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Subsidiarity in the European Union

Against the backdrop of the highly controversial debate on the future competences of the different European institutions, the principle of subsidiarity, a fundamental principle of European Union law, has recently met with renewed interest. The contributions to this Forum discuss a number of pertinent issues.

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Soft Coordination and Hard Rules in European Economic Policy – Managing Subsidiarity from an Economic Point of View

There is no doubt that European integration has changed the economic policy of the individual member states. Monetary policy, fiscal policy, tax policy, agricultural policy, competition policy, environmental policy, employment policy, social policy and health policy – to mention just a few examples – have led to varying degrees of increasing power at the European level while at the same time the "subsidiarity" principle is codified as a basic rule in the Maastricht treaty.

However, the future competences of the different European institutions are highly controversial. Some people argue that the European Commission has already greatly expanded its own powers and therefore call for a policy of decentralisation, i.e. bringing power back to European citizens and to local and national governments. Others argue, however, that we need more European power in certain policy areas, e.g. to combat international terrorism or to face the economic challenges of globalisation. Both strategies are to be seen in the context of reducing public hostility towards the European Union.

Some experts want to reinforce the power of the member states,[1] and are calling for a body to survey the principle of "subsidiarity" and thereby help to avoid the taking-over of more and more functions by Brussels. Such a procedure should help to close the existing "democracy gap" between the citizens in the different European member states and the European institutions. As a result, the power of Brussels would be limited according to the interpretation and application of the principle of "subsidiarity" relating to European integration and defined through the individual members.

This position can be justified additionally with reference to a proposal by the Commission on the future of European economic policy. The idea of the Commission's proposal is to require unanimity instead of a qualified majority in the Council of Ministers for the refusal of proposals on the coordination of economic policy prepared by the Commission and its bureaucracy.[2] Through the implementation of this idea the Commission would be empowered to define the standards of coordination in the European economic policy field, as unanimity between all member states in questions of coordination is unlikely.

But it is not only the Commission and the Council of Ministers that want to concentrate more decision-making powers at the central levels of governance in Brussels; sometimes one of the member states itself prefers a greater centralisation of power. France, for example, occasionally demands a "gouvernement économique", i.e. European power in questions of European-wide economic policy in addition to what is already done from and in Brussels. Furthermore, France has proposed a business cycle fund as a prerequisite for an anti-cyclical fiscal policy.[3] Moreover, the coordination of employment and social policy works at the same time in the direction of more central

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[1] Cf. D. Spinant: UK to propose "subsidiarity" watchdog, in: euobserver.com of 22 July 2002, at: http://www.euobserver.com/index.phtml?aid=7057&sid=9; cf. in this connection, however, R. Caesar: Eine neue Aufgabenverteilung zwischen EU und Mitgliedstaaten?, in: E. Theurl, E. Thöni (eds.): Zukunftsperspektiven der Finanzierung öffentlicher Aufgaben, Vienna et al. 2002, pp. 29-54.

[2] Bundesministerium der Finanzen: Verstärkte Koordinierung der antizyklischen Finanzpolitik in Europa?, Stellungnahme des Wissenschaftlichen Beirats beim Bundesministerium der Finanzen, Monatsbericht des BMF, August 2002.

[3] Cf. in detail H. Tomann: Europäische Integration und Wandel des wirtschaftspolitischen Regimes, in: Jahrbuch für Wirtschaftsgeschichte: Wirtschaftspolitik nach dem Ende der Bretton-Woods-Ära, Munich 2002, p. 62.

competence for the Commission and the Council of Ministers in Brussels.[4] Furthermore, European social policy has become an item of contention. "On the one hand, a social policy framed by the European Union is feared to pose a threat to national social and labour market policies; on the other, the absence of the Union's clearly defined competences in this field is held responsible for the citizen's lacking identification with the Community".[5]

Bearing in mind the pros and cons of giving more power to Brussels compared to the loss of sovereignty in the member states it can be clearly stated that there is a need for a solution which would settle most of the above questions better than the status quo does. Part of this status quo is the different forms of coordination in the different areas of economic policy. The key question arises: "Do we need more Maastricht-type criteria", i.e. is soft coordination within other areas of economic policy enough or do we need no further coordination at all?

Within the different areas of economic policy there are:

- a single European policy as in the case of monetary policy (including the exchange rate);[6]
- close coordination in budgetary policy, with treaty rules regarding the size of public debt, in combination with commonly agreed rules and objectives, an exchange of information and peer review;[7]
- weak coordination in the field of labour market policies (including wage developments, pensions systems[8]) and product and capital market policies. In the area of weak coordination we again find peer review, guidelines, methods of best practice, agreement on a common understanding, information exchange or just a dialogue;
- finally, there are the newly developed open methods of coordination considered by many as a governance innovation although they include some of the above-mentioned forms of coordination, mainly the discussion of best practices and peer reviews. It remains an unanswered question whether this will lead to sanctions by the Commission in the future.

Furthermore, European law also reflects different degrees of obligation. There is close coordination regarding the primary sources of European law, e.g. the treaties, including protocols and the secondary sources defined by article 249 of the Amsterdam Treaty, meaning regulations, directives, judgements, recommendations and statements/comments. The most binding rules are the regulations, defining rules on a general and abstract basis, which are directly binding for all member states, whereas directives are only binding in regard to goals, but open in terms of means.

Apart from the different forms of coordination the actors involved have to be taken into consideration. It makes a difference whether the coordination is preceded by the Council of Ministers, takes place in joint forums or is implemented by the Commission itself. However, independent of the forms of economic policy coordination, its actors and the form of implementation, profound questions must be dealt with.

- Is there an optimal degree of decentralised and centralised competences?
- Does a rational profile and division of power between Brussels and the national governments exist?
- Does such a profile comprise a better balance between the danger of over-legislation by the Commission and the Council of Ministers on the one hand, and the danger that local matters which need to be tackled Europe-wide, or even need global attention, are not adequately recognised on the other hand?

These questions are easily written down, but difficult to answer. This paper intends to develop a framework for the coordination issue from an economic perspective.

The Market as a Form of Hard Coordination

To begin with, it will be necessary to define the given economic policy framework of a member state, before starting the debate on responsibilities for economic policy and investigating to which level of government the responsibility should be allocated.

A practical perspective stems from the status quo of the provision of private and public goods in different member states of the European Union. This perspective concerns the different legal frameworks

[4] Cf. in detail, D. M. Trubek, J. S. Mosher: New Governance, EU Employment Policy, and the European Social Model and the Commissions White Paper on Governance, manuscript 2001.

[5] B. v. Maydell et al.: Enabling Social Europe, Berlin 2006, p. IX.

[6] Cf. Art. 121 (EC) Treaty of Amsterdam (formerly article 109 j (EC) Treaty of Maastricht); European Council: Resolution of the European Council on the Stability and Growth Pact, Amsterdam, 17 June 1997; Council Regulation (EC) No. 1466/97 and No. 1467/ of 7 July 1997; R. Ohr, A. Schmidt: Europäische Geld- und Währungspolitik: Konsequenzen der gemeinsamen Währung, in: R. Ohr, T. Theurl (eds.): Kompendium Europäische Wirtschaftspolitik, Munich 2001, pp. 417-466.

[7] Cf. in this connection H. Tomann, op. cit., pp. 49-64; C. de la Porte: The soft open method of co-ordination in social protection, in: European Trade Union Yearbook 2001, Brussels 2001, pp. 339-363; H. Dermot, M. Imelda: The Open Method as a new mode of governance: The case of soft economic policy co-ordination, in: Journal of Common Market Studies, Vol. 39, No. 4, 2001, pp. 719-746.

[8] Bundesministerium der Finanzen: Verstärkte Koordinierung der antizyklischen Finanzpolitik in Europa? Gutachten erstattet vom Wissenschaftlichen Beirat beim Bundesministerium der Finanzen, Monatsbericht des BMF, August 2002.

under which the economies work in each country. For cultural, historical, political and other reasons (sociologists call these "path dependencies") activities in some countries are organised privately through the market whilst in others, or in other periods of time, the same goods are provided publicly or collectively. A third possibility in between parliament and markets is a corporatist framework, e.g. the self-governmental processes within the different branches of the German social security system. These and other non-governmental organisations belong to the governance structure in question.[9]

Should the status quo mixture of public and private goods in the member states be accepted and taken for granted? Until recently, the description of the differing status quo of the legal framework in the individual European member states was taken for granted. But since the Treaty of Maastricht (1992) and within Community law there is now clarity, at least from an economic point of view, concerning the character of our mixed economies under European law. Paragraph 81 and the following paragraphs in the Treaty define a clear legal framework with regard to the role of the market economy.[10] This is done for the common market in combination with the four European fundamental freedoms of the Single Market: free movement of goods, free movement of persons, free movement of services and free movement of capital.[11] On this basis, which includes European competition law, there is now a clear fundamental framework and analytical foundation for the future of economic policy in Europe and its coordination.

By comparing the given legal framework of the EU with constitutional law, e.g. in Germany, it becomes clear that the market economy is more codified at the European level than for Germany as one of its member countries. In other countries the situation will be similar and should be put on the agenda of researchers and politicians. With respect to the "subsidiarity" principle this implies that whenever a market can handle the provision of goods, the legal framework in the specific country has to be adjusted accordingly. A member state ignoring that can be sued by the European Commissioner for Competition.

