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Valmistelukunnassa tarkkailijana oleva alueiden komitean jäsen Patrick Dewael on toimittanut valmistelukunnan pääsihteerille liitteenä olevan esityksen.

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European Convention

The principle of subsidiarity

In the Laeken Declaration, particular attention is being devoted to the question of how the principle of subsidiarity should be implemented¹. At the occasion of the plenary debate, which was held on October 4, 2002, I have already submitted a contribution regarding the principle of subsidiarity (CONV/152/02). In this final phase of the Convention, I would like to return to this topic, which should be considered as the 'leitmotiv' for the European architecture.

The principle of subsidiarity is first and foremost a political one. As a result, the legal translation in Article 5 EC is no more than a vague description, whereas the way in which subsidiarity is being implemented remains a matter of discussion. Nonetheless, it seems to be easy to elucidate the principle: decisions should be taken as close as possible to the citizen. The developmental history of the principle indicates that it deals with protecting the powers of the Member States in areas where their goals or interests do not correspond to those of the Community. As a result, there is little or no discussion concerning the exact meaning of the principle: decisions should be taken at the most appropriate level. Discussions on the implementation of the principle, however, exist all the more.

A first point of discussion concerns the implementation *ratione materiae*. Although Article 5 EC stipulates that the principle of subsidiarity is only applicable to those areas that are not part of the exclusive powers of the Community, the Treaty does not indicate which powers are to be considered as exclusive ones. The Court of Justice has attempted to define the concept of an 'exclusive competence' in greater detail in its jurisdiction. However, such an approach clearly lacks transparency, whereas it does not guarantee full legal justice. After all, the jurisdiction of the Court on this matter is extensive and fragmented, which results from the fact that the Court only replies to those questions that are of importance to a specific case. Consequently, the Court is not able to come up with a summary of the exclusive powers of the Community. Furthermore, the Court of Justice has not, for all Community powers, pronounced rulings on the nature of these areas of competence.

The implementation *ratione personae* also remains a topic of discussion. More specifically, the question whether sub-national governments should be taken into account needs to be tackled. An explicit reference to sub-national levels of government in Article 5 EC will contribute to a higher level of transparency and certainty regarding the implementation of the principle of subsidiarity. As

¹ On behalf of the government of Flanders, a policy-oriented scientific interdisciplinary research project has been conducted by the faculties of Law and Political Science of the Universities of Ghent and Leuven, which resulted in various answers to this very relevant question.

European measures, within Member States, often concern powers that belong to the regional level, it is important that the means, possibilities and interests of these regions are also taken into account whenever Article 5 EC is being implemented. This is *a fortiori* applicable to the regions in Belgium, which can be described as governments whose spheres of competence are parallel to those of the national or central government. As a result, these regional governments cannot be considered as subordinates to their national or central counterparts.

Accordingly, an amended Article 5 EC could be formulated as follows:

Article 5 EC

“The Community shall take action, in accordance with the principle of subsidiarity, only if and as far as the objectives of the proposed action cannot be sufficiently achieved by the Member States **or by the regional governments** and can therefore be better achieved through an action by the EC/EU.”

A precondition for including such a reference is, however, that the concept of a 'regional government' or a 'region' is being limited in scope (in a Protocol: see *infra*). Furthermore, the final choice on which specific entity qualifies to be a region in this European sense, must be made by the national government of a Member State (Member State Declaration: see *infra*). After all, they are the signatories of the Treaties which first and foremost create obligations in the framework of the relations that exist between the Member States.

As such, it is recommendable that the 'regions with legislative powers' are being designated by the Member States themselves. The European Union could then establish the minimum criteria that need to be met by these governments in order to fully participate at the European level.

The identification of the regions with legislative powers must, in principle, emanate from the mission that has been entitled to them by virtue of the national constitutional order, i.e. an autonomous norm-setting competence regarding policy matters that, in unitary states, have been entitled to the national government. Taking this into consideration, possible examples of European minimum criteria are: the possession of legislative powers in particular fields, the absence of political control on legislative actions, and the juxtaposition to the national level.

These minimum criteria must be laid down in a strong legal document such as a Protocol, which is an integral part of the Treaty and which must be ratified by the Member States. It is then up to the Member States to draft a Declaration in which they indicate which of their regional governments comply with the stipulated criteria, and which European tasks may be performed by the concerned governments. The Council must ratify the Declaration by the Member States, and subsequently this Declaration should be published in the Official Journal.

