

Subsidiarity under the Constitution for Europe

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1. Introduction

The principle of subsidiarity lies at the heart of the European Union's strife to bring the EU closer to the citizen.² Yet, it appears to be failing to do so in its present form. Therefore, the new Treaty Establishing a Constitution for Europe [hereafter: European Constitution] has the intention to bring it to the best possible position in this respect.

After long discussions on the issue of the distribution of competences between the European Community and its Member States, it was tried to clarify this by introducing in the Treaty of Maastricht what is at present Art. 5 EC. This provision covers the notions of attribution, subsidiarity and proportionality, which, when added up, should deal with all aspects of this distribution of competences. The principle of attribution lays down the basic rule of public international law that the international organization can only exercise the competences in those policy fields which have been given to it in the treaty of establishment. Subsidiarity is in this respect meant to determine the remaining role of the Member States in the exercise of the competences thus transferred to the international organization. Proportionality then limits the scope of the transferred powers even further.

The principle of subsidiarity is a special case among these: not only does it deal with the position of the Member States but also with the position of the citizen in these Member States. This is so because subsidiarity is traditionally linked to the necessity to bring the European Community and European Union as close to the citizen as possible, namely through the role of national parliaments in case a competence can better be exercised at the national level.

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² See the Protocol on the Application of the Principles of Subsidiarity and Proportionality, as annexed to the Treaty on Establishing the European Community.

Since its introduction into the European Community legal system in the Treaty of Maastricht in 1993, the principle of subsidiarity has therefore attracted much attention, both in politics and in literature. Its meaning and scope were unclear, its working in practice unknown. The principle of subsidiarity concerns the distribution of competences between the European Community and its Member States and is at present formulated in Art. 5 (second sentence) TEC:

In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.

This definition in itself already reflects that application in practice of the notion of subsidiarity easily runs into difficulties. It is often pointed out³ that the wording leaves too much room to manoeuvre, like the terms 'sufficiently achieved' and 'better achieved'. Relatively vague terms are at the heart of the contents of subsidiarity. For a more effective functioning, this notion of subsidiarity should be improved, both in wording and in intent. This probably is why it does not play an important role in EU law, in the legal decisions under EU law.

For these reasons, the principle of subsidiarity was under debate at the Convention. Different aspects were proposed to amend the present text or to be added to it. Yet, the definition of subsidiarity itself (Art. I-11 sub 3 of the European Constitution⁴) will not change. In two important other ways, the European Constitution will bring changes to the system of subsidiarity as we know it under present-day European Union law. The first way concerns the Protocol on the Application of the Principles of Subsidiarity and Proportionality, in which the new procedural rules for the application of subsidiarity are laid down, including an important role for the national parliaments. Secondly, lists are included containing the policy fields which are exclusive and non-exclusive to the

³ Tim Koopmans, Subsidiarity, Politics and the Judiciary, in: *European Constitutional Law Review*, 1: 112-116, 2005.

⁴ As numbered in CIG 87/1/04 REV 1, 13 October 2004.

European Union. This is important to the application of the notion of subsidiarity since it can only be applied to non-exclusive competence fields.

The above means that only the application will change, not the contents of the notion of subsidiarity as such, or at least that the application will lead to changes which influence the contents. It is therefore necessary to study the present-day situation first, followed by the amendments to it in the European Constitution, concluding with the implications in the European Constitution for the application of the principle of subsidiarity. In this way, it will be possible to consider an answer to the question whether the application of the principle of subsidiarity as embedded in the European Constitution, will bring the European Union closer to the citizens. As will be shown, both changes may influence the position of the Member States and their parliaments, or at least have the intention to do so.

2. Subsidiarity under the Present System

As mentioned above, the principle of subsidiarity has been a much debated issue under European law since the Treaty of Maastricht came into force in 1993. Elements of importance are most notably the role of subsidiarity in case law, its political value in many aspects, and its role and possibilities in practice. From the beginning, thus, it appears that it has mainly been a political instrument: although much emphasis is placed on it in practice and in literature, it has never played an important role in the case law of the Court of Justice of the EC. Yet, the working group on the role of national parliaments at the European Convention considered subsidiarity to be a potential means to strengthen the position of national parliaments in the European decision-making process.

There are several reasons why the principle of subsidiarity was not able to play an important role. Although it was tried several times, most notably by

Advocates-General,⁵ the Court of Justice only discussed it as a secondary point of legal argumentation.⁶ A role for the Court of Justice would be the only possibility for judicial scrutiny since the Court of Justice has the task to check the working of the Treaty, as stated in Art. 221 TEC. Involvement of national courts is therefore not foreseen. Yet, the tools the Court of Justice has been given, make it very difficult to objectively evaluate the application of the principle in actual cases. The first one concerns the policy fields on which it can be applied: only the non-exclusive competences. Yet, there is some discussion about which policy fields fall under this.⁷ Does the fact that a policy field is mentioned in one of the Treaties mean that it is an exclusive competence of the European Union? The answer to this question is relevant to both the application of the principle of subsidiarity and to the possibility for the European Community at present to exercise the same competences in external relations. For subsidiarity, it needs to be decided per policy field whether it falls under the exclusive competences or not. This decision is based upon an evaluation of the extent of European legislation in the field, not on solid facts, which is the reason why there is much debate about each policy field to which the rule of exclusive competence may apply.

