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REPORT

from :	Chairman of Working Group I on the Principle of Subsidiarity
to	Members of the Convention
Subject :	Conclusions of Working Group I on the Principle of Subsidiarity

Working on the basis of its mandate (CONV 71/02), the Working Party on the Principle of Subsidiarity has devoted several meetings to examining this question, efficiently, transparently and democratically. During the meetings, several experts on the question were heard. [1]

Discussions within the Group made it possible to reach consensus on certain approaches and principles (Part I).

On this basis, the Group agreed on a series of proposals intended to improve the application and monitoring of the principle of subsidiarity (Part II).

Finally, the Group considered that certain general measures, detailed examination of which would, however, have exceeded its terms of reference, could facilitate the application and monitoring of the principle of subsidiarity (Part III).

[1] See list of hearings in Annex I.

I. Principles and approaches to applying and monitoring the principle of subsidiarity

(1) It has become evident that the principle of subsidiarity is currently already under examination by the Institutions taking part in the legislative procedure on the basis inter alia of the criteria established in the Treaty and in particular in the Protocol on the principles of subsidiarity and proportionality. The principle of subsidiarity is also subject to *ex post* judicial review by the Court of Justice. The Group nevertheless took the view that it could still be improved upon, as regards both application and monitoring.

(2) However, these improvements should not make decision-making within the institutions more cumbersome or lengthier, nor block it. The Group therefore felt that the creation of an *ad hoc* body responsible for monitoring the application of the principle of subsidiarity should be ruled out.

(3) The Group considered that some of these improvements would require amendments to the Treaty and in particular to the Protocol on the application of the principles of subsidiarity and proportionality.

(4) The Group was at pains to ensure that the improvements which it proposes should be effective independently of the institutional architecture specific to each Member State. It made a point at the same time of avoiding interference with any national institutional debates.

(5) The Group considered that as the principle of subsidiarity was a principle of an essentially political nature, implementation of which involved a considerable margin of discretion for the institutions (considering whether shared objectives could "better" be achieved at European level or at another level), monitoring of compliance with that principle should be of an essentially political nature and take place before the entry into force of the act in question.

(6) The Group also felt that *ex ante* political monitoring of the principle of subsidiarity should primarily involve national parliaments. The Group felt that monitoring by national parliaments in relation to their governments should be strengthened as regards the determination of the position of the latter on Community questions. This approach appears also broadly to be shared by the Convention Working Group on national parliaments, chaired by Ms Stuart, with which the Group on the Principle of Subsidiarity held a joint meeting, and which is considering the drafting of a Code of Conduct on the matter.

However, members of the Group consider that an *ad hoc* mechanism should be established enabling national parliaments to be more involved in monitoring compliance with subsidiarity, while ensuring that the mechanism is flexible and does not result in the lengthening of the legislative process or blocking it, and does not lead to the creation of a new bureaucracy.

(7) Agreement was reached within the Group that *ex post* monitoring of subsidiarity should, on the other hand, be of a judicial nature. In this respect the conditions for referral to the Court of Justice should be broadened.

On the basis of these principles, the Group drew up the following proposals to improve the application and monitoring of the principle of subsidiarity.

II. The Group's proposals to the Convention

Broad agreement was reached between members of the Group that the Convention should be presented with proposals on three lines:

(a) reinforcing the taking into account and the application of the principle of subsidiarity by the institutions participating in the legislative process, (i.e. the European Parliament, Council and Commission) during the drafting and examination phase of the legislative act;

(b) setting up an "early warning system" of a political nature, intended to reinforce the monitoring of compliance with the principle of subsidiarity by national parliaments;

(c) broadening the possibility of referral to the Court of Justice for non-compliance with the principle of subsidiarity.

(a) reinforcing the application of the principle of subsidiarity during the phase when a legislative act is being drafted and proposed by the institutions participating in the legislative process:

The Group felt that the principle of subsidiarity would be applied all the better the earlier it was taken into account in the legislative process.

In the drafting phase of a legislative act, responsibility for compliance with subsidiarity rests with the Commission. It is for the Commission to consult, as soon as possible, all the players (particularly the Member States, economic operators, local and regional authorities, and the social partners) who may be affected directly or indirectly by the legislative act being planned or drafted. In drawing up its legislative proposals, the Commission should take account of reinforced and specific obligations concerning justification with regard to subsidiarity. Thus any legislative proposal should contain a "subsidiarity sheet" setting out circumstantiated aspects making it possible to appraise compliance with the principle of subsidiarity. This sheet should contain some assessment of its financial impact, and in the case of a Directive, of its implications for the rules to be put in place by Member States (at national or other level).

To give tangible form to these proposals, the Protocol on subsidiarity currently annexed to the Treaty would have to be amended.