Within the Protocol itself, the Treaty articles that qualify for actions by regional governments could be enumerated.

The regions with legislative powers would thus acquire a status which is similar to the status of "partner regions of the Union", as envisaged by the draft report Lamassoure.

The text of the Protocol could then be as follows:

“Regional governments of Member States which are characterised by (1) an absence of political "guardianship" by the national government, (2) the possession of legislative powers in certain well-defined areas, (3) the presence of a directly elected parliamentary assembly, and (4) an own government which is responsible to this parliamentary assembly, can be authorised by their national government to act independently in the cases in which the Treaty envisages an action by (a body of) the Member State.

In order to authorise their regional governments in this respect, the Member States draft a Declaration in which they indicate which of their regional governments have complied with the above-mentioned criteria and for which Union powers the bodies of the concerned regional governments may act.

The Declaration will be ratified by the Council and will then be published in the Official Journal. The powers of the Union that qualify for an intervention by regional governments are the following: [...].”

Obviously, the Union powers that qualify for an intervention by regional governments should at least include those policy areas for which the Committee of the Regions needs to be consulted: education and youth affairs; culture; public health; trans-European transport-, telecommunications-, and energy networks; economic and social cohesion; employment; social affairs; environmental affairs; vocational training; transport. Agricultural policy and the Structural Funds also need to be taken into account.

The Declaration by the Member States, which provides the regional governments the possibility of intervening, could be formulated as follows:

Declaration regarding the role of regions with legislative powers in the European Union

“[X], Member State of the European Union, declares that the following regional governments comply with the four criteria that have been listed in [the Protocol] and hereby authorises them to act whenever the Treaty envisages an action by the member state regarding the powers of the Union [enumeration of the powers of the Union which have been allocated to the regional governments in accordance with the internal law of the member state]:

[names of the regions with legislative powers].

[Member State X] designates [region Y] as a competent national body in the sense of Article [245 +1 EC].”

However, the crux of the problem concerning the implementation of the subsidiarity principle does not seem to limit itself to the lack of clarity that exists regarding the implementation *ratione materiae* or *ratione personae*. After all, these obscurities are relatively easy to explain. In contrast, the essence appears to be that, in implementing Article 5 EC, the different interests that are into play need to be weighed against each other politically. In this context, I refer to the interests of the European Community (e.g. the internal market) vis-à-vis the interests of some Member States or governments to preserve their powers in particular fields, such as, for example, culture, public health and education.

In order to acquire an insight in the political interpretation that occurs whenever a measure is being put to the test of Article 5, a strengthened obligation to state reasons for the Commission can undoubtedly provide a useful contribution. By mandating the Commission to attach a document (the Subsidiarity Memorandum) to each legislative proposal that is part of the field of shared powers, in which the Commission motivates in detail the extent to which the principle of subsidiarity has been implemented, it would be possible to acquire a greater insight into the Commission's main motives for proposing -or, alternatively, not proposing- a measure at the European level. In this respect, it is important that the Commission indicates why it considers the interests or goals of the Community to be more important than the interests of the Member States and their regional governments in retaining their competence regarding the proposed measure. Moreover, in its White Paper on European Governance, the Commission has itself argued for a stricter observance of the subsidiarity and proportionality principles.

In the Convention's Working Group on Subsidiarity, Michel Petite, Director-general of the Commission's legal department, has elucidated how the observance of Article 5 EC is currently being controlled. In the context of this issue of control, different relevant questions are being formulated whose answers could be regarded as the main motivation for a proposal in the light of the principle of subsidiarity. The following questions could be formulated:

- *“Which are the objectives that are being pursued in comparison with the obligations of the Community?”*
- *What is the Community dimension of the problem (e.g., how many member states [and regions] are directly involved?)*
- *What is the most efficient solution for the comparison between the funds of the Community and those of the Member States [and their regions]?*
- *What concrete added value is being provided by the envisaged measures, and what would be the cost of a failure to act?*
- *Is there a need for uniform regulations or would a directive with general objectives suffice?”*
{WG I – WD3, pp. 3-4, freely translated}

