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on the subject

SUBSIDIARITY IN THE COMMUNITY

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A. The existing system

1. What should we take subsidiarity to mean? How should it be treated in the pact, or act, that is to redefine the key rules for the structure, working and future development of the European Union?

A first answer is that the idea of a union whose action is subsidiary with respect to that of the Member States has been an inherent feature of European integration as it has occurred to date. A principle of this kind was latent in the original design of the founding fathers, who wished the rebuilding of the Europe that emerged from the destruction of the Second World War to be a great shared enterprise undertaken with the continuous and fruitful contribution of all the participating countries. Significantly, the new text of Article 23 of the German constitution (the so-called Europa-Artikel) refers expressly to the principle of subsidiarity. The Union must comply, it is one of the conditions of Germany's participation in the integration process inaugurated by the Maastricht Treaty

In fact, with the Maastricht Treaty the principle of subsidiarity, previously recognized only for the environment (Article 130r.4 of the EEC Treaty), was given general force. The three paragraphs of Article 5 of the EC Treaty define the principle and its scope. The Community (the Union) is required to act within the limits of its powers and of the objectives assigned to it by the Treaty and not to go beyond what is necessary to achieve these objectives (paragraphs 1 and 3). For matters not falling within its exclusive competence, the Community is to take action, in accordance with the principle of subsidiarity, only if the possibility of the objectives of the action being achieved sufficiently (*de manière suffisante*) by the individual Member States can be excluded, owing to the scale or effects of the proposed action. In such cases Community measures are deemed to be more effective and justified.

The system set out in Article 5 has given rise to fierce debate. Among the Community institutions, the Commission was the first to address the question of the criteria needed to apply its provisions. Subsequently, it was addressed in an Interinstitutional Agreement and then in a protocol (no. 7) annexed to the Amsterdam Treaty.

What conclusion can we draw from the facts in our possession?

2. The principle of subsidiarity was seen by the authors of the Treaty in two ways:
- a) as the principle governing the distribution of competences between the Community and the Member States: conceptually speaking, the Community's scope for action is subsidiary with respect to that of the Member States;
 - b) as the principle governing the exercise of Community competences and thus concerned with the moment in which they are translated into acts. In this second sense the principle of subsidiarity is closely bound up with that of proportionality. Once the conditions for the Community to take action are satisfied, it must not go beyond what is necessary to achieve the objective in question.

Article 5 implicitly refers to the principle of subsidiarity in the first of the two senses mentioned above insofar as it refers to competences, as they are abstractly divided between the Community and the Member States, and expressly uses the same principle in the second sense of regulating and conditioning the manner in which the Community exercises the competences assigned to it:: Community action must be justified as better adapted to the needs of the case in question by comparing, necessarily *ex ante*, the results it would produce with those that would follow from unilateral action by the individual Member States.

The fact is that the reference to the principle of subsidiarity in paragraph 2 of Article 5 is intended to introduce a general constraint, a rule whereby it is presumed that the action of the Member States is sufficient and adequate. The Community must therefore overcome this presumption when giving its reasons for intervening. Otherwise, it is prevented — again on grounds of subsidiarity — from using a power it has been granted by the Treaty.

3. The Commission, in the absence of a classification or any other criterion laid down in the Treaty for distinguishing between the Community's exclusive competences and those that are concurrent or shared, has put forward its own view, aimed basically at enlarging the first category of competences, for which Article 5 excludes application of the principle of subsidiarity. The Commission defines the notion of exclusive competence on the basis of two related elements: the first functional, the Community's obligation to act, and the second, material, the consequent situation of the Member States, which are deprived of the right to intervene unilaterally. Starting from this premise, the Commission has built blocks of exclusive competences around the four freedoms of circulation and certain common policies that are indispensable for or follow from the

creation of the Single Market (trade policy, general competition rules, common organization of agricultural markets, the conservation of fishery resources, and essential aspects of transport policy). Apart from this, the Commission sees the principle of subsidiarity as having a dynamic capacity that does not restrict Community action within a rigid framework but allows it to be increased or reduced or even sidelined, depending on whether the conditions in which the Community finds itself having to operate impose one or another of these solutions.

4. The Commission, as the body with the power of initiative in preparing legislation, is required to give the reasons for its proposals in compliance with Article 5 of the EC Treaty. Among other things, the conformity of these reasons with the principles of necessity, subsidiarity and proportionality is then assessed by the European Parliament and the Council. If these bodies, which have the decision-making power, raise objections, the Commission amends its proposals.