If this regulatory policy is considered to be valid as the basis for economic policy, the first priority must be to analyse not only possible market failures but in particular government failure and that of politicians themselves – an area in which there are no sanctions like those from competition on functioning markets, except elections. Subsequently, from this basis of deregulating where the market forces are the major form of coordination, one can proceed to search for other necessary forms of coordination. To make the idea more applicable: the forms of coordination should always include the question whether there is a potential for deregulation in the concerned area before other forms of coordination are discussed.[12]

To sum up, before starting to argue about the different methods of hard, soft and open coordination it should be verified whether an issue is regulated that could be better achieved through the markets and with more distance to political interference. The market economy offers a form of hard coordination through competition rules and at the same time provides a good example of the application of the "subsidiarity" principle. Indeed, the market economy is perhaps the most important principle of coordination, but is seldom mentioned when the European Commission talks about strengthening the coordination in European economic policy. And there are good reasons for this behaviour.

What Does the Theory of Bureaucracy Tell Us?

Having successfully established the Single European Market, the European Commission may expect two forces which will strengthen its political powers. Both developments are well explained by economic theory.

One force is represented by national pressure groups in the member states which are faced with the loss of national economic protection. Consequently, they call for a European substitute for that protection and this has to be implemented by the European Commission. This is often neglected as a driving force for strengthening the power of the Commission.

It seems contradictory that the member states should all agree at the same time to the loss of their national sovereignty. But economic theory tells us about the gains in terms of maximising their votes, when policymakers avoid political competition, unpopular deci-

[9] Cf. H. Zimmermann, K.-D. Henke: Finanzwissenschaft: Eine Einführung in die Lehre von der öffentlichen Finanzwirtschaft, 9th edition, Munich 2005, pp. 159 ff.; Monopolkommission: Netzwettbewerb durch Regulierung 14, Hauptgutachten der Monopolkommission, Bonn 2002, for the importance of corporatism in areas other than social security.

[10] Cf. K. W. Abbott, D. Snidal: Hard and Soft Law in International Governance, in: International Organization, Vol. 54, 2000, pp. 421 ff.

[11] Cf. Bundesministerium der Finanzen: Freizügigkeit und soziale Sicherung in Europa, Gutachten erstattet vom Wissenschaftlichen Beirat beim Bundesministerium der Finanzen, No. 69, Berlin 2000.

[12] A very sensible example is the National Health Service in the United Kingdom. A shift from direct to indirect control is called for. What this means is that NHS should be removed from government control and what this means is probably said by Sir Anthony Grabham, the current (2002/3) President of the British Medical Association, who has called for a radical substitution of the currently tax-financed system by a system that is financed by social security contributions and/or premiums and, on a micro-economic basis, the management of the patient by private companies under strict public supervision.

sions and parliamentary control. If political decisions are transferred to supranational organisations, the political responsibilities are divided or partly removed from competition, majority and control. In the case of the European Union it is possible that the national legislator has to accept a European regulation which has been decided at the European level by all national executives.

It is obvious that the European Commission, the European Parliament, and even the European Court of Justice, are highly interested in the transfer of political power from the national to the European level. We know from the theory of bureaucracy and the popular Parkinsons' Law about the determinants that let organisations grow. Basically, it is the principal-agent problem which allows them (being the agent) to maximise the budget (paid for by the principal) and finally their own utility.

To summarise, as we have seen before, the economic integration of markets is well controlled by competition. The political integration of institutions which complements the economic integration may lack any analogous control. Instead, the European Union faces a lack of democratic rules and therefore seems to violate the subsidiarity principle.[13]

The Theories of Public Goods and of Fiscal Federalism

Before asking what level of government should accomplish a certain public function, and whether the public goods should be provided on a local, regional or national basis, at the European level or even on a worldwide basis, it has to be defined whether the goods that are presently provided should be public at all, and if so, whether they are European-wide goods. Otherwise, the given status quo with its historically developed bundle of public goods has to be accepted. With the acceptance of the status quo as the basis for coordination, however, one might risk coordinating things that do not belong together and implicitly strengthening the Brussels position. Furthermore, the theory of public goods cannot provide valid information about the optimal mixture of public and private goods, and finally, it cannot be derived from this theory whether the public sector in a country is disproportional, meaning too small or too large. More precisely, from a very fundamental position one could try to measure whether the public sector has already reached socialism in the sense of too many public institutions, enterprises and expenditures, or is still working under the conditions of a free-market economy. Technically speaking, there is no clear concept of privatisation and deregulation or re-regulation of and within the public sector. Solid government supervision is needed. The prerequisite for more private goods and deregulation is a clear legal framework and at the same time the setting of financial incentives for all participants. This would be the type of coordination that makes up the constitutional element of the market economy.[14]

Applying the economic theory of fiscal federalism to the allocation of expenditures and taxes[15] with its internal coordination mechanisms means that this regulatory framework of a country is set, i.e. we accept the given quantities of public goods without examining whether the public sector in a particular country is optimally sized in volume and/or structure. On this basis, which is not satisfactory at all, it has to be stated which level of government should be in charge and therefore responsible for the provision and financing of these given "public" goods.

To decide upon these issues, the regional or geographical scope of these goods has to be analysed and divided into local, regional, national and European-wide goods. On the basis of allocation, distribution, short-term and long-term stability, as three fields of interest in public finance, it is possible to develop criteria that help to decide whether certain public goods should be provided more at a central or more at a regional or local level (cf. Table 1).

Unfortunately, this economic approach gives only a very first indication of whether a good is considered to be regional or central. And worldwide goods would require a world government because their external effects cannot be internalised at the regional level.

In a well-defined field of interest, e.g. foreign policy or climate (environmental) policy, central responsibility will be adequate from an economic point of view. However, in most cases, the "subsidiarity" principle must be used in order to avoid the same errors at different places. One example would be the structural policy for specific spatial goals. The situation of a region with its needs must also be recognised as a base of a successfully applied policy as a European-wide view of regional problems.

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[13] For more detail cf. R. Vaubel: Europa-Chauvinismus. Der Hochmut der Institutionen, Munich 2001, pp. 117 ff.; A. Downs: An Economic Theory of Democracy, New York 1957; J. A. Schumpeter: Capitalism, Socialism and Democracy, New York 1942.

[14] For more detail cf. J. M. Buchanan, R. A. Musgrave: Public Finance and Public Choice: Two contrasting Visions of the State, Cambridge Mass. 1999, pp. 11 ff.; W. Eucken: Grundsätze der Wirtschaftspolitik, Stuttgart 1952/1990.

[15] Cf. W. Oates: The theory of public finance in a federal system, in: Canadian Journal of Economics, Vol. 1, 1968, pp. 37-54; W. Oates: On local finance and the Tiebout-Modell, in: American Economic Review, Vol. 71, 1981, pp. 93-97; C. M. Tiebout: A pure theory of local expenditures, in: Journal of Political Economy, Vol. 64, 1956, pp. 416-424; M. Olson: Towards a more general theory of governmental structure, in: American Economic Review, Vol. 76, 1986, pp. 120 ff.

Table 1
Criteria for Allocating Functions to Central or Decentral Government Level

Economic objectives / Decision on centralisation	Achievement of objectives rather central	Achievement of objectives rather decentral
Efficient allocation		
Public supply adapted to individual preferences		
- principle of fiscal equivalence	(X)	X
- principle of "subsidiarity"		X
- provision for regional "spillovers"		X
Promoting innovations in the public sector		X
Production at lowest possible costs (provision for economies of scale and divisibility of public goods)	X	X
Distributive justice	X	X
Stabilising the business cycle	X	
Fostering economic growth	X	(X)

Based on: H. Zimmermann, K.-D. Henke: Finanzwissenschaft. Eine Einführung in die Lehre von der öffentlichen Finanzwirtschaft, 9th edition, Munich 2005, p. 195.

In terms of identifying an optimal mixture of private and public goods and an optimal profile of governmental competence neither the theory of public goods nor the theory of fiscal federalism is well-defined or unambiguous. Whether goods are local, regional, national, European-wide or worldwide depends a lot on the administrative status quo, i.e. the different sorts of federalism in the individual states. In France there are départements, régions and communes, in Germany there are states ("Länder") and municipalities ("Gemeinden", "Regierungsbezirke" and "Landkreise") and in the United Kingdom there are counties and boroughs. To change the boundaries of these political regions according to the principle of fiscal equivalence is challenging and yet recommended throughout.

The Euregios on the borders between European states prove the possibility of favourable cooperation between regions and are financially supported through Interreg funds by the European Budget.[16] Certain functions can be fulfilled better with other regional boundaries than the existing ones. An optimal geographical size for the accomplishment of governmental functions is difficult to define but a prerequisite for more fiscal equivalence, i.e. for a better allocation of resources.[17]

However, whilst internalising external regional effects provides cost-consciousness, government functions have more elements than just providing and financing a good.[18] They also comprise

- the planning process
- the decision process
- the implementation process
- the final control mechanism.

These different processes could be, and are in reality, allocated to different levels of government (cooperative federalism), so that there is a broad profile of competence where levels of centralised and decentralised government are included at the same time within the same field of economic policy.

What is additionally missing in this discussion about the economics of fiscal federalism and the allocation of public functions to different levels of government is a solid empirical basis to evaluate and compare the different approaches to solving the intergovernmental fiscal relations within Europe and on a national basis. Therefore, one day a European framework is required for a solution that solves the problems on the basis of the Single Market with its four freedoms and European competition law. Part of this framework is competition between different systems under the status quo, and a financial framework that may lead to a new type of European budget autonomy.

