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Subject: Note by MEP Kirkhope on "the principal of subsidiarity: judicial or political overview?"

THE PRINCIPLE OF SUBSIDIARITY: JUDICIAL OR POLITICAL OVERVIEW?

Written contribution by Timothy Kirkhope

The principle of subsidiarity is a simple one. Where we can work together as Europeans, we should do so; where we cannot work together, for lack of agreement or where there is no pressing need to do so, we should arrange things on a national basis. Applying this principle to our work in the European Union will, I believe, reattach citizens to the political process by establishing a Europe of cooperating nation states.

One of the key areas for discussion in our Working Group V on "Complementary Competencies" is the question of who should monitor the implementation of the principle of subsidiarity. At present, two options have been suggested:

- Judicial monitoring by the European Court of Justice (ECJ);[1] or
- Political monitoring by the European Council.[2]

As I shall demonstrate, each has its drawbacks.

Proponents of the ECJ as the monitoring body suggest that judicial control "is more transparent and does not muddle political and legal reasoning."[3] This argument has its merits; but it could be argued that the ECJ *has*, on occasion, acted in a political manner. For instance, the *van Gend en Loos* (1963), *Costa v ENEL* (1964) and *Simmenthal* (1978) rulings lay down two fundamental principles:

- the direct effect of Community law in the Member States (i.e. European laws are automatically national laws); and
- the primacy of Community law over national law (i.e. European laws are 'superior' to national laws).

It could be argued that these were political rather than strictly judicial decisions. Whereas in the United Kingdom having a common law tradition we are accustomed to Courts interpreting the

[1] See, for example, 'Subsidiarity must be controlled by a judicial body', written contribution to Working Group V by Elmar Brok, Alain Lamassoure, Joachim Wuermeling, Reinhard Rack and Peter Altmaier, Working document 4.
[2] See, for example, 'A report for the Joint Oireachtas Committee on European Affairs,' submitted as written contribution CONV 27/02 by John Bruton.
[3] Elmar Brok et al., page 2.

letter of the law, the ECJ, drawing on the Continental European legal tradition, has been known to take into account the *"intent" of the law* and to use the aspiration of "ever closer union" which promotes European integration. More often than not, however, the judicial activism of the ECJ has been a force for good. The 'four freedoms', for example, would not have been established so quickly had the ECJ not ruled that the relevancy provisions of the Treaty had direct effect and could therefore be relied upon in national courts. But these examples add credence to the proposition that the ECJ is not purely a judicial body.

The main alternative to judicial monitoring of the principle of subsidiarity is observation by a political body. John Bruton argues that "wherever there is a dispute about whether the Union is going beyond its competence … the 'Court of Appeal' should be political rather than legal."[4] Bruton envisages the European Council as the 'Court of Appeal' but rightly argues that decisions should only be re-examined where a "significant interest" believes the Union has gone beyond its powers. If, for instance, forty per cent of MPs in the national parliaments of at least a quarter of the member states signed a petition, this would constitute a valid basis for an appeal. There are obvious problems with this approach. Can a fundamentally political body have such powers when its own transparency and accountability are under scrutiny and review? If such a body is ascribed such powers, where is the judicial or legal control? If there is none, where is the democratic control? Will the citizens accept such a situation when they already view the Council with such scepticism? Any adoption of the political option would need to be accompanied by a thorough reform of the Council to allow open and understandable decision-making and although this is very desirable I retain my doubts that it is achievable in the short term.

A third option is to have a European Arbitrator as the 'Court of Appeal'. Just as citizens turn to the European Ombudsman to ensure the application of European law and the Court of Auditors to guarantee the financial regularity of European funding, they could consult a European Arbitrator in cases where they feel the principle of subsidiarity has been misapplied.

- *Who would appoint the Arbitrator?* MEPs and members of the European Scrutiny Committees in the national parliaments would vote on candidates who had the backing of at least four national governments. The Arbitrator would be appointed for a five year term.

[4] Bruton, page 26.

- *Who would be an ideal candidate?* The candidates would ideally have to be legally qualified and have had experience as a high court judge or equivalent, but so long as they had the backing of four national governments, they could put themselves forward for election.
- *Who could propose European laws to be re-examined by the Arbitrator?* Any single national government could ask the Arbitrator to re-examine whether the principle of subsidiarity had been correctly applied to a piece of European legislation. Alternatively, a petition by forty per cent of MPs in the national parliaments of at least a quarter of the member states could trigger a re-examination.

The details of who should elect the Arbitrator, what the remit of the position should be and how legislation should be referred back for re-examination can, of course, be debated. But I believe that the principle of having a European Arbitrator combines the very best of both suggestions already proposed for the monitoring of the principle of subsidiarity. The judicial element is contained in the fact that Member States would be encouraged to nominate candidates with a legal background and the political element is maintained through selection by national governments and election by MEPs and MPs on European Scrutiny Committees. I hope this third option provides a means of achieving consensus on this important issue and I put it forward for consideration and debate.

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