Compliance with the principle of subsidiarity must in any case be subject to judicial review, insofar as it is a principle that is binding on all the Community institutions. It is unlikely to be invoked in an action for annulment brought by one of the institutions to censure acts issued by another. The Community institutions should nonetheless apply self-discipline and check whether their acts comply with the rules of subsidiarity at the time they adopt them. An action for annulment is less unlikely (and in fact there have been some instances) where a Member State has been outvoted in the Council. In such cases the Court of Justice recognizes the institutions' right to exercise discretion and tends to annul contested acts only in the presence of manifest errors in the assessment of the conditions justifying Community action.

B. The outlook for reform

1. The European Convention is called upon to see how the principle of subsidiarity can be sanctioned in a basic text of a constitutional nature. Of course, the Union we want in Europe is not a super state, nor is it destined to become one. Compatibly with its peculiar institutional mission, it is open, however, to the values — not only of democracy but also of constitutionalism — that are fostered by the legal systems of the Member States. The principle of subsidiarity is one of these common values, as is testified by two notions: the minimal state and the decentralized state. In the first case we have the state that enhances individual freedom and initiative to the utmost, without this leading to unbridled *laissez faire*; in the second we have the state in which power tends to move to the territorial levels closest to citizens, but not to such an extent that the centre is inevitably anemic and the periphery smothered by too many tasks. In both cases each level of power is

subsidiary with respect to others and, ultimately, with respect to individual citizens, who must be guaranteed an autonomy that protects them from the interference of an omnipresent state, but which they must know how to make good use of, in the collective interest as well as their own.

These concepts of subsidiarity come from the systems of the Member States, but they have obvious implications for European integration. The idea of the minimal state has been realized in the new forms that have seen the collapse of the obstacles to the fundamental freedoms of transnational circulation and the development of that universe of individual rights embodied in the Single Market: rights that have been placed out of reach of interference by the public authorities and protected by effective legal guarantees. The Nice Charter of Fundamental Rights and citizenship of the Union complementing national citizenship are natural developments in a community that embraces and protects individuals and not only the states participating in it.

There thus exists abundant raw material for a bill of rights, to be consecrated in the act that will refound the Union, and this act must also contain the concept of subsidiarity, as a rule of a decision-making system that is as little removed as possible from citizens and that can serve as the basis for the division of competences, i.e. of powers and their exercise, among the various levels of government (the Union, the Member States and the regions).

2. The great variety of approaches to subsidiarity in the Community legal system and the difficulty of formulating the principle and putting it into practice have been due above all to the fact that the competences of the Community, both exclusive and not, arise, in a manner of speaking, from an archipelago of legal bases, which differ according to the objectives of the treaties and the actions required to achieve them and according to the matters to be regulated. What is needed, therefore, is a classification of the competences in general categories that would conform with the rules of subsidiarity, ensure the necessary clarity and certainty and be enacted in primary legislation and not left, as now, to the nonetheless indispensable interpretative role played by the courts or to interinstitutional agreements. The classification will be all the more effective in operational terms if it is accompanied by the introduction of a precise hierarchy of legislative acts and the redefinition of the decision-making instruments, matters on which there now appears to be a broad consensus.

The classification of competences should be aimed, it is worth stressing, not at overturning or compromising the relationship that has developed between the competence of the Community and the guaranteed scope of the intervention of the Member States but at placing it on a presumably sounder and more rational footing.

3. Useful indications regarding the distribution of powers within the Union are to be found in the recent resolution of the European Parliament (2001/2004 (INI)) adopting the report presented by Alain Lamassoure. The document outlines a “constitutional framework” of competences, divided into the three following categories:

- a) Competence of the Member States, which is presumed as a matter of principle: it exists in all the cases in which the Treaty has not provided otherwise. The “residual” competence of the Member States is a rule that is frequently adopted in federal legal systems. At present, however, it is not be found expressly stated in that of the Community. Its introduction would give it the significance it merits in a union of states that wishes to equip itself with its own constitutional rules.

All the many competences not assigned to the Union are to be included in the sphere of the Member States on the assumption that, in addition to maintaining their sovereignty within the limits laid down in the Treaty, they are members of the Union and, as such, are able to pursue its ends. Every Member State within its own sphere performs this role, which is of common interest, and they all manage it together where there is an institution of the Union in which they are called upon to participate.
- b) Exclusive competences of the Union, which are limited to just a few important sectors (customs policy, external economic relations, the internal market, including the four freedoms and financial services, competition policy, and, for the euro area, monetary policy). to which could be added those resulting from the transfer to the Union of matters that have not yet been “Communitized”, such as, those involved in the third pillar and, if possible, the common conduct of foreign and defence policy.
- c) Concurrent competences that are shared between the Union and the Member States, for which it is necessary to lay down general rules, principles and objectives in a whole series of matters, provided always that the measures adopted are justified by an underlying European interest; the transposition of these rules into national law, in accordance with the principles of subsidiarity and proportionality is up to the Member States, without prejudice to their competence to legislate on the same matters when the Union has not yet exercised its prerogatives (there is an evident analogy with federal systems, in which individual states are allowed to regulate certain sectors where the central government is silent or does not act).