A Desirable Kind of Budget Coordination

Whether the financial constitution should include transferring taxing power from the member states to Brussels, or just a financial framework as in the past, must be discussed and has to do with some kind of new cooperative federalism and the principle of fiscal equivalence in Europe.[19] What can be said in any case is that financial resources have to be accompanied by the requirement that certain functions have to be fulfilled, i.e. the revenues have to be determined by the functions (principle of connectivity). Otherwise there is no allocation efficiency to be accomplished.

For some people "creeping federalism" describes the danger that the Commission and the Council of

[16] For more detail cf. V. E. Schaub: Grenzüberschreitende Gesundheitsversorgung in der Europäischen Union. Die gesetzlichen Gesundheitssysteme im Wettbewerb, Baden-Baden 2001, pp. 79 ff.

[17] For Functional Overlapping Competing Jurisdictions (FOCJ) cf. Bruno S. Frey: Ein neuer Föderalismus für Europa: die Idee der FOCJ, Tübingen 1997, pp. 87 ff.

[18] See in this connection the optimum currency area as a completely different example. Cf. R. A. Mundell: A Theory of Optimum Currency Areas, in: American Economic Review, Vol. 51, 1961, pp. 657-664; and in connection with tax-policy cf. D. Göpffahrt: Die Besteuerung multinationaler Unternehmen aus europäischer Perspektive, Baden-Baden 2001.

[19] Bundesministerium für Wirtschaft und Technologie: Neuordnung des Finanzierungssystems der Europäischen Gemeinschaft, Gutachten erstattet vom Wissenschaftlichen Beirat beim Bundesministerium für Wirtschaft und Technologie, Dokumentation No. 455, Bonn 1998.

Ministers will claim more and more power for Brussels and at the same time cause a growing democracy gap between the EU and its citizens. This was, and is, the case for the Maastricht criteria in connection with the Stability and Growth Pact. The convergence criteria from the Maastricht Treaty together with the four European fundamental freedoms was a solid concept for economic policy. There was a clear macroeconomic idea associated with European competition law. Thus, fiscal policy is only a part of this concept, as the successful accomplishment of the Maastricht criteria has to do with budgetary constraints and budget consolidation. Apart from consolidation there is no autonomy in the area of fiscal policy for the Commission and the Council of Ministers.[20]

Concerning the existing budget of the European Union, which is mainly a kind of transfer budget, there are needs for changes on the expenditure as well as on the revenue side. One proposal is to separate the EU budget into two parts: one for allocational and the other for distributional functions. European-wide goods, as are to be found in the areas of foreign policy, defence and security policy (incl. anti-terrorism), environmental policy, in the framework for research and education, trade policy, transnational networks and certain parts of tax policy, could be on the expenditure side of this new allocational budget. The revenues for such a budget should be financed via a European tax on the basis of the benefit or equivalence principle, in contrast to the status quo. There we mainly find a distributional logic, meaning political considerations largely based on bargaining power. This proposal can be justified by looking at the present budget with its enormous share of agricultural and structural expenditures.[21]

"Solidarity", distribution and political rationality may be achieved in the transfer budget within the current intergovernmental fiscal relations. The financing for this part of the budget could stem from contributions paid to Brussels on the basis of the GNPs of the member states together with own resources in the form of duties etc. as is now already the case. The value-added tax with its tax-base for calculating the contributions should be abolished for distributive reasons and substituted by the existing proportional "GNP-tax" which could be made progressive by charging more from countries with a higher per capita income.[22]

Summary

The "constitutional and allocational view of coordination" comprises

- monetary policy as a consequence of the Single Market;
- the market economy and competition law as the fundamental economic framework of the European Union.

These hard rules for a European economic policy include the search for more regions (Euregios) in order to better fulfil the elements of fiscal equivalence in the different areas of European economic policy with their specific different structures and processes (e.g. planning, deciding, implementing and controlling).

The "political view of soft coordination" with the great interest shown in it by the media, in particular the "open method of coordination", should not only consist of benchmarking and the discussion of best practices. It should also include more information about different legal frameworks and incentive structures, i.e. the potential for privatisation in the sense of the European treaty.

These elements of coordination could be given as a guideline to the "subsidiarity watchdog" that many experts are calling for to prevent European institutions from allocating too much power to themselves.

Thus, an economic constitution is postulated on the basis of more market economy with outcome-oriented financial incentives. Furthermore, a financial constitution and more fiscal equivalence in the different processes of governmental responsibility can be accomplished among different levels of government. This procedure would minimise market and government failure at the same time.

To summarise, this paper has tried to find a better framework for the coordination issue only from four different economic standpoints. Other disciplines, i.e. political science, jurisprudence and historians may add to this picture. The economic approach shows that a common European economic policy has a clear conceptual basis that would lead a "watchdog" in the right direction when managing subsidiarity.

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[20] Cf. Bundesministerium der Finanzen: Verstärkte Koordinierung der antizyklischen Stabilitätspolitik in Europa?, Gutachten erstattet vom Wissenschaftlichen Beirat beim Bundesministerium der Finanzen, Berlin 2002; Deutsche Bundesbank (ed.): Recent Developments in Financial Systems and their Challenges for Economic Policy: A European Perspective, Reden anlässlich einer Konferenz in Frankfurt am Main am 28/29 September 2000. In this publication there are arguments concerning a possible debt autonomy for Brussels in order to better pursue monetary policy on the "open market".

[21] Cf. in more depth B. Milbrandt: Die Finanzierung der Europäischen Union: Perspektiven für eine Osterweiterung, Baden-Baden 2001.

[22] Cf. R. Peffekoven: Die Finanzen der Europäischen Union, Mannheim 1994; and K.-D. Henke: Sozialproduktsteuer, in: Wirtschaftswissenschaftliches Studium 17, 1988, pp. 140-142.

Wolf Schäfer*

Harmonisation and Centralisation versus Subsidiarity: Which Should Apply Where?

In the Treaty of Maastricht the concept of subsidiarity is declared to be a general principle of action for the European Union (EU). Both in the preamble and in Article 3b of the EC Treaty it is stressed explicitly as the foundation upon which institutional task sharing is organised within the EU. In the EU, this task sharing is related in particular to the competences of the member states in relationship to the Community. Despite its importance, the principle of subsidiarity is not clearly defined in economic – or legal – terms. From an economic point of view it appears appropriate to identify the subsidiarity principle as the institutional manifestation of the general principle of comparative advantages that applies in societies based on the division of labour: i.e. the division of labour within a community should take place in such a manner that a particular institution be entrusted with those tasks for which it has comparative advantages over other institutions. With regard to the provision of goods, comparative advantages should be identified pertaining to their proximity to citizens' preferences and cost efficiency.

The Principle of Subsidiarity and Systems Competition

The interpretation of modern liberal theories of the state associates the principle of subsidiarity with limiting state power and safeguarding individual freedom and self-responsibility. In this context it is firstly assumed that responsibility should rest on the private rather than the state level, and secondly on the lower rather than the higher state level. This implies that the state's task of allocation entails providing incentives for the efficient production of goods in the private economy and in the case of purely public goods to supply these in accordance with citizens' preferences.[1] One example of a purely public good within the EU as a whole is the realisation of the Single Market with the four freedoms of movement of persons, capital, goods and services. This is a constitutive Community task. Accordingly, it is for the Commission to actively press for the necessary market liberalisation measures in the member states, even in the face of national resistance – something it has been seen to have done, pointing the way forward, in recent years.

In the economic theory of federalism the subsidiarity principle is regarded as a rule of establishing responsibility within a multi-tiered state structure. The subsidiarity principle's inherent predilection for tasks to be allocated on a decentralised basis is fuelled by the aim of satisfying citizens' preferences to the greatest extent possible. The more heterogenous these preferences are, the less capable homogeneous public services provided by central bodies are of living up to this heterogeneity. Rather, the supply of public services has to be geared to the different users who should then also provide for their financing. This addresses the principle of fiscal equivalence[2], which is assigned to the principle of subsidiarity within the framework of the theory of fiscal federalism.

A decentralised form of task sharing between administrative bodies in accordance with the principle of fiscal equivalence should not only satisfy the citizens' heterogenous preferences in optimal fashion, but also – by means of the vertical and horizontal competition between government institutions initiated by it – produce incentives for innovation among the public suppliers.[3] This addresses the dynamic component of the principle of subsidiarity.

All in all it becomes clear that the subsidiarity principle corresponds to the organising principles of the market economy and in its institutional manifestation is inherent to systems competition.

Harmonisation and Centralisation

One frequent objection to the strict application of the principle of subsidiarity is that the centralised production of public services can result in economies of scale. This opens up a trade-off when considering the welfare advantages gained by the optimal satisfaction of citizens' preferences through decentralised administrative bodies on the one hand and the associated

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[1] Cf. James M. Buchanan: Federalism and Fiscal Equity, in: American Economic Review, Vol. 40, No. 4, 1950, pp. 583-599; Jerome Rothenberg: Local Decentralization and the Theory of Optimal Government, in: Julius Margolis (ed.): The Analysis of Public Output, New York 1970, pp. 31-64; Wolf Schäfer: Overlapping Integration Areas, in: Franz Peter Lang, Renate Ohr (eds.): International Economic Integration, Heidelberg 1995, p. 55 ff.

[2] Cf. Mancur Olson, Jr.: The Principle of 'Fiscal Equivalence': The Division of Responsibilities among Different Levels of Government, in: American Economic Review, Vol. 59, No. 2, 1969, pp. 479-487.