The presentation of the Commission's annual legislative programme would seem to be an important occasion providing an opportunity for a preliminary debate on subsidiarity. The Group therefore proposes that that programme should be discussed by the European Parliament and national parliaments.

The Working Group also considered the possibility of the appointment, within the Commission, of a "Mr or Mrs Subsidiarity", or of a Vice-President specifically responsible for ensuring his institution's compliance with the principle of subsidiarity. Any proposal of a legislative nature would necessarily be referred to him. He (or she) would provide an outside view to the departments which had drafted it. This Vice-President could, if necessary, be given a hearing by national parliaments. However, despite some advantages (particularly that of strengthening the application of the principle of subsidiarity by the Commission, and providing national parliaments with a single identifiable interlocutor within the Commission who could be heard in capitals), this proposal did not receive sufficient support within the Group to be adopted. In particular, it was stressed that each Commissioner should be responsible for compliance with the principle of subsidiarity in the areas under his competence, and that it was a matter for the Commission to decide on its internal organisation.

(b) setting up an "early warning system" allowing national parliaments to participate directly in monitoring compliance with the principle of subsidiarity

The Group proposed the creation of a new *ex ante* political monitoring mechanism involving national parliaments. The innovative and bold nature of this proposal should be highlighted: for the first time in the history of European construction, it involves national parliaments in the European legislative process.

Such a mechanism would enable national parliaments to ensure correct application of the principle of subsidiarity by the institutions taking part in the legislative process through a direct relationship with the Community institutions. In concrete terms, the Group proposes that the Treaty should stipulate that:

– the Commission should address directly to each national parliament [2], at the same time as to the Community legislator (Council and European Parliament), its proposals of a legislative nature (the Protocol on national parliaments currently entrusts this task to governments);

[2] "Each national parliament" means each chamber of the same parliament when the parliament is composed of two chambers. This is the case in the great majority of current Member States and candidate countries.

– with six weeks from the date a proposal is transmitted, and before the legislative procedure proper is initiated, any national parliament would have the possibility of issuing a reasoned opinion regarding compliance with the principle of subsidiarity by the proposal concerned. This opinion should be expressed by a majority and commit the whole of the assembly concerned in accordance with procedures which it will itself determine. That reasoned opinion would be addressed to the Presidents of the European Parliament, the Council and the Commission. It should relate exclusively to the question of compliance with subsidiarity (and not to the substance of the proposal in question) and could be of a general nature or concern only one particular provision of the proposal in question. It could also alert the Community legislator to the possibility of a violation of the principle of subsidiarity if one or other provision were amended in some way during the legislative process.

The consequences of such opinions for the continuation of the legislative process could be modulated, depending on the number and substance of the reasoned opinions received.

- if, within the six-week deadline, the Community legislator received only a limited number of opinions, he would give further specific reasons for the act with regard to subsidiarity;

- if, within the six-week deadline, the legislator received a significant number of opinions from one third of national parliaments, the Commission would re-examine its proposal. That re-examination may lead the Commission either to maintain its proposal, amend it or withdraw it.

This "early warning system" would place all national parliaments on an equal footing. It would make it possible to encourage them to examine the Commission's legislative proposals with regard to the principle of subsidiarity and to ensure that the concerns that they might be led to express further to that examination would be taken more fully into account by the Union legislator (Council and European Parliament). At the same time, by obviating the creation of a new body, it would heed the warnings voiced within the Working Group against the risk of making the institutional architecture and the legislative procedure more cumbersome or the further development of a weighty bureaucracy.

Several members of the Working Group felt that the convening of the Conciliation Committee (Article 251 of the TEC) could also be an appropriate moment again to involve national parliaments in monitoring the principle of subsidiarity. The Group therefore proposes that, once the Conciliation Committee has been convened, the Commission should send national parliaments the Council's common position and the amendments adopted by the European Parliament.

National parliaments would thus be able to make known to their government their assessment as regards subsidiarity, but also if they wished to do so, under the same conditions as set out above and within the deadline for the conduct of the conciliation procedure (six weeks), to send a reasoned opinion to the Presidents of the European Parliament, the Council and the Commission on the application of the principle of subsidiarity.

There is a broad consensus on the part of the Group's members on all the above proposals, although some of them had initially favoured the creation of an ad hoc body to monitor application of the principle of subsidiarity.

(c) broadening the possibility of referral to the Court of Justice on grounds of non-compliance with the principle of subsidiarity

The Group agreed that the *ex post* judicial review carried out by the Court of Justice concerning compliance with the principle of subsidiarity could be reinforced. To take account of the primarily political nature of monitoring subsidiarity, it was important to link the possibility of appealing to the Court against violation of the principle of subsidiarity with the use by national parliaments of the early warning system proposed above. Recourse to judicial proceedings must be able to occur only in limited and probably exceptional cases, when the political phase has been exhausted without any satisfactory solution being found by the national parliament(s) involved.

