle of subsidiarity for all mixed competences and should therefore be formally enshrined in the treaty.
- In the opinion of the CEMR, there is another element adding precision to the principle of subsidiarity: the principle of relation (or ‘connexity’), as encapsulated in the saying “he who pays the piper calls the tune”, which perfectly describes the situation. However, this is also a method of political self-control for UE decision-makers.

C. Political and/or legal control mechanisms to observe the principle of subsidiarity

The CEMR supports requests appropriate means to monitor compliance with the principle of subsidiarity as also expressed elsewhere, in particular by the Committee of Regional and Local authorities, to establish a political body of legislators to settle disputes arising from compliance with the subsidiarity principle. It is clear that municipalities and regions should have the possibility of taking part (for example, through the Council of Regions) in the spirit of partnership and as legitimate representatives at their level. Such a political body could follow the Austrian example of a consultative body consisting of representatives of the EU member States and of regions and municipalities and in which local and regional authorities

²⁰ Cf. No. 11 of the Amsterdam protocol: “... the European Parliament and Council shall, as an integral part of the overall examination of Commission proposals, consider their consistency with Article 5 of the Treaty”.

²¹ Cf. Amsterdam protocol No. 11, phrase 2.

²² Cf. Amsterdam protocol (No. 3 among others) for limits laid down.

²³ Cf. Article 91 of the German constitution which states that the federal government cooperates in specifically listed fields to complete assignments by the Länder when these assignments are important to the entire nation and federal government cooperation is required to improve living conditions.

²⁴ Article 91, paragraph 2 of the German constitution formally states that in such instances, the community’s assignments must be stated by a law ‘with approval from the Federal Chamber (chamber of Länder) and that the law must include ‘general principles for completion’.

exercise a veto when EU measures imply a cost for them. As the institutional spokesperson for regions and municipalities, the Council of Regions could defend their interests.

The CEMR supports the request for a right to continue the CoR before the European Court of Justice for all cases where its right of participation and consultation in the legislative process (which requires a greater guarantee in the future) or when implementation actions or programs have been breached.

In addition, it should also be mentioned that regional authorities must make it their own responsibility to defend the principle of subsidiarity by referring such matters to domestic judicial authorities insofar as such authorities exist at a national level. In cases where this would not be conclusive, they should be able to refer the matter to the European Court of Justice (possibly by means of an instrument to transfer the decision or filing of non-acceptance if domestic courts object to the referral).

However, practice in member States²⁵ shows both that reconciliation competences at European Union level and a very often lengthy procedure through judicial bodies offer insufficient protection against additional burdens and the financial ramifications of European Union decisions.

The most effective means against burdens of this type and especially against “European compromises paid for by municipalities (regions)” can be to enshrine this principle whereby decisions and actions with financial ramifications for municipalities and regions are tolerated only if decision-makers guarantee financial resources for the (extra) cost at the same time²⁶. Such a measure²⁷ will comply with transparency and will serve to ensure political self-discipline whilst having a preventive effect because it goes against the extension and relocation of assignments²⁸. The principle of relation states the same thing: “he who orders must pay”²⁹ or at least guarantee financing.

In conclusion, it can be said that:

The principle of subsidiarity must be formally enshrined in treaties, if it is intended to ensure flexible limits to competences in the subsequent development of the Union, and also to correct limits as situations and assignments change.

The CEMR has submitted several proposals to ensure sufficient inclusion in a treaty and is available to Convention members and their working groups to discuss the issue.

²⁵ Cf. the decision of the Deutscher Städtetag dated 10 April 2002 with regard to the financial reform of municipalities which prompted the decision to include the principle of relation in the German constitution and which stated that ‘it should therefore be possible to prevent the Bundestag and the Bundesrat (the upper and lower chambers of the federal parliament) from taking decisions to the detriment of municipalities, as is very often the case’. Cf. *Der Städtetag*, June 2002, page 44.

²⁶ The principle was integrated, albeit unsatisfactorily, in the Charter of Local Autonomy, in which article 9 states that “the resources of local authorities must be in proportion to... proven competences”.

²⁷ With regard to the various models possible to enshrine the principle of relation, see the summary presentation by G. Witte on ‘relation in the Länder constitutions’ in *Der Städtetag*, June 2002, page 24 et seq.

²⁸ Cf. “principles and groundwork of the Städtetag for financial reform of municipalities”, 10 April 2002, referred to in *Der Städtetag*, page 43 with regard to the request to include relation in the constitution owing to the adverse experience which added a large number of new burdens.

²⁹ Cf. No. 12 of the Report by Commissioner Ana Palacio dated 10 June 2002 for the EU convention (attached to the agenda of the Convention for the 24/25 June 2002 hearing, appendix V, page 12-14), with regard to the principle of relation, the English wording ‘principle of relation’ (for ‘relation’) is a poor translation although the description of the content is exact.