[3] Cf. Wallace E. Oates: Fiscal Federalism, New York 1972, p. 12.

forgoing of any economies of scale that centralised production might bring on the other. But by no means, however, should this automatically lead to the conclusion that a cost-benefit analysis is necessary when deciding on the optimal allocation of responsibilities for particular tasks to the national and supranational policy levels. Rather, it would be appropriate to differentiate with respect to the definition of the type and extent of public services provided by regional and national authorities on the one hand and the production of these services on a supranational level on the other. We would then have both at once: proximity to citizens' preferences and economies of scale, i.e. subsidiarity and cost savings.

Often enough, moreover, harmonisation and centralisation are justified by the hypothesis of cross-border external effects relating to certain public services or by the latters' property of non-excludability, which is a characteristic of pure public goods.[4] This argument is sometimes expressed in more general terms:[5] neither competition between states nor the principle of subsidiarity with its assumption that private service provision is preferable to state supplied services can function, it is claimed, because states select and take on those tasks where competition among private economic agents has failed (selection principle). However, since state tasks are justified by market failure, it is argued, it is unreasonable to re-introduce the market through the back door of systems competition. So, for example, if the state produces public goods because their provision by private agents would lead to ruinous competition, then ruinous competition between the states can also be expected. Or if the social state has developed because private services are not possible due to the problem of adverse selection, then systems competition among the social states would also come to grief on the problems of adverse selection. As a result, systems competition between individual states would not lead to citizens' being provided with public goods and reallocation to the extent they desire and at minimal cost. This sub-optimal situation, it is argued, can only be prevented by coordinating the systems in the various states.

This argument cannot stand uncontradicted.[6] Firstly, it is of course true that international externalities can in general be internalised even without central decision-making bodies in the sense of Coase by means of international compensation payments. As a matter of principle the question should be raised as to why – if there is a need to internalise – private institutions should not spontaneously come into being to make a profit from satisfying this need. If this were to happen the assumption of private responsibility in the sense of the subsidiarity principle would also come to bear. Moreover, it is doubtful as to whether political agents really act wisely and benevolently, and this leads to the problem of the correct identification by the state of the externalities to be internalised. Where do externalities appear? How substantial are they? What are their effects? At this point it is probably necessary to refer to the basic impossibility of centralising decentral knowledge in the sense of Hayek.[7]

The argument in favour of harmonisation and centralisation as derived from the selection principle basically implies a state acting in optimal fashion that possesses the comprehensive knowledge and ability to identify purely public goods and to produce them efficiently. And indeed, in such a theoretical, optimal world no competition mechanism is required in order to first find optimal solutions in the sense of the subsidiarity principle. However, the real world is not optimal and nobody possesses ex-ante knowledge with regard to optimality. For this reason, the search process inherent in the exploratory nature of systems competition is indispensable in the real world, for it is precisely this process that is meant to find out whether, and on what level, state action is optimal.

A further argument against systems competition and subsidiarity and in favour of administrative harmonisation and centralisation lies in the claim that different institutional regulations generate competitive advantages and disadvantages which distort international competition. For this reason, it is argued, a *level playing field* must be created, i.e. a competitive environment of standardised institutional conditions that removes distortions to competition. However, this demand for a level playing field fails to appreciate the important fact that institutional regulations belong – in much the same way as land, physical capital and also, to a certain extent, labour, but also the weather, language and culture – to the more immobile factors of a particular country. Who would consider standardising land prices and rents, languages and cultures? These are all expressions of regional and country-specific differences in factor endowment and preferences; they represent comparative advantages and disadvantages that countries possess and, to a certain extent, (can) produce themselves. The patterns of international

[4] Cf. Mark V. Pauly: Optimality, 'Public Goods', and Local Governments: A General Theoretical Analysis, in: Journal of Political Economy, Vol. 78, 1970, pp. 572-585.

[5] Cf. Hans-Werner Sinn: How Much Europe? Subsidiarity, Centralization and Fiscal Competition, in: Scottish Journal of Political Economy, Vol. 41, 1994, pp. 85-107.

[6] Cf. Wolf Schäfer: Systemwettbewerb versus Harmonisierung in der Europäischen Union, in: Horst Tomann (ed.): Die Rolle der europäischen Institutionen in der Wirtschaftspolitik, Baden-Baden 2006, p. 23 ff.

[7] Cf. Friedrich August von Hayek: The Use of Knowledge in Society, in: American Economic Review, Vol. 35, No. 4, 1945, pp. 519-530.

specialisation for countries and regions must turn out to be correspondingly varied. Harmonisation aimed at creating a level playing field contradicts fundamental economic principles which focus on product, process and locational innovations as the driving forces behind an *uneven* playing field.

A third argument for harmonisation and centralisation and against systems competition lies in the hypothesis of a *race to the bottom*. It is feared that within systems competition governments will, in competition with each other, reduce the level of regulation so far as to fall short of the optimum. In extreme cases regulation disappears altogether (zero regulation). This could, so the argument goes, then lead to the collapse of modern welfare states.

The race to the bottom hypothesis is based on a very particular model of neoclassical thought:[8] perfect competition with a large number of small, identical states; benevolent governments that produce purely public goods and whose aim is to maximise residents' income; perfect mobility of international capital and perfectly immobile labour; a fixed global capital stock; single parametrical competition. These assumptions do not correspond with reality, and it thus comes as no surprise that there is no empirical evidence of a race to the bottom – e.g. with regard to taxation – within the EU, nor even within the OECD. Basic models that include multi-parametrical competition – e.g. with regard to taxes-services packages offered by the states to the private sector in an environment of systems competition – thus appear to be more capable of delivering explanations.[9] Here there is no race to the bottom, but rather a tendency towards an equivalence calculation on the part of private agents as a kind of equilibrium analysis with regard to what the state takes from its citizens in the form of taxes and duties and what it gives back in the way of public services.[10] Eliminating systems competition, and with it the principle of subsidiarity, on the weight of the argument of needing to prevent a race to the bottom can therefore not be accepted.

Political Cartels

Yet all these and further arguments are brought forward often enough as economic justification for the evident increasing tendency in the EU towards centralisation, which clearly runs counter to the principle of subsidiarity – even though it is the fundamental principle for action in the EU. The presumably decisive reasons for the increasing departure from the principle of subsidiarity by means of further centralisation in the EU are more likely to be derived from the domain of politico-economic explanation approaches: the Community's bodies are striving to strengthen their power by extending their areas of activity. This is equally true for the Commission, the European Parliament and the European Court of Justice. Furthermore, the Community's institutions have an interest in harmonisation and coordination in a wide variety of policy areas within the EU and thus also in the formation of intergovernmental political cartels which are overseen by the Community's bodies and thus in turn encourage centralisation.[11]

However, national governments also have an interest in political cartelisation in the form of harmonisation because they want to use it to avoid institutional competition and consequently the principle of subsidiarity. Through harmonisation they also attempt to limit or even remove altogether the exit options for the private sector which are associated with systems competition. The interest in harmonisation is greatest where, in institutional competition, governments have comparative disadvantages in the relevant policy areas and as a consequence have an interest in a strategy of *raising the rivals´ costs*. Since the increase in majority decisions in the European Council makes this all the more possible, the reduction in the number of unanimous votes thus implies an increasing departure from the principle of subsidiarity in the EU.

This raises the question of how to respond to the creeping loss of importance ascribed to the principle of subsidiarity in the EU. The European Constitutional Group proposes the installation of a European subsidiarity court to preside over charges related to the distribution of competences between the EU and its member states and whose judges are appointed from the highest national courts.[12] It is argued that these would have a greater interest in asserting the principle of subsidiarity than the existing Community bodies. However, since it is the citizens in the member states who presumably have the greatest interest in the principle of subsidiarity, Vaubel[13] demands the establishment of an additional parliamentary chamber as

[8] Cf. as basic models e.g. Murray C. Kemp: Foreign Investment and the National Advantages, in: Economic Record, Vol. 38, 1962, pp. 56-61; George R. Zodrow, Peter Mieszkowski: Pigou, Tiebout, Property Taxation, and the Underprovision of Local Public Goods, in: Journal of Urban Economics, Vol. 19, 1986, pp. 356-370.

[9] Cf. in particular: Charles M. Tiebout: A Pure Theory of Local Expenditures, in: Journal of Political Economy, Vol. 64, 1956, pp. 416-424.

[10] For this reason, competition of systems promotes the trend towards benefit taxation.

[11] Cf. Roland Vaubel: Enforcing Competition Among Governments: Theory and Application to the European Union, in: Constitutional Political Economy, Vol. 10, No. 4, 1999, pp. 327-338, here p. 331.

[12] Cf. European Constitutional Group: Report, London 1993.

[13] Cf. Roland Vaubel: Internationaler Politischer Wettbewerb: Eine europäische Wettbewerbsaufsicht für Regierungen und die empirische Evidenz, in: Jahrbuch für Neue Politische Ökonomie, Vol. 19, 2000, pp. 280-335, here p. 290.

a "European Senate for Political Competition" whose members are directly elected by the citizens of the EU.

The notion that political cartels – in similar fashion to economic cartels – can be contracts to the detriment of third parties and thus require political competition regulation – again in the same way that we have economic competition regulators – has yet to become generally accepted. This is most likely due to the fact that in the traditional concept of the organic state it is assumed that politicians are benevolent and their endeavours geared to maximising the common welfare and not their own political benefit. However, in conjunction with the modern economic constitutional concept of the state, public choice manifests political agents' fundamental orientation towards self-interest, which often enough is geared to excluding political competition. Despite all the difficulties involved in the practical design of an institution to control political cartels, the discussion should be continued in order to strengthen systems competition and thus also the principle of subsidiarity in the EU.