The Group therefore proposes that a national parliament (or one chamber thereof, in the case of a bicameral parliament) which has delivered a reasoned opinion under the early warning system [3] described above, should be allowed to refer the matter to the Court of Justice (CJEC) for violation of the principle of subsidiarity.

The Group further proposes an innovation, by also allowing the Committee of the Regions, the competent consultative body representing all the regional and local authorities in the Union at European level, the right to refer a matter to the Court of Justice for violation of the principle of subsidiarity. This referral would relate to proposals which had been submitted to the Committee of the Regions for an opinion and about which, in that opinion, it had expressed objections as regards compliance with subsidiarity.

On the other hand, a majority of Group members consider that the degree of and arrangements for the involvement of regional and local authorities in the drafting of Community legislation should be determined solely in the national framework. Thus they claim that the mechanism proposed in this document does not, where appropriate, prevent consultation in a national framework with regional or local assemblies. Any other approach would, moreover, risk affecting the equilibrium established between the Member States at European level. For these reasons, the Group did not accept the proposal to grant a right of appeal to the Court of Justice for violation of the principle of subsidiarity to regions which, within the framework of national institutional organisation, have legislative capacities.

The Group also examined the possibility of establishing within the Court of Justice an ad hoc chamber responsible for questions of subsidiarity. However, it considered that it would be for the Court itself to take the necessary organisational measures.

[3] This may therefore be a reasoned opinion framed at the beginning of the procedure, or in conciliation committee proceedings.

Finally, the Group looked at the possibility of establishing an ex ante judicial mechanism (between adoption of the Community act and its entry into force), which would be based on certain provisions of the Member States for monitoring the constitutionality of laws. In the end, it abandoned this idea on the grounds that that the introduction of a judicial review in the legislative phase would be tantamount to the monitoring of subsidiarity losing its primarily political nature. Moreover, the Group thought that a judicial review of compliance with the principle of subsidiarity at a different stage from the monitoring of compliance with other principles, such as the allocation of competence or proportionality, would have been difficult to implement.

III. Guidelines

The Group agreed that the proposals set out above did not exhaustively cover the range of problems related to subsidiarity.

In particular, since the principle of subsidiarity governs the exercise of competences, a better distribution of the latter, in a manner clearer and more comprehensible to citizens, would be a determining factor in promoting better application of the principle of subsidiarity. The proceedings of the Group chaired by Mr Christophersen are therefore of quite particular importance. [4]

The Group also recalls that the Protocol on national parliaments should be strengthened, to promote tracking by national parliaments of their governments, as regards the monitoring of the principle of subsidiarity. The Group therefore calls upon national parliaments to exercise their responsibilities in the matter to the full.

[4] The recent European Parliament resolution of 16 May 2002 ("Lamassoure resolution") constitutes a particularly welcome basis for consideration in this area.

The Group also believes that a simplification of the legislative acts available to the Union, and a clarification of their effects, would promote the application and monitoring of the principle of subsidiarity given particularly that it would make it easier to determine responsibility as regards the implementation of such acts by the Community or by the Member States. Differentiation in the Treaty between acts of a legislative nature and acts of an executive nature would be desirable in this respect. The Group also considers that such simplification would promote application of the principle of proportionality by allowing greater recourse to acts adapted to the intensity of the action required.

Finally, the Group believes that it would be desirable for cases before the Court of Justice relating to the delimitation of competences or subsidiarity to be dealt with as speedily as possible.

ANNEX I

Hearings held

The Group held a number of hearings of experts on matters relating to the application and monitoring of the principle of subsidiarity:

– Mr Michel Petite, Director-General of the Commission Legal Service, on application of the principle of subsidiarity by the Commission.
– Mr Dietmar Nickel, Director-General of the European Parliament's Directorate-General for Committees and Delegations, on the application of the principle of subsidiarity by the European Parliament;
– Mr Jos Chabert, Minister and former President and member of the Committee of the Regions, Mr Henrich Hoffschulte, first Vice-President of the CEMR (Council of European Municipalities and Regions) and Mr Jeremy Smith, Secretary-General of the CEMR, on the application of the subsidiarity principle in relations between decentralised entities and states.
– Mr Jean-Claude Piris, Legal Adviser and Director-General of the Council Legal Service, on the application of the principle of subsidiarity by the Council.
– Mr Francis Jacobs, Advocate-General at the Court of Justice, on monitoring by the Court of Justice of the principle of subsidiarity.
– Mr Jacques Arrighi de Casanova, Council of State Member, on monitoring by the French Council of State (*Conseil d'Etat*) and Constitutional Court (*Conseil Constitutionnel*) of compliance with the principle of constitutionality in France.
– Mr Andreas Maurer, Associate Professor at the University of Cologne, on how national parliaments scrutinise the subsidiarity principle.

After each hearing, the Group held a discussion on the various issues raised by the speakers.