

CONV 156/02

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NOTE

from :	Secretariat
to :	Working Group I on the Principle of Subsidiarity
Subject :	Summary of the meeting on 25 June 2002

The third meeting of Working Group I was devoted to further consideration of the application of the principle of subsidiarity by the Council, with the participation of Mr Jean-Claude PIRIS, Legal Adviser and Director-General of the Council Legal Service, and to the question of the legal monitoring of the principle of subsidiarity, with the participation of Mr Francis Jacobs, Advocate-General at the Court of Justice.

Application of the principle of subsidiarity by the Council

Mr Piris referred to the three ways of preventing what could be perceived as excessive legislative centralisation at European level: the principle of conferment of competence, the principle of subsidiarity and the principle of proportionality. Legislative acts were examined to check their conformity with each of these three principles in turn.

The examination of the first principle, i.e. the question whether the Treaty had conferred on the Union a power to act, was an objective legal question that had to be answered in the light of the powers granted to the Union by the provisions of the Treaty.

The principle of subsidiarity, however, referred not to the existence of competence but to the exercise of that competence: where the Community had competence, it had to exercise it only if the objective could be better achieved at European level than at Member State level. Consequently,

the principle of subsidiarity was a subjective and essentially political one which called for a value judgment within the Institutions' discretion.

Lastly, the principle of proportionality related to the scope and intensity of the Institutions' activity.

Mr Piris went on to say that the examination of the principle of subsidiarity was closely linked to the examination of substance. For this reason, the Council often addressed the question of compliance with the principle of subsidiarity by intervening to amend a draft act to make it less detailed or by allowing the Member States a greater number of options when they came to implement it. However, as regards the internal market, the Member States often made the opening of their borders conditional on the existence of a proportional level of confidence, which often led to excessively detailed regulations, as each Member State tended to seek the incorporation of its own legislation into the Community legislation rather than establish a minimum platform of Community requirements.

Given the broadly subjective nature of the principle of subsidiarity, Mr Piris thought it necessary to avoid politicising the legal monitoring of that principle by asking the Court of Justice, or another court yet to be established, to comment on subsidiarity outside the ordinary process of monitoring the conformity of existing acts with the Treaty. In any case, he believed that any monitoring of the principle of subsidiarity should take place at the end of the legislator's proceedings rather than at the beginning, since the legislator often made considerable changes to the proposals submitted by the Commission.

Mr Piris drew attention to the sensitive issues that would be raised by the creation of a new body for monitoring the principle of subsidiarity: composition, deadlines for reaching decisions, method of decision-making, method of referral, whether the opinions or decisions of such a body would be binding, and so on.

Lastly, Mr Piris raised the alternative possibility of having a "Mr (or Ms) Subsidiarity" attached to each Head of State or Government and to the Presidents of the European Parliament and the Commission, who would be responsible for alerting them to any failures to comply with the principle of subsidiarity.

Legal monitoring of the principle of subsidiarity

Advocate-General Jacobs said that the principle of subsidiarity had not been invoked very often before the Court of Justice. The Court had annulled acts for violation of the principle of conferment of competence or the principle of proportionality but never on the basis of a violation of the principle of subsidiarity.

The Court's role in examining compliance with the principle of subsidiarity mainly concerned the question whether the Institutions had fulfilled their duty to comment, even implicitly, on compliance with the principle of subsidiarity. In doing this, however, the Court did not refer to matters of substance except in the case of a manifest violation.

As to the possible establishment of a mechanism for the legal monitoring of the principle of subsidiarity before an act came into force, the Advocate-General gave some very preliminary guidelines as the Court had not discussed the matter in depth.

The Advocate-General drew attention to the fact that any monitoring of the principle of subsidiarity by the Court before a legal act came into force could be taken to mean that the Court was participating in the legislative procedure, which it had no wish to do. For this reason, the Court was not greatly in favour of such monitoring. The Treaty provided for monitoring by the Court of Justice prior to entry into force only as regards international agreements. This was a very specific case, given that in such a situation it was difficult to carry out legal monitoring once the agreement had come into force.

The Advocate-General then referred to the problem that would be caused by the introduction of legal monitoring prior to an act's entry into force, i.e. the problem of compliance with the principle of subsidiarity and compliance with the principles of conferment of competence and of proportionality being examined at different stages, in view of the link that existed between them.

Lastly, the Advocate-General expressed the view that, if legal monitoring of the principle of subsidiarity were carried out by two different judicial bodies, one before the act came into force and one afterwards, then there would also be problems relating to the risk of conflict between the two bodies.

The French Constitutional Council monitored an act's constitutionality before it came into force but this was because there was no such monitoring afterwards.

The Advocate-General saw no objection to making provision in the Treaty for the political monitoring of the principle of subsidiarity prior to an act's entry into force. The establishment of such a monitoring mechanism would not preclude legal monitoring once an act had come into force.

The Advocate-General also suggested the possibility of attaching to every legislative act a memorandum or sheet concerning the principle of subsidiarity so that a more extensive explanation than that contained in the preamble could be given of the reasons for which the legislator had adopted the act. The memorandum could be published at the same time as the legislative act.

The Advocate-General made clear that the Court did not think it necessary for the time being to have a special chamber for matters concerning the principle of subsidiarity (however, where the need arose, the necessary organisational steps would be taken).

Mr Mendez de Vigo noted in conclusion that the question of monitoring the principle of subsidiarity was an eminently political one, which should not be confused with the question of legal monitoring. The possibility of establishing a political monitoring mechanism was worth studying in detail, since it would be a political mechanism that monitored the work of the legislator.

Lastly, Mr Mendez de Vigo reminded members of the Working Group that they could submit written contributions. An initial report on this question would be circulated before the summer holidays.