In addition, the principle of subsidiarity can be strengthened by the institutional anchoring of exit options for EU states and regions by legalising secession and opting out. This enables states and regions to withdraw from certain fields of Community policy where the principle of subsidiarity has been breached, and to take these on themselves. In extreme cases even a legalised withdrawal from the EU should be made possible.[14]

[14] Cf. Wolf Schäfer: Withdrawal legitimised? On the Proposal by the Constitutional Convention for the Right of Secession from the EU, in: INTERECONOMICS, Vol. 38, No. 4, 2003, pp. 182-185. Article I-60 of the draft constitution is to be welcomed in this context.

Tendency Towards a Weakening of the Subsidiarity Principle in the EU

The increasing harmonisation and centralisation activities of the Community's bodies that run counter to the principle of subsidiarity are taking hold of more and more areas of policy, as becomes clearly evident in the EU Treaties from Maastricht to Amsterdam and Nice, and ultimately in the proposed constitutional treaty: the EU postulates an increasing number of Community responsibilities in social, structural, environmental, employment, health, industrial, transport, technology, research and education policy. These are policy areas which lie almost exclusively within the competence of the member states and in the main belong there. In addition, we have the institutional arrangement of the Open Method of Coordination (OMC), the approach of which, through benchmarking and examples of best practices, has a fundamentally centralising effect because it is geared to the dubious strategic goal laid down at the EU summit in Lisbon of becoming the world's most competitive and most dynamic knowledge-based economic region by the year 2010.[15]

Policy developments in the EU that are to a large extent running counter to the principle of subsidiarity are weakening the institutional potential of this region of integration. The key vision should not be a Europe of harmonised equalness, but a Europe of subsidiarity, of plurality in differentiation.

[15] Such a resolution fatefully recalls many similar resolutions made by the governments of the centrally administered states of the former Eastern Bloc to the effect that they would overtake certain Western states at a particular point in time.

Jacques Pelkmans*

An EU Subsidiarity Test Is Indispensable

The principle of subsidiarity compels us all to reflect on what we want the EU to do and not to do. Subsidiarity is therefore fundamental to the proper design of the Union and to the political legitimacy of its powers and activities. In this elementary sense, subsidiarity is widely supported. However, its application in the Union since the Maastricht Treaty (which introduced it) leaves much to be desired, to put it diplomatically. Broadly positive are the greater awareness of the design issue of the EU after having incorporated it in the EU/EC treaty and the subsidiarity debates during and after the writing of the constitutional treaty. In the early 1990s, invoking subsidiarity had a chilling effect on the inclination of EU institutions to go for ever more EC draft legislation. In the years of the Convention and the constitutional treaty debates, the subsidiarity question was fiercely debated in the political terms of "more or less Europe". Such discussions are of eminent importance to raise awareness about what the Union does, and perhaps should not necessarily do or, indeed,

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does not yet do but ought to. If there were no more to subsidiarity, this article would not be written.

Unfortunately, apart from the broad awareness concerning subsidiarity and the "constitutional moment", the principle of subsidiarity has to be applied *within* the current EU system. It is not hard to appreciate that this "routine" application of subsidiarity has largely been neglected or, at best, minimal. This is not in the interest of the Union. Where are the careful applications of the Protocol on Subsidiarity and Proportionality, attached to the 1997 Amsterdam Treaty (but which had already largely been around since the Edinburgh European Council of December 1992[1])? If and when the Commission brings up an explicit consideration of subsidiarity, it is usually in the context of the recent "better regulation" framework,[2] but the Regulatory Impact Assessments rarely go into a scrutiny of the criteria in any detail. In Council or Coreper committees, the subsidiarity flag is often raised so as to hide a country's resistance behind a veil of EU interest. Apparently, once the subsidiarity flag is up, assertion reigns and hard logic is avoided. Most national and European parliamentarians regard subsidiarity as "political", without ever answering the query as to how their judgement can be more or better than "instinctive" when they do not have a method or a profound analytical basis at their disposal. Also, in the European Court of Justice (ECJ) few cases have been brought.[3] Finally, the constitutional treaty foresees the direct involvement of national parliaments, giving them a six-week period for assessing whether a new draft legislation violates subsidiarity. Although the ratification process has stopped, a number of national parliaments are nevertheless experimenting with such assessments. Why has nobody in the EU circuit or in the COSAC[4] ensured that 25 parliaments (all acting in no more than six weeks, and with respect to perhaps as much as 40 or more pieces of draft legislation a year) are basing their evaluation on a common methodology?

Browsing in the academic literature of European law and political science yields a host of contributions but few of them are application oriented. Summing up somewhat unfairly, leaving out many subtleties, political science regards subsidiarity as the new jargon of more explicit power struggles in the EU (e.g. the concern of the German Laender or the relatively powerful regions such as the Belgian communities and some Spanish regions) or another route to ensure political legitimacy. Such essentially political contests do not depend on methods or consistency and, in any event, they matter most during the constitutional moment. In European law, the consensus is that subsidiarity is a legally "empty" principle and some authors even suggest that it holds distinct drawbacks or dangers.[5]

The Role of a Functional Subsidiarity Test

The poor treatment of subsidiarity outside the constitutional moment can only be remedied by the systematic application of a well-founded subsidiarity test. The economics of subsidiarity provide a solid analytical foundation as well as the wanted functionality of a test. This test is set out below and a few examples are briefly explained. However, before doing so, it is critical for a proper understanding to be clear as to the place and role of such a test. What matters is that functionality and politics both play their respective roles. The test can only work, of course, if the legal basis for the assignment of powers to a higher level is itself uncontroversial (based on the principle of conferral). Beyond that, the test should be functional in that a systematic reasoning, with a view to achieving an optimal assignment of competences, is pursued and always based on a given methodology so that everybody can repeat the test and conduct one with the same discipline. This must mean that the test itself can never be politicised in whatever respect. With political disagreement about goals or too great political sensitivities concerning central powers, the "better achievement" (Art. 5, EC) of certain policies is logically excluded and hence becomes irrelevant. In such cases, the refusal to consider centralisation is a purely political act – which might be legitimate, of course – but not a "test"! The test is only useful if it is first accepted that it is a functional one which informs political decisionmakers about costs and benefits as well as the implications of further (de)centralisation.

The test should also not be confused with the ultimate political decision to (de)centralise. Whereas the *test* is functional, the *decision* ought to be political. Legislative or other such political decisions ought to be made by *elected* political agents who are politically accountable. Only in such a way can subsidiarity acquire political legitimacy. The routine application of subsidiarity to numerous pieces of often highly complex EU legislation is well served by using a test as a functional underpinning of an ultimately political decision.

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[1] In fact, much can be found in the preparatory document of the summit from the Commission SEC (92) 1990, The principle of subsidiarity, 27 Oct. 1992

[2] Cf. also M. Petite: Subsidiarity in practice, in: Sharing power in Europe, proceedings of the Dutch/British subsidiarity conference in The Hague, under the UK presidency, 17 November 2005; the author is DG of the Commission's Legal Service

[3] Cf. ibid. for two recent cases of some interest, however.

[4] COSAC is the association of Europe committees of the national parliaments in the Union.

[5] A non-specialist survey is to be found in J. Pelkmans: Subsidiarity between law and economics, College of Europe, Research papers in Law, No. 1, 2005; cf. www.coleurop.be and go to LAW.

The EU Subsidiarity Test

Art. 5, EC, specifies the subsidiarity and the proportionality principles. Any action of the Community must fulfil two conditions. First, in areas of shared competences, the Community must demonstrate "a need to act in common", as given by the existence of either economies of scale or cross-border externalities.[6] In the large majority of instances, this "need" can be verified. Second, any action must be proportional to the objective pursued. The idea behind proportionality makes eminent sense: once some degree of centralisation (in the very general sense of acting in common) is regarded as beneficial, proportionality is meant to minimise the costs. What degree of centralisation is to be favoured once a "need to act in common" is established, is not trivial at all. It is not only naïve but counterproductive to assume that "centralisation" only implies a shift of all power to the Commission.[7] The EU institutional system is carefully balanced and centralisation can range from feeble forms of inter-member states' cooperation (the Lisbon process) or "joint" responsibility (e.g. member states and the Commission sign those parts of trade agreements which deal with certain selected services), via the well-known "Community method" of legislation (the legislator being usually the Council and the European Parliament together), to delegation to the Commission of technical refinement or amendments of existing acquis, eventually to autonomous EU agencies and, indeed in one case, to an independent agency (the ECB). One important criterion for deciding upon the degree of centralisation, once the need-to-act-in-common test is passed, is credibility. If member states voluntarily cooperated on a given policy issue, there would seem to be no need for any centralisation. As game theory teaches, simple and repetitive cooperative games lead to "learning" and may eventually result in efficient bargaining. But non-repetitive cooperation is often difficult to agree upon, for instance when the number of interested parties is large, the range of policy alternatives is wide, the problem is complex, and when the (relative)gains and losses of players would be unevenly distributed. What really matters for economic agents in the market, however, is whether cooperation is credible and hence sustainable. The credibility of cooperation is low if information is highly imperfect or asymmetrically distributed, especially in complex policy areas, because this renders it impossible to monitor compliance. Credibility is also low when the incentives to cheat are strong and the ability or willingness to impose collective sanction is perceived as minimal. If cooperation cannot come about, or it would not be credible, there is a case for a greater degree of centralisation, such that credibility is ensured.

The subsidiarity test is about the benefits of the relevant degree of centralisation. There are four steps.