The Union is under an obligation to legislate within the limits imposed by the principle of

subsidiarity whenever competences are shared with the Member States. The criteria for justifying its action are those laid down in Article 5 of the EC Treaty and referred to earlier. The element added is the certainty deriving from the specification, in the form of a list included in the basic text on the Community's governance, of the shared competences, so as to distinguish them from the Community's exclusive competences, to which the subsidiarity rule does not apply.

4. Certainty regarding the different competences and their listing in a legislative text respond to a recognized requirement of constitutionalism that the Convention cannot ignore. If it did, it would not interpret the desire for a Union in which power is distributed by means of rules that are certain, as are those that protect the rights and freedoms of individuals. And if the competences are completely catalogued in such a text, that certainly does not mean the objectives to be pursued are ignored; on the contrary, each competence, regardless of whether it is listed among those of the Union or those of the Member States, is the means for achieving one or more of them,.

The problem of how to regulate unforeseen common needs inevitably arises for any system in which the responsibilities of the central authority are fixed, while all the residual powers are entrusted to the individual units making up the system. The solution to this problem is to be found in review clauses, as well as other elements of flexibility such as court decisions and evolutionary practices. This is demonstrated by the implicit powers of federations, which correspond to the measures taken by the Community for the operation of the common market, albeit in the absence of the necessary powers, but subject to the conditions and the special procedure laid down for this purpose in Article 308 of the EC Treaty.

5. It is precisely thanks to the mechanism provided in Article 308 that the rigidity of the system of competences is attenuated. In fact the competences that are not assigned exclusively to the Community tend to become mobile, operational in the presence of circumstances that may be here today and gone tomorrow, so much so that the European Parliament proposes retaining a mechanism analogous to the present Article 308 of the EC Treaty in the new basic text, but for use only in exceptional circumstances and provided it works both ways, so that competences can be returned to the Member States when the need for Community intervention ceases to exist.

The two-way nature of such a mechanism may give rise to perplexity insofar as it runs counter to the idea of Europe as a process of gradual and irreversible integration. On the other hand, the mechanism almost inevitably implies the risk of over-application, with the consequent transfer of numerous competences from the concurrent sphere to the exclusive sphere, and will therefore

have to be counterbalanced by identifying a body to monitor observance of the rules and principles, in which members of the national parliaments should participate so as to offset the democratic deficit lamented by European citizens.

To this end, without prejudice to the ultimate competence of the Court of Justice, it is possible to envisage the creation of a body that could make a rapid assessment of measures' conformity with the principle of subsidiarity before they were adopted by the Union. In this respect it would be possible to examine the desirability of establishing a special Subsidiarity Commission that would include members from national parliaments and the European Parliament and operate according to a formula similar to that of the Conference of European Affairs Committees (COSAC).

6. There remains the question as to whether it is necessary, or desirable, to have recourse to the resources of the Community every time the measures the Member States can adopt would not be sufficient to achieve the objectives of the Treaty. The logic underlying the principle of subsidiarity calls for powers that are graduated with a scale of levels that are as close as possible to each other. Accordingly, it might be worth examining the possibility of overcoming the inadequacy of unilateral measures through forms of cooperation. This would imply laying down rules for this activity and seeing how they meshed in with the mechanisms of subsidiarity. More generally, as can be seen from the experience of decentralized states and, more pertinently, from the experience of European integration itself, power has to be wisely distributed, but it is not always a trunk to be sawn into separate planks. There are also concurrent powers, which do not necessarily operate on separate parallel planes but can be integrated so as to carry out common tasks and exploit the scope for synergy of interventions and resources that cannot come higgledy-piggledy from the centre or the lower levels. It is in this way that the United States passed from dual to cooperative federalism. This line of development has been followed, moreover, by nearly all federal systems. In short, the separation of powers does not impede, but permits, their cooperation and ultimately serves to guarantee it, provided sufficiently flexible and malleable instruments and moments of concertation are found.

Thus, when the principle of subsidiarity is evoked, a whole series of constitutional values, rules and techniques is conjured up, in a single formula. And we should not lose sight of the potential wealth of these implications.

