

COVER NOTE

from	Secretariat
to	The Convention
Subject :	Contribution by Mr. Elmar Brok, Mr. Jacques Santer, Mr. René van der Linden, Mr. Joachim Wuermeling and other members: “Subsidiarity must be controlled by a judicial body”

The Secretary-General of the Convention has received the contribution annexed hereto from Mr. Elmar Brok, Mr. Jacques Santer, Mr. René van der Linden, Mr. Joachim Wuermeling and other members of the Convention.

SUBSIDIARITY MUST BE CONTROLLED BY A JUDICIAL BODY

Written Contribution by Elmar Brok, Jacques Santer, René van der Linden, Joachim Wuermeling and others (please see annexed list)

General criticism about the insufficient application of the principle of subsidiarity has lead the Convention to reflect on creating a new body to monitor the implementation of subsidiarity and proportionality.

Apart from a better delimitation of competences in the Treaty itself, this could help to reassure Member States, regions and also the citizens that the EU only acts if there is a clear evidence of need for initiatives on the European level.

How can this control be organised? Should this body come into play at the beginning of the legislative process or at the end? Should we rather look for a political mechanism or for judicial review?

We would like to propose to establish a judicial ex-post-review of legislation with respect to competences, subsidiarity and proportionality.

Given that the European Court of Justice is already the Union's Constitutional Court, a "competence-chamber" should be set up within the Court to rule on conflicts concerning competences.

An additional referral procedure could be introduced prior to the entry into force of a legislative measure and capable of suspending the application thereof.

That referral procedure would work as follows:

- It could be initiated by the Commission, by a significant minority in the Council, the European Parliament, a national parliament and regions with legislative competences;
- The procedure would have to be initiated within a period of one month from the

adoption of the legislative measure, the Court also having to give a decision within one month;

- The sole grounds admissible in this urgency procedure would be a conflict of competences and the non-compliance with the principles of subsidiarity and proportionality;
- The competence chamber consists of judges of the European Court of Justice, as an alternative senior judges of Member States could set up together with ECJ a joint chamber.

We favour a judicial control because it is more transparent and does not muddle political and legal reasoning. It also keeps the distinction between European and national decision making procedure.

Another political control of subsidiarity as proposed by some governments does not help to counter the current shortcomings. The political assessment of the necessity and the appropriateness of an EU-initiative is up to the institutions of the legislative procedure, e.g. Commission, Council and European Parliament. It would severely undermine the role of these institutions, if their considerations were subject to a „peer-review“ of other parliamentarians of national and even European Parliament. A new political body mixed of national and European representatives would not be responsible to anybody. Such a doubling of the debate would not bring about any added value and would be incomprehensible for the citizens.

However, a judicial control within a „competence chamber“ of the European Court of Justice will check on legal grounds the compatibility of a proposal with the delimitation of competences, the principle of subsidiarity and proportionality. This review would help to lighten up step by step the grey zones between European and national responsibility instead of discussing again the content. By this means the delimitation of competences would be enhanced substantially.

Members of the Convention supporting the written contribution “SUBSIDIARITY MUST
BE CONTROLLED BY A JUDICIAL BODY”

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