1. Identify whether a measure falls within the area of shared competences (if exclusive to the EC, the test does not apply; the current treaty is not so easy to read in this respect but the reader may wish to study Art. I – 12 of the constitutional treaty where it is spelled out[8]).
2. Apply the criteria (scale and externalities across intra-EU borders, or other criteria if justifiable); this is the "need-to-act-in-common" test.
3. Verify whether credible cooperation is feasible.
4. If steps 1 and 2 are confirmed, and 3 denied, then the assignment is to the EU level (even if this still leaves considerable choice as to how to specify the degree of centralisation); if step 3 is feasible and sufficient for the purpose, the EU level should either not be involved or only under strict conditions (e.g. with a ban on harmonisation).

If step 4 would point to (further) centralisation, it is essential to apply a proportionality test in order to minimise the costs of centralisation. This (complex) issue is not studied in this contribution as it brings us into the realm of implementation, monitoring and enforcement as well as into intricate menus of instruments which are more or less "costly" in informational or bureaucratic terms. Proportionality also hangs together with soft yet critical issues of horizontal trust amongst the member states and vertical trust between the EU level and the member states. For instance, a lack of trust can prompt extremely detailed EU regulation, leaving no discretion whatsoever for the member states (or, indeed for economic agents and market incentives), as was the case in the "old approach" to technical harmonisation before the Single Act. Such legislation clearly amounted to regulatory failure but it took a new standardisation strategy, a new treaty, landmark cases in the ECJ on mutual recognition and an ambitious internal market strategy (embraced by all member states) before a much more "proportional" new approach (with far lower costs) could be effectively pursued.

Testing for Subsidiarity

Using the functional subsidiarity test in the EU for the assignment of public economic functions to the

[6] For reasons of space, the text on Art. 5 is kept short. More elaborate treatment is to be found in J. Pelkmans: European integration, methods and economic analysis, 3rd revised edition, Harlow/NewYork 2006, Pearson Education, chapter 3; and in e.g. J. M. Sun, J. Pelkmans: Why liberalisation needs centralisation – subsidiarity and EU telecoms, in: The World Economy, Vol. 18, No. 5, Sept. 1995.

[7] In any event, the member states are most often responsible for implementation and this also renders the EU system relatively decentralised to begin with.

[8] Art. I – 13 specifies the shared competences but it is also crucial to consider Arts. I – 14 through I – 17.

relevant levels of government might well be easier than for non-economic state functions such as justice & home affairs or foreign policy and/or defence. Thus, the test lends itself naturally to the proper assignment of efficiency (or, in Musgrave terms, allocation) functions to the EU level. In this type of issue, a far-reaching degree of liberalisation can actually prompt considerable (though varying) degrees of centralisation on specific regulatory or competition aspects for the internal market to work properly. This is particularly true for network markets[9] but in some respects is also relevant for regulated sectors like financial services or food. The EU has been quite ingenious here, with its innovation of mutual recognition, which combines the guarantee of free movement and free establishment with some latitude for domestic regulation and a rather limited degree of central laws. The genuine problem with mutual recognition is less with its design but much more with its practical (non-)application or political fears in some member states with regard to allowing it without a heavy dose of conditionalities (which either increases centralisation via harmonisation or makes a mockery of the internal market, as was witnessed in the amending of the services draft directive proposed by Commissioner Bolkestein).[10]

Applying subsidiarity is not straightforward in the EU, however, not even for public efficiency functions.[11] Some resistance emerges when liberalisation requires centralisation. Even though all EU countries (and OECD countries) raise no doubt about having independent regulators for network industries which are being liberalised, the EU's internal market for network industries, quite miraculously, has to make do without common regulators. But the EU is not in the business of liberalising *national* network markets; its task is unambiguously to create a single market and one cannot be surprised that this core task remains a fantasy without EU regulators. Subsidiarity is also purposely misused as an excuse for fragmentation. This is clearest in labour markets. Proponents of keeping labour markets as national as possible begin by not accepting free movement of workers except when it is sure to remain trivial or residual. One way to ensure that is the host country control principle because it takes away the only competitive advantage of EU workers from lower wage coutries. Hence, legal demand for such workers will shrink to a trickle as there are no advantages except when there is a shortage of a specific category of skills. In addition, many other restrictions as well as the close linkages with the welfare state (which is "national") put up a host of other barriers. It might well be correct not to build up an array of EU rules on labour and social issues, but the reasoning should be proper: subsidiarity cannot be correctly applied if one first excludes cross-border externalities and thereby the "need-to-act-in-common" test. Only by first allowing free movement (or estimating potential mobilities, if an experiment is seen as too risky) can one cast a judgment on the ensuing cross-border externalities, not when one begins by outlawing significant movement from the start. Yet another set of sensitive issues emerges when powers in certain domains are undisputedly national (think of public health, the media, education) but the boundaries of what exactly are those national competences are subject to shifts given new technology, or new cross-border externalities.[12]

Finally, the economics of federalism strongly suggest that EU-wide public goods ought to be assigned to the central level. Thus, some economists have pleaded for the centralisation of foreign policy and defence on these grounds, helped by expressions of support (be it in highly general terms) from European citizens in the Eurobarometer polls.[13] This quick-fix in applying subsidiarity unfortunately augments the risks that a subsidiarity test will be discredited by decision-makers. There is a fundamental difference between economic federalism and the economics of subsidiarity, even if the scale and externalities criteria feature in both. In economic federalism the optimal assignment is analysed inside a country; with subsidiarity in the Union that is not the case. One has to go back to the very roots of the idea of subsidiarity to see why this matters a great deal. Subsidiarity starts from the notion that policy ought to reflect the voters' preferences and this is best achieved when remaining close to voters whenever possible. So the welfare behind subsidiarity is the fullest possible satisfaction of voters' preferences. Cost/benefit aspects come in when the costs of policies are too high to be borne in small jurisdictions (i.e. scale) and when jurisdictions interact intensely in the common space, be it a country or the Community (cross-border externalities). These two

[9] Cf. e.g. J. M. Sun, J. Pelkmans, op. cit.; and the Stoffaes report on energy regulators: C. Stoffaes et al.: Vers une regulation europeenne des reseaux, Paris 2003.

[10] Cf. J. Pelkmans: Mutual recognition in goods and services, an economic perspective, in: F. Kostoris Padoa Schioppa (ed.): The principle of mutual recognition in European integration, 2005, Palgrave-Macmillan, for a general overview of the economic meaning and costs/benefits of mutual recognition; an excellent legal analysis of the draft services directive and major amendments is: Uyen Do: La proposition de directive relative aux services dans le marche interieur .. definitivement hors service?, in: Revue de Droit Europeenne, No. 1, 2006.

[11] The following is based on and elaborated in J. Pelkmans: Testing for subsidiarity, in: T. Bruha, C. Nowak (eds.): Die Europaeische Union: Innere verfasstheit und globale Handlungsfaehigkeit, Baden-Baden 2005, Nomos.

[12] Cf. the examples elaborated in J. Pelkmans: Subsidiarity between law and economics, op. cit., for public health and the media; and J. Pelkmans: Testing for subsidiarity, op. cit., for education.

[13] CEPR: Built to last: a political architecture for Europe?, London 2003, with e.g. Guido Tabellini, Erik Berglof and others as authors.

criteria rationalise the moving away from the local/national level to higher levels of decisionmaking. However, one ought not to forget the underlying necessity to "read" the voters' preferences very carefully. As is well-known, it is extremely difficult to pinpoint properly revealed preferences, and this is particularly true when it comes to elusive yet critical notions such as nationhood, identity, fundamental values and solidarity. That is why political processes do this permanently, disciplined to some extent by the accountability of elected agents in representive democracy. In foreign policy and defence, not the cross-border externalities in numerous technical economic dossiers inside the internal market matter, but imprecise although profound sentiments ("preferences") about vague notions like nationhood, values and identity. Thus, the "costs" of even a modest degree of centralisation in this area are not to be measured in monetary terms, at least not in the first place. Also, the third step of the test (credible cooperation) will be very hard to accomplish once voters begin to realise what deeper cooperation in foreign policy and defence might entail. Wavering, prudence, many exceptions, and a lack of credibility in these domains is simply to be expected, unless perhaps a foreign threat is so imposing that there are no other options.

Equity and Macro-economic Stability Functions

The other two public economic functions are equity and macro-economic stabilisation. Given space constraints, only a sketch of some of the issues can be made here. Cross-border mobilities in federations can easily be so large, actually or potentially, that redistribution at the lower level of government is bound to be undermined, hence becoming unsustainable.[14] In the EU of today or tomorrow, this is not the case. True, as noted before, cross-border mobilities are constrained by restrictions as well and therefore "subsidiarity" is sometimes invoked improperly. Nevertheless, the case for EU equity at a more than very marginal scale is utterly weak and the current assignments reflect this reasonably well.[15]

Macro-economic stabilisation in the Union is currently a complex mix of some obligations for all member states (sound fiscal policies, stable prices, independent central bank), a centralised monetary policy (but only for 13 eurozone countries) and a fairly decentralised but nonetheless constrained fiscal regime (again, only for Euroland). Whereas the centralisation of monetary policy (due to indivisibilities, the functioning of interbank markets etc.) is widely supported in Euroland, and the choice of a single currency rather than perfectly fixed exchange rates has added further benefits, the constrained, yet decentralised fiscal regime suffers from recurrent credibility problems among academic economists (but so far not at all in financial markets).

