



**EUROPESE CONVENTIE**  
SECRETARIAAT

**Brussel, 24 juli 2002 (26.07)**  
**(OR. en)**

**CONV 213/02**

**CONTRIB 72**

**BEGELEIDENDE NOTA**

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van: het secretariaat

aan: de Conventie

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Betreft: **Bijdrage van de heren Elmar Brok, Jacques Santer, René van der Linden,  
Joachim Wuermeling en andere leden:  
"Subsidiariteit moet door een rechterlijk orgaan getoetst worden"**

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De secretaris-generaal van de Conventie heeft bijgaande bijdrage ontvangen van de heren Elmar Brok, Jacques Santer, René van der Linden, Joachim Wuermeling en andere leden van de Conventie.

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## **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”**

Peter ALTMAIER

Eduarda AZEVEDO

Filadelfio BASILE

Elmar BROK

Panayiotis DEMETRIOU

Claude DU GRANRUT

Marta FOGLER

Emre KOCAOGLU

Frantisek KROUPA

Riitta KORHONEN

Alain LAMASSOURE

Hanja MAIJ-WEGGEN

Alois PETERLE

Reinhard RACK

Jaques SANTER

Maris SPRINDZUKS

Antonio TAJANI

Erwin TEUFEL

René VAN DER LINDEN

Edmund WITTBRODT

Joachim WUERMELING