Other questions can be added to these:

- *“How strong and how compelling are the internal-market requirements/competitive distortions/trade restrictions/cross-border effects in question?”*
- *What precisely are the aims by reference to which the effectiveness of action at a particular level is being assessed?*
- *What are the countervailing arguments in favour of Member State action, e.g. such as the decision of the states to specify expressly in the Treaty that they retain national competence over a closely related or overlapping policy area?*
- *What kind of parties would be involved and what kind of decision-making process would take place if action were adopted (i) at Community level (ii) at national (or subnational) level?*
- *Are there alternatives to allocating the decision to be taken at one level or the other only - e.g. could the decision-making be shared between Community and other levels through the adoption of particular kinds of legal instruments or action?”*
[Gráinne De Búrca, “Reappraising Subsidiarity’s Significance After Amsterdam”, p. 24, freely quoted]

In this context it is important to ensure that such questions go to the very heart of the implementation of Article 5 EC. Questions that rather relate to the interests of the Member States and their regional governments could also be included, i.e., those questions which reveal the

interests of the Member States and their regional governments to preserve a specific competence in the area of a measure that is being proposed.

In order to incorporate the strengthened obligation to state reasons in the Treaty, a new paragraph can be added to Article 5:

Article 5 EG

“[...]”

In order to ensure the proper observance of the provisions of this article, the Commission adds a separate memorandum to each of its proposals, indicating in detail, on the basis of qualitative and -if possible- quantitative indicators, how and to what extent the principles of subsidiarity and proportionality have been observed.”

Another solution would be the amendment of Article 253 EC, which contains the obligation to state reasons. The new article 253 EC could read as follows:

Article 253 EC

“The regulations, directives and decisions adopted jointly by the European Parliament and the Council, and the regulations, directives and decisions adopted by the Council or the Commission, are being reasoned and shall refer to any proposals or opinions that need to be requested in accordance to this Treaty.

Whenever Article 5, paragraph 2 of this Treaty is applicable, the Commission adds a separate memorandum to each of its proposals in which it indicates in detail, and on the basis of qualitative and, if possible, quantitative indicators, how and to what extent article 5, paragraph 2 has been observed.”

The optimal solution would also envisage a Protocol which contains a non-limitative summary of the questions that need to be answered.

Apart from the Subsidiarity Memorandum, an attempt could be made to direct the political assessment on the basis of guidelines, starting with those that can currently be found in the Subsidiarity Protocol. However, the guidelines that have been drafted in the Subsidiarity Protocol are not neutral. The specific character of the subsidiarity principle hampers the development of objective criteria that enable the implementation of Article 5 EC. The subsidiarity principle is a rather abstract one which needs to be implemented on a case-by-case basis.

The amendment to the Treaty could then read as follows:

Article 5 EC

“The Community acts, in accordance with the principle of subsidiarity, only if and as far as the objectives of the proposed action cannot be sufficiently achieved by the Member States **or by the regional governments** and can therefore be better achieved by the Community, **in particular, whenever:**

- the concerned matter contains transnational aspects which cannot be satisfactorily dealt with by the sole action of a Member State;
- action at community or Union level would have obvious advantages compared to national action because of its scale or its consequences;
- the sole action by the Member States or the failure to act at Community or Union level would conflict with the provisions of the Treaty or would in any other way damage the interests of the Member States;
- the estimated cost of a failure to act at Community or Union level would clearly be higher than the cost of taking action.”

Finally, an argument could be made for an increased control on the application of Article 5 EC. Within the Convention, an *ex ante* role in this is being foreseen for the national parliaments. However, as far as the regional parliaments perform the same duties as the national parliaments, or as far as they are being affected in a similar way by European measures -in other words, whenever the regional competencies are at stake- these regional parliaments should enjoy the same rights as the national parliaments in a similar situation.

Last but not least, it must be clear that wherever this implies a greater *ex post* legal control, the logic of the principle of subsidiarity requires that access to the European Court of Justice must also exist for individual regions with legislative powers. If the Convention wishes to take the constitutional regulations of the Member States into account (CONV 331/02 p.9), a procedure must be introduced which enables the Member States to authorise their respective regions with legislative powers to act before the Community Court in clearly defined matters and under specific conditions (cfr. *supra*).