From a subsidiarity perspective, both equity and (the fiscal side of) macro-economic stabilisation face a sort of all-or-nothing choice which seems to stifle political initiative. In equity, once the EU moved beyond the (relatively) very modest cohesion and structural transfers which are not interpersonal income transfers, it would be very difficult to do this solely on the expenditure side. Pressures would emerge, implying that social charges or taxes would be levied at the EU level, which is a Rubicon not easily crossed (neither in terms of voters' preferences nor in the eyes of many politicians). Therefore, even if in one or two decades the case for some EU equity function were to become stronger due to cross-border mobilities, any proposal for a modest "social union" will face an uphill struggle. Similarly, in today's monetary union, the awkward choice might well be between two exceedingly tough requirements: either, one somehow accomplishes a credible regime of fiscal constraints (debt ratios and deficits) or one acknowledges that some common fiscal stabilisation is "a need-to-act-in-common" beyond the Stability and Growth Pact, but this, in turn, might only be possible in a political union.[16] It should be firmly recognised that ideas about political union, even a modest political union, invite a totally different cost/benefit approach than a purely functional subsidiarity test. These are political decisions far more prominent and radical than writing a constitutional treaty (which was largely status quo anyway) and we have observed how emotional and politicised national debates about such a moderate document have been.

Conclusions

If the EU wishes to take the subsidiarity principle seriously in routine legislative and policy initiatives, and not only during a rare "constitutional moment", a subsidiarity test is indispensable as a step prior to political debate and decisionmaking. This is just as much the case for the national (i.e. parliamentary) level as for the Union as such. A functional test can be developed based on recent literature and we have attempted to

[14] Cf. e.g. W. Oates: An essay in fiscal federalism, in: Journal of Economic Literature, Vol. 37, No. 3, 1999, pp. 1120-1149.

[15] For underpinning, cf. e.g. J. Pelkmans: Testing for subsidiarity, op. cit.; and L. Calmfors et al.: Report on the European economy 2003, chapter 3, CESifo, Munich 2003, European Economic Advisory Group.

[16] Prominent authors now advocate the latter route. Cf. e.g. P. de Grauwe: What have we learned about Monetary Integration since the Maastricht treaty?, in: Journal of Common Market Studies, Vol. 44, No. 4, 2006, pp. 711-730. However, some central bankers have argued this all along, e.g. H. Tietmeyer: Europäische Währungsunion und Politische Union – das Modell mehrere Geschwindigkeiten, in: Europa Archiv, Vol. 49, No. 16, 1994.

show that it can be applied flexibly to numerous examples without giving up the discipline of sequence and functionality. It would:

- inform political decisionmakers, particularly in more complex cases, about the entire spectrum of arguments and presumably costs and benefits as well, so that they could concentrate on the political decision for which they are accountable to voters;
- rationalise and clarify the reasoning (and dismiss misleading points);
- thereby render unproductive populism more difficult;
- greatly facilitate a direct comparison between the views of many national parliaments, which otherwise, without a rigorous and common test, would degenerate into a cacophony of political desires for a myriad of unclear or idiosyncratic motives.

Ian Cooper*

The Subsidiarity Early Warning Mechanism: Making It Work

On 10 May 2006 the European Commission released a communication to the European Council with the boilerplate title, "A Citizens' Agenda: Delivering Results for Europe." Towards the end of this document came a rather startling announcement: "The Commission wishes to transmit directly all new proposals and consultation papers to national parliaments, inviting them to react so as to improve the process of policy formulation."[1] In response, one month later the European Council, in its presidency conclusions, "welcomed" this decision, commenting further: "The Commission is asked to duly consider comments by national parliaments – in particular with regard to the subsidiarity and proportionality principles."[2] Thus it was with little fanfare, and without explicitly saying so, that the EU institutions took the first tentative steps towards switching on something called the "early warning mechanism." That is a new legislative procedure which has the potential to significantly change the way the EU is governed, but exactly how – or indeed whether – it will work in actual practice remains uncertain.

What is most significant about the early warning mechanism (EWM) is that it would bring national parliaments into the EU legislative process for the first time. Specifically, it would make them into "subsidiarity watchdogs." National parliaments would be empowered to raise objections to any EU legislative proposal which they believe violates *subsidiarity* – the principle that the EU should not act in circumstances where action at the national level is more appropriate. The prospects for the EWM were thrown into doubt in 2005 when the electorates in France and the Netherlands voted to reject the Constitutional Treaty; the EWM was but one of many institutional reforms that were prefigured in that document. Now that it seems that the EU institutions will move to establish the EWM anyway – though perhaps in a watered-down form – even in the absence of the Constitutional Treaty's ratification, the key question for the future is how to make it function well. That question is the primary focus of this paper. In the pages that follow I will briefly review the story of the creation of the EWM, and assess its prospects.

The Genesis of the Early Warning Mechanism

The early warning mechanism was devised by the Convention on the Future of Europe, which drafted the Constitutional Treaty. The Laeken Declaration, which established the Convention, anticipated the creation of the EWM when it suggested that national parliaments could play a role in the EU's legislative process though "preliminary checking of compliance with the principle of subsidiarity".[3] It is not surprising that the Convention embraced this idea, given that a majority of its members were in fact national parliamentarians.

The procedures for the EWM were set out in the Subsidiarity Protocol appended to the Constitutional Treaty.[4] Under the EWM, when new legislation is proposed, the proposing institution – which in practice is almost always the Commission – must transmit the proposal not only to the other EU instititutions as it has always done but also directly to national parliaments. In response, any national parliament would within six weeks be able to send to the EU institutions "…

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[1] COM 2006 (211) final, p. 9. Available at http://eur-lex.europa.eu/LexUriServ/site/en/com/2006/com2006_0211en01.pdf.

[2] "Brussels European Council 15/16 June 2006: Presidency Conclusions", p. 14 (point 37). Available at http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/90111.pdf.

[3] Available at http://europa.eu.int/futurum/documents/offtext/doc151201_en.htm.

[4] Available at http://europa.eu/constitution/en/ptoc97_en.htm#a568.

a reasoned opinion stating why it considers that the draft in question does not comply with the principle of subsidiarity" (Art. 6). Except in cases of urgency, the EU institutions must not take up the legislation until after the six-week period has elapsed; furthermore, the proposing institution must "take account" of national parliaments' opinions. Most importantly, if one third[5] of national parliaments raise objections, then the proposing institution is required to formally "review" the measure, after which it "… may decide to maintain, amend or withdraw the draft. Reasons must be given for this decision" (Art. 7). This last provision became known as the "yellow card" because it empowers national parliaments to issue a "warning" to the proposing institution. A further provision for a "red card," in which two thirds of national parliaments would have been able to veto a proposal, was considered but rejected by the Convention. So as it stands the EWM is strictly advisory.

After the negative referendum results in France and the Netherlands, it was suggested that the EWM should be established anyway, even in the absence of the Constitutional Treaty's ratification. This suggestion was controversial among both supporters and opponents of the Treaty: supporters worried that "cherrypicking" one appealing element would lessen the exigency of the Treaty's ratification, and thus make its demise more likely; opponents protested that it would be an illegitimate implementation of one part of the Treaty through the "back door." It should be noted, however, that precisely because the system is strictly advisory it would be entirely legitimate for the respective institutions to start the EWM. In fact, there is precedent for such a move: many of the previous institutional reforms related to subsidiarity were put into practice immediately – in the aftermath of the Maastricht constitutional crisis – and only later incorporated into EU law, in a protocol to the Amsterdam Treaty.[6] The main drawback of the lack of a treaty basis for the EWM is that it would lack the element of legal compulsion that stipulates that the proposing institution *must* review those legislative proposals that receive the "yellow card"; but even this element could be provided by a non-treaty legal instrument such as an Interinstitutional Agreement.

It might seem that the Commission's recent statement has settled the argument in favour of the supposition that the EWM can begin without the Constitutional Treaty. However, the sudden announcement that it would now begin sending all legislative proposals and other preparatory documents to national parliaments falls short of an outright launch of the EWM. It does not actually mention the Constitutional Treaty in this context; nor does it refer to such details as the six-week deadline or the one-third threshold. In all likelihood this is to avoid the accusation of "cherry-picking". Even so, given its reticence it is unclear whether the Commission intends to fully launch the EWM as envisioned by the Constitutional Treaty or merely to inaugurate a weaker and vaguer "consultation" process. It would be preferable that the Commission were to signal clearly that it is willing to voluntarily submit to the requirements of the EWM – in particular the requirement that the one-third threshold triggers a "yellow card" review. The success of the EWM will depend largely on the perception that the Commission is willing to take the process seriously, and genuinely take into account the reasoned opinions of national parliaments that raise subsidiarity objections to its proposals.

The COSAC Pilot Project on the Third Railway Package

Another important condition on which the success of the EWM depends is, of course, the willingness and ability of national parliaments to respond to Commission proposals in a reasoned and timely manner. Recent events have shown that securing this end may be something of an uphill battle.

The institution which takes a leading role in coordinating national parliamentary scrutiny of EU affairs is the Conference of Community and European Affairs Committees of Parliaments of the European Union, otherwise known as COSAC. Recently, COSAC arranged a "pilot project" to test how the EWM will work in actual practice. To simulate the conditions of the EWM, national parliaments were given a period of six weeks in March and April of 2005 to review a package of proposed legislative measures related to railways, the "Third Railway Package." The results of this experiment were instructive in that they revealed a great deal of confusion among the participants as to exactly how the system ought to work.[7] Part of the confusion could be said to be "teething problems" – the kind of logistical difficulties that should be expected to arise in the early stages of any system that is large, complex and lacking central coordination. These kinds of problems will probably be progressively resolved as the system develops. But some of the difficulties of the pilot project could be said to be more serious, in that

[5] The threshold is lowered to one fourth for proposals concerning police cooperation and judicial cooperation in criminal matters under the Area of Freedom, Security and Justice.

