

Working Group 1

Working document 17

Working group I « on the Principle of Subsidiarity »

**Subject: Letter by Mr. Slavko Gaber Member of the European Convention
- Remarks on the WD "First Proposals for the Conclusions."**

At the request of Mr. Slavko Gaber. members of the Working group will find enclosed a copy of the letter he has addressed to Mr. Mendez de Vigo.

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Ljubljana, 5 September 2002

Working Group I (Subsidiarity)

To Mr. Iñigo Méndez de Vigo, Chairman of the Subsidiarity Working Group

Remarks on the Working Document »First Proposals for the Conclusions«

Dear Mr. Méndez de Vigo,

Allow me, first, to congratulate you and the secretariat for the efforts invested in the preparation of the final document.

Before presenting the proposals for the conclusions, I would like to bring to your attention other issues related to the control of subsidiarity, such as the distribution of competences, and the role of national parliaments.

The principle of subsidiarity is a political principle and, therefore, also the control should be political and occurring prior to the adoption of the act. Judicial control can only be carried out *ex post* to avoid the court being involved in the legislative process. The only exception is the process of adoption of international agreements known both to the Member States and the candidate countries as well as to the EU. In addition to the existing institutions entitled to institute a proceeding before the Court of Justice (after the adoption of the act since judicial control is carried out *ex post*), the national parliaments and the Committee of the Regions should also be included.

The principle of subsidiarity is closely connected with the distribution of competences between the Member States and the EU, and with the role of national parliaments in the EU legislative procedure, particularly in terms of scrutiny over the government, which raises the question of subsidiarity.

It is the unclear distribution of competences which raises the issue of subsidiarity. At this stage of integration, it is still too early to speak about a comprehensive catalogue of competences. However, the Treaty on EU should define the types of competences more precisely (at least the ones that are widely agreed upon). In fact, the question of subsidiarity only appears in relation to shared competences, namely how and to what extent should the EU function and which instruments it should use.

Furthermore, the role of the national parliaments in the EU legislative procedure should be enhanced, particularly with regard to scrutiny over the government. Obviously, the definition of such control is within the domain of every Member State's national legislation, meaning that every country is given a free hand. The fact is that such scrutiny is efficiently implemented only by half of the Member States' national parliaments.

Following the logic of the proposed text for the conclusions of the working group, I will now present some of my points and comments:

1. I agree with you that the proposals of the Group should focus on:

“(a) reinforcing application by all the institutional players of the principle of subsidiarity” and
“(b) setting up an “early warning system”, enabling national parliaments to participate directly in monitoring compliance with the principle of subsidiarity”.

In particular, I am supportive to the idea of creating an “early warning system”.

With regard to the idea of “(c) creating a subsidiarity chamber within the Court of Justice” (given the fact that subsidiarity questions have very rarely appeared before the Court of Justice), I do not think that there exists a need for such a special mechanism. Allow me to add that my doubt relates to my basic assumption that the subsidiarity issue is above all a political issue and far less a legal one. Moreover, in the area of politics, it is obviously more symbolic than real, and what we are supposed to tackle is the reality of this symbolic issue. In other words, citizens feel that the EU is interfering in matters where it should not and that it is doing so in a way that it should not. National parliaments and governments – due to procedures that are too complicated and non-transparent enough – are reinforcing that feeling. We should therefore try to cope with the diminishing legitimacy of the EU decision-making.

2. In relation to “(a) reinforcing application by all the institutional players of the principle of subsidiarity”, I would like to support the idea of the “subsidiarity sheet” which would enable EU institutions as well as national governments and parliaments (in certain countries also regional authorities) to tackle the problem of subsidiarity more easily.

On the other hand, I do not see the need for “a “Mr or Ms Subsidiarity” or a Vice-President specifically responsible for ensuring the relevance and coherence of these justificatory aspects”. The added value of such an “institution” at the EU level – the problem we are supposed to address is the transparency and eligibility to react at the national level – is, to my understanding, doubtful. A special Commissioner would mean unnecessary duplication of functions since the Commission already has an efficient legal service which has to legally examine every question of subsidiarity and determine whether the proposed act falls within the competence of the EU and does not interfere with the competence of the Member States.

For the part on the “subsidiarity sheet”, I also support the idea that “the Group might recommend certain amendments to the Protocol on subsidiarity currently annexed to the Treaty”.

A subsidiarity sheet has to be prepared by the Commission which is the only institution to have legislative initiative and should monitor the act since the stage of proposal. Every proposed act, together with the subsidiarity sheet, should be sent simultaneously to the governments, the European parliament, the Council and to the national parliaments; this should be regulated by the Protocol on subsidiarity.

3. With regard to “(b) setting up an "early warning system" allowing national parliaments to participate directly in monitoring compliance with the principle of subsidiarity”, I agree that the Group could propose:

3.1. “initiating examination of compliance with the principle of subsidiarity as from the phase at which the legislative act is devised. The principle of subsidiarity would be applied all the better the earlier it is taken into account in the legislative process.” In this respect I plea for a new – properly reorganised and strengthened with a permanent secretariat – role for COSAC. COSAC and before that the EU Committees in the respective national parliaments (if so decided, also national parliaments could do it) should have the opportunity to discuss “the Commission annual legislative programme”, which should also be presented to national parliaments.

The "Congress of the People of Europe", that was proposed by the Chairman of the Convention, is not an appropriate place to discuss subsidiarity. Such a Congress could however be a proper forum for general discussions, for example “State of the Union”.

3.2. “creating a new *ex ante* political monitoring mechanism involving national parliaments.” I agree that an early warning mechanism should consist of Commission directly addressing to each national parliament, at the same time as it does to the Community legislator (Council and European Parliament), its proposals of a legislative nature”. This would enable to “set a period of time, before the legislative procedure proper is initiated, during which each national parliament would have the possibility of issuing a reasoned opinion or detailed comments regarding compliance with the principle of subsidiarity by the proposal concerned”.

While agreeing with the proposed arrangement of an “early warning system”, I would like to propose an additional mechanism which is in line with a number of discussions that took place in our working group. What do I have in mind? When you, Mr. Chairman, are proposing that at a certain stage “the legislator would have to hold a debate specifically devoted to examining the contributions received from national parliaments on the question of subsidiarity in order to take them into account and to resolve the objections expressed (“prior debate”)”, my proposal is that the core COSAC should participate in this “prior debate”. With “core COSAC” I have in mind the presidents of EU committees in the respective national parliaments, 25-27 people altogether. On one hand, they should be appointed by their committees to present the view of the committee. On the other hand, they are going to report back to their national parliaments. Having set up a permanent COSAC secretariat - which was proposed several times at the Convention and in the working group- no additional structure would be needed. Within the working group, we should consider whether there would be any other consequences (for example, delaying the proposal for a certain period of time) besides the already known re-examination of the proposal by the Commission and legislator.

Core Cosac would be involved in this prior debate a few times per year, for example, whenever more than a certain number of national parliaments or those coming from nations with more than a certain number of votes in the Council, believed the proposal to be in contradiction with the principle of subsidiarity.

I am proposing this reconsideration because I believe that the European legislative proposals would thus be more in line with the principle of subsidiarity. It would also better ensure that the concerns that might be either rightly expressed or just serving as an excuse for not taking a fair share of the responsibility for EU politics, diminished. Thereby we would add an important element to the picture of legitimisation of EU action without “compromising legal certainty” and at “the same time, by obviating the creation of a new body” and making “institutional architecture and the legislative procedure more cumbersome or the further development of a weighty bureaucracy”.

Sincerely,

Slavko Gaber