

NOTE

from : Iñigo Méndez de Vigo

to : Members of the Convention

Subject : **Mandate of the Working Group on the principle of subsidiarity**

Please find enclosed a note on the above subject intended to facilitate the discussions of the Working Group on the principle of subsidiarity.

WORKING GROUP I: "Subsidiarity"

Chairman: Méndez de Vigo

How can compliance with the principle of subsidiarity be monitored in the most effective manner possible?

Should a monitoring mechanism or procedure be established?

Should this procedure be of a political and/or legal nature?

I. Introduction

The purpose of this note is to spell out the mandate of the Working Group on the principle of subsidiarity. The mandate is part of the process of examining the delimitation of competence between the European Union and the Member States referred to in the Nice and Laeken Declarations on the future of the European Union. Subsidiarity is a philosophical principle taken over from Church social doctrine by German federalism in 1949 and by Community law in 1992, positing that what the lesser entity can do adequately should not be done by the greater entity unless it can do it better. It must therefore be understood as an instrument for determining when the Union is to act in areas not coming under its exclusive competence (i.e. the bulk of the Union's areas of activity).

II. The principle of subsidiarity in the Treaties

It was the Treaty of Amsterdam which introduced the principle of subsidiarity into the EC Treaty as a general principle applicable to all areas of non-exclusive competence (see Art. 3b, current Art. 5 of the TEU) ¹.

In accordance with the conclusions of the Birmingham European Council of 16 October 1992, the Edinburgh European Council meeting on 11 and 12 December 1992 set down a global approach for applying the principle of subsidiarity. That global approach was to a large extent taken over by the Protocol on the application of the principles of subsidiarity and proportionality annexed to the EC Treaty by the Treaty of Amsterdam, which among other things establishes detailed criteria for

¹ Previously, the only explicit reference to the principle of subsidiarity in the Treaty was in the case of the environment (Article 130R(4), deleted on entry into force of the TEU).

the application of the principle of subsidiarity by the Community Institutions participating in the legislative procedure.

That Protocol also lays down obligations for those Institutions, and primarily for the Commission, which is required to substantiate its legislative proposals having regard to the principle of subsidiarity. The grounds given must be examined by the Community legislator, who is bound to take account of the principle of subsidiarity throughout the legislative procedure. The Commission is also required to submit an annual report on implementation of Art. 5 of the Treaty to the European Council, the European Parliament and the Council.

Having said that, there is a view that introduction of the principle of subsidiarity into the Treaty and adoption of the Protocol on the application of the principles of subsidiarity and proportionality have failed to yield the expected results and that considerations of policy or urgency have often overridden compliance with the principle of subsidiarity.

III. Questions to be examined by the Working Group

These will include both application of the principle of subsidiarity and monitoring of compliance with it.

1. Application of the principle of subsidiarity

The Protocol on the application of the principles of subsidiarity and proportionality embodies criteria for implementing the principle of subsidiarity as regards the content of the action, its form, and the nature and scope of Community action.

The Working Group will have to examine to what extent the criteria established in the Protocol are adequate, whether they should be more detailed or whether further criteria should be added.

2. Monitoring application of the principle of subsidiarity

Monitoring compliance with the principle of subsidiarity will be the main question for examination by the Working Group. At the plenary meeting on 15 and 16 April, a large majority of speakers were in favour of more effective mechanisms for monitoring the principles of delimitation of competence and subsidiarity. As monitoring may be political and legal in nature, the Working Group will have to look into the effectiveness of current monitoring and means of strengthening it. Consideration will also have to be given to the possibility of setting up an ad hoc monitoring body.

(a) Political monitoring of the principle of subsidiarity

At present, political monitoring of the principle of subsidiarity is to a large extent carried out by the Institutions participating in the legislative procedure, on which obligations in this respect are imposed by the Protocol on the application of the principles of subsidiarity and proportionality. National parliaments carry out such monitoring to the extent that they are able to control the position taken up by their government within the Council.

The Working Group should first examine whether and to what extent the Protocol obligations have been complied with and, should that not be the case, how to bring the Community Institutions participating in the legislative procedure to discipline themselves and apply the principle of subsidiarity more effectively. There are various paths open here: a Mr (or Ms) "subsidiarity" to assist each member of the European Council and the European Parliament, with responsibility for verifying and giving a timely opinion on compliance of proposals for legislative acts with the principle of subsidiarity? Ask the Commission to attach a "subsidiarity sheet" to every proposal for a legislative act? Other?

The Working Group will also have to examine whether monitoring application of the principle of subsidiarity by national parliaments should be stepped up, either by its participation in the legislative procedure (mention having been made here of possibly including representatives of national parliaments in delegating a member within the Council), or by enhancing their control of the position to be taken by their government within the Council. Consideration could also be given to strengthening the role of COSAC in this control.

Finally, the Working Group will have to look into the need to set up an ad hoc body to monitor compliance with the principle of subsidiarity and, if so, to propose possible compositions (national parliaments? joint committee consisting of European Parliament/national parliaments? other?), and into the powers and role of such a body: advisory or decision-making? A priori monitoring before a proposal is examined by the Council or throughout the legislative procedure? Power to call, a posteriori, for a second Council discussion if it considers that the principle of subsidiarity has been violated? assent for Article 308 with reduced scope? other?

(b) *Legal monitoring*

At present, legal monitoring is carried out by the Court of Justice and national courts. Given that the principle of subsidiarity is essentially political in nature and in view of the considerable discretionary margin enjoyed by the legislator in its application, the Court, when issues of non-compliance are referred to it, basically confines itself to establishing the existence of reasons as regards compliance with the principle of subsidiarity.

An initial question for the Working Group will be the case for strengthening legal monitoring of the principle of subsidiarity and, if so, by what means and at which stage. As regards means, mention has been made of the possible creation of a "subsidiarity" chamber within the Court of Justice, or setting up a mechanism for cooperation between the Court of Justice and national constitutional courts. Others argue for subsuming under the Court's legal monitoring acts falling under Titles V and VI of the TEU. The possible introduction of an "ex ante" legal or semi-legal form of monitoring along the lines of what already exists in certain Member States could also be investigated.

Second, the Working Group will have to look into possible widening of the power of referral to the Court as regards proceedings for annulment for violation of the principles of subsidiarity and delimitation of competence. At present, active entitlement to make referral to the Court of Justice via such form of appeal is confined to those persons directly and individually concerned, to Member States, the Council or the Commission (and to the

European Parliament following entry into force of the Treaty of Nice). Consideration could be given to extending this right of appeal to national parliaments (or to an ad hoc body composed of members of national parliaments, if such were set up) in respect of violation of the principles of delimitation of competence. Some have also adverted to the possibility of conferring such right on the Committee of the Regions or the constitutional entities whose legislative competence would be called into question.

The solution found to the question of applying and monitoring the principle of subsidiarity will be key in ensuring better allocation and definition of competence in accordance with the Nice and Laeken Declarations on the future of the European Union.

=====