[6] I. Cooper: Subsidiarity to the Rescue: Why the "Early Warning System" Should be Salvaged from the Constitutional Treaty, in: INTERECONOMICS, Vol. 40, No. 4, 2005, pp. 185-190.

[7] Report on the Results of COSAC's Pilot Project on the 3rd Railway Package, to Test the "Subsidiarity Early Warning Mechanism", 17-18 May 2005, Luxembourg. Available at: http://cosac.eu/en/info/early-warning/pilotproject/pilot.

they stem from a fundamental ambiguity at the heart of the EWM, to be discussed further below.

National parliaments vary along lines of political culture and institutional structure. They also vary considerably in the kind and extent of scrutiny that they exercise over EU affairs. For example, COSAC points out that among member states there is a divide between two broad types of scrutiny system, dubbed "document-based" and "mandating" – as well as various hybrids between the two.[8] Consequently each parliament must decide for itself the following questions: how the subsidiarity compliance of EU legislative proposals should be monitored (most have delegated the task to either a European Affairs committee or sectoral committees); which body is formally responsible for the adoption of the reasoned opinion (whether a committee or the plenary); and whether, in bicameral parliaments, there should be a coordination of views in the reasoned opinions.[9] Once all these cross-national differences are factored in it becomes apparent that the EWM is a machine of considerable complexity.

Of the current twenty-five member states, thirteen have unicameral parliaments and twelve have bicameral parliaments; thus there are 37 separate legislative chambers of national parliaments in the EU. Of these, 31 took part in the pilot project. The parliaments were meant to scrutinise the "Third Railway Package" for its subsidiarity compliance. Of the 31 participating parliamentary chambers, 17 indicated that they believed the package was, at least in part, in breach of subsidiarity.[10] But an important complicating factor in this exercise was that the package actually contained four separate and substantively different legislative proposals which were:

- a proposal for a Directive on the development of the Community's railways;
- a proposal for a Directive on the certification of train crews operating locomotives and trains on the Community's rail network;
- a proposal for a Regulation on international rail passengers' rights and obligations;
- and a proposal for a Regulation on compensation in cases of non-compliance with contractual quality requirements for rail freight services.

As it turns out, the various parliaments raised objections to different proposals within the package: the number of parliaments that objected to the four measures were, respectively, 3, 5, 4 and 10. Thus if the package were considered as a whole, enough parliaments objected to trigger a "yellow card" review; but if the proposals were considered separately, they did not. This exercise revealed a fundamental difficulty: further thought must be devoted to determining how the parliamentary votes should be tallied.

A post-pilot-project survey of national parliaments found a number of concerns about the process, some of which were logistical and some more fundamental. On the logistical side, some parliaments were concerned about the lack of translation of the proposals into all the languages of the EU25. Some expressed concern that six weeks was too short a time for the full consideration of the proposals and the preparation of reasoned opinions. And some were troubled that it was difficult to know about the results in other parliaments before the end of the six-week period – information which would have aided them in coming to a decision. It is easy to see that these kinds of concerns are likely to be smoothed over as the process develops – with more efficient translation services, more practice at reviewing proposals and formulating reasoned opinions, and better coordination and exchange of information between parliaments during the six-week period.

More fundamental concerns expressed by the national parliaments concerned more basic questions about their role and the whole purpose of the EWM. A very common concern was that the Commission had not furnished sufficient arguments in justifying the proposals in terms of subsidiarity; in fact, 20 of the 31 participating parliamentary chambers reported that the Commission's justifications regarding subsidiarity and proportionality were unsatisfactory. Many also stressed that it was very difficult to reach a decision on whether subsidiarity had been breached.

Another fundamental difficulty which was raised by a number of national parliaments concerned the scope of the review. Some thought that it was difficult to make a distinction between the principles of subsidiarity and proportionality. That indeed is an excellent observation. As I have pointed out elsewhere,[11] it is patently absurd that the EWM, as outlined in the Constitutional Treaty, entails a *subsidiarity* review of proposed EU legislation but not a *proportionality* re-

[8] Documents that explain the difference between these two systems are available at: http://cosac.eu/en/info/scrutiny/scrutiny/document-based and http://cosac.eu/en/info/scrutiny/scrutiny/mandating.

[9] A table that summarises these cross-national differences is available at: http://cosac.eu/en/info/earlywarning/overview/.

[10] L. Kubosova: MEPs Back Railway Bill Despite National Concerns, EU Observer, 28 September 2005. In the EWM each national parliamentary system will be allotted two "votes" – two for unicameral parliaments, and one for each chamber in bicameral systems. Thus there are a total of fifty votes, seventeen of which (one third) are required to initiate a review of a proposal. Due to the large number of non-participating parliaments and the ambiguity of many of their responses, I have not attempted to give a definitive tally of their "votes" in the pilot project.

[11] I. Cooper: The Watchdogs of Subsidiarity: National Parliaments and the Logic of Arguing in the EU, in: Journal of Common Market Studies, Vol. 44, No. 2, June 2006, pp. 281-304.

view. These two principles concern, respectively, ends and means: the first concerns *whether* the EU should act, and the second concerns *how* it should act. If the EWM is restricted to the former, then national parliaments are reduced to expressing blunt opposition to a proposal rather than including constructive criticism as to how the proposal could be improved. Otherwise, on what basis would the Commission be convinced to *amend* its proposal in response to national parliaments' reasoned opinions? It is to be hoped that in the future the participants in the EWM will overlook this unfortunate oversight in the Constitutional Treaty, and that, as the European Council says, the Commission should "… duly consider comments by national parliaments … in particular with regard to the subsidiarity *and proportionality* principles" (my emphasis).

The Ambiguity at the Heart of the EWM: Democracy or Subsidiarity?

To judge whether the EWM succeeds in the future, we must have a clear idea of how to define "success". That is difficult, because the EWM has a dual purpose. First, it is intended to enhance the democratic legitimacy of the EU; and second, it is intended to increase the compliance of EU legislation with subsidiarity. While these two purposes are not contradictory, it is entirely possible that they will be in tension with one another at least some of the time. The first concerns inputs (i.e. the quality of the democratic process) and the second concerns outputs (i.e. the quality of legislation). The Convention settled on the EWM as a handy solution to two separate problems: how to make the EU legislative process more democratically legitimate, and how to devise a subsidiarity review mechanism that does not require the creation of any new institutions. The genius of the EWM is that it employs national parliaments, which are ideal for both purposes but for very different reasons. On the one hand, national parliaments are ideal for promoting democracy because they have impeccable democratic credentials, which will presumably rub off on the EU, alleviating its endemic democratic deficit. On the other hand, national parliaments are ideal "subsidiarity watchdogs" because they are presumed to have a strong interest in advancing an interpretation of that principle that will curtail the expansion of EU authority, which is a threat to their own freedom of action. While these two purposes of the EWM are easily conflated in the easy formula that both bring Europe "closer to the people," it is better for our purposes that they remain distinct.

The dual purpose of the EWM, then, is to alleviate the democratic deficit and to ensure that EU legislation complies with subsidiarity. The final result, as devised by the Convention, is something of a hybrid: as a subsidiarity review mechanism it is distinctly political in character, and as a process of democratic scrutiny it is extremely limited in scope and power. Monitoring subsidiarity compliance could have been construed as a narrow, even technical, task calling for a disinterested body of experts. Conversely, the problem of the democratic deficit could have been seen to require a grander reform along the lines of a "third legislative chamber" for the EU. In fact, the Convention contemplated both of these kinds of options. On the one hand, the working group on subsidiarity considered but ultimately rejected subsidiarity review mechanisms of a largely technocratic or judicial nature. These included: the creation of a new, *ad hoc* body to monitor the application of the principle of subsidiarity; the appointment within the Commission of a "Mr. or Mrs. Subsidiarity"; the creation of an *ad hoc* chamber within the ECJ responsible for questions of subsidiarity; and an *ex ante* judicial mechanism to scrutinise an EU legislative act after it is adopted but before it enters into force.[12] These mechanisms were found unsuitable because the working group agreed that subsidiarity is "a principle of an essentially political nature"[13] which should be monitored by political institutions. On the other hand, a grandiose proposal for a "third chamber" in the EU was advocated by the Convention chairman Giscard d'Estaing himself. He called for a "Congress of the Peoples of Europe," made up of members of the European Parliament and a proportional number of representatives of national parliaments, which would "meet periodically to review the 'State of the Union' [as] a sort of European 'global constituency'."[14] This idea was rejected because it would have overly complicated the political structure of the EU; it also would have been too unwieldy to be effective as a timely subsidiarity review mechanism. In the end, the EWS could be seen as a compromise between these vastly different kinds of proposals. In a way, it makes national parliaments into a far-flung body of "subsidiarity experts" which advises the Commission on matters of subsidiarity compliance. But it also constitutes them as a kind of "virtual third chamber" – albeit with consultative powers and a narrow mandate – whose role is to collectively pass democratic judgement on EU legislative proposals. The key to making the EWM work, then, is to understand and acknowledge both purposes behind the EWM and to balance the two.

[12] The Convention took it for granted that EU legislation would be subject to *ex post* review by the ECJ for compatibility with the subsidiarity provisions of the Constitutional Treaty, as has always been the case with Article 3b of the Maastricht Treaty; but they decided that the new *ex ante* subsidiarity review mechanism they were creating should be political in character.

[13] CONV 286/02, p. 2.

[14] Bruges Speech, 2 October 2002. Available at http://european-convention.eu.int/docs/speeches/3314.pdf.