A second vague notion in Art. 5 TEC is “sufficiently achieved”. A similar problem concerns the linked notions of “scale of effects” and “better achieved”. For the application of these notions, a rather subjective weighing of the circumstances is necessary, something that cannot be asked of a court which can only judge on the basis of objective legal criterions. The application of these vague notions would mean a stronger political opinion than the Court of Justice

⁵ For instance Conclusion of Advocate-General Pergola in case C-35/98, *Minister of Finance vs B.G.M. Verkooijen*, 24 June 1999, or Conclusion of Advocate-General Geelhoed in case C-491/01, *British American Tobacco (Investments) Limited and Imperial Tobacco Limited vs Secretary of State for Health*, 10 September 2002.

⁶ Case T-65/98, *Van den Bergh Foods Lts vs Commission*, judgment of the Court of Justice of 23 October 2003; Case C-377/98, *The Netherlands vs European Parliament and Council*, judgment of the Court of Justice of 9 October 2001.

⁷ Gráinne de Búrca, *Reappraising Subsidiarity's Significance after Amsterdam*, Harvard Jean Monnet Working Paper 7/99, pp.18-20; Manuel Medina-Ortega, *A Constitution for an Enlarged Europe*, 2004, 32 *Ga. J. Int'l & Comp. L.* 393.

is willing to give.⁸ All innovative steps forward by the Court of Justice have so far been made possible by a stricter legal interpretation of the EC Treaty and of secondary legislation.⁹ This element of the legal definition of the principle of subsidiarity has made it very difficult for it to be part of the Court of Justice case law.

Yet, the question arises whether such a case law development would be necessary or required. Subsidiarity does play an important role in practice, namely as a political notion.¹⁰ During negotiations for new EU legislation, the Member States apparently pay attention to a possible application of the principle of subsidiarity.¹¹ The principle of subsidiarity is in this way very relevant and is applied, but its importance lies in political negotiations rather than in legal merits. Does this mean that the text in the EC Treaty is obsolete as it is sometimes suggested?¹² The fact remains that it can only be referred to by the Member States during negotiations because it is in the text of the EC Treaty.

A final important role in the application of the principle of subsidiarity is played by the special Protocol on the Application of the Principles of Subsidiarity and Proportionality, added to the EC Treaty by the Treaty of Amsterdam:

For Community action to be justified, both aspects of the subsidiarity principle shall be met: the objectives of the proposed action cannot be sufficiently achieved by Member States' action in the framework of their national constitutional system and can therefore be better achieved by action on the part of the Community.

The following guidelines should be used in examining whether the abovementioned condition is fulfilled:

- the issue under consideration has transnational aspects which cannot be satisfactorily regulated by action by Member States;
- actions by Member States alone or lack of Community action would conflict with the requirements of the Treaty (such as the need to correct distortion of competition or avoid disguised restrictions on trade or strengthen economic and social cohesion) or would otherwise significantly damage Member States' interests;

⁸ Tim Koopmans, *op.cit.*

⁹ Gráinne de Búrca, *op.cit.*

¹⁰ See also Phil Syrpis, In Defense of Subsidiarity, *Oxford Journal of Legal Studies*, no. 2 (2004), pp. 323-334.

¹¹ As can for instance be deduced from the states-of-affairs sent by the Dutch Minister of Foreign Affairs to Dutch Parliament every three months. A 'subsidiarity test' for each piece of EU legislation under negotiation, is included.

¹² As is described by Manuel Medina-Ortega, *op.cit.*

— action at Community level would produce clear benefits by reason of its scale or effects compared with action at the level of the Member States.¹³

Thus, an explanation of the fact that the principle of subsidiarity is meant as a political instrument in practice was added to the text of the EC Treaty in an attempt to remove any confusion about the application of the principle in practice and in literature.

3. Subsidiarity under the European Constitution

Is this embedding of the principle of subsidiarity in practice going to change under the European Constitution? At least the wording of the present Art. 5 TEC will not be amended and will be repeated in Art. I-11 sub 3 Eur. Const. Yet, the circumstances under which the principle will function, will change in at least two important ways. Firstly, the European Constitution contains a clear list of exclusive policy fields. Secondly, the subsidiarity principle will play an important role in a system trying to get national parliaments involved in the EU decision-making process.

3.1. Policy Fields in the European Constitution

For policy fields, subsidiarity has thus always been different for exclusive and for shared competences: only the latter category being subject to the subsidiarity test in both the original and the future version of the principle. Which policy fields are shared between the EU and the Member States and which are not, has not always been very clear. In the European Constitution, however, exhaustive lists have been drawn up in Art. I-13 for exclusive competences¹⁴ and in Art. I-14 for shared competences¹⁵. The list of exclusive competences in Art. I-13 appears to

¹³ Art. 5 of the Protocol.

¹⁴ Exclusive competences are those which are exclusively in the hands of the European Union.

¹⁵ Shared competences are shared by the Member States and the European Union.

be rather limited: monetary policy, common commercial policy, customs union and the conservation of marine biological resources.

The contents of these lists have changed from draft version of the European Constitution to draft version:¹⁶ which policy field falls under which list? The decisions were based on the *acquis communautaire* without introducing new elements into the present-day system of distribution of competences between the EU and the Member States. This means that the disputes over this in practice and literature had to be settled. However, this does not mean that everyone holds the opinion that each competence is in the correct list in the European Constitution.

The new system means that, on the one hand, most of the possible disputes on the division of competences between the EU and the Member States will be solved automatically by the list. On the other hand, it is very well possible that this strict listing and division may lead to an enlargement of the number of policy fields to which the principle of subsidiarity may apply. This is an unavoidable effect from the wish of the Member States to recognize as few exclusive powers for the European Union as possible, thus ensuring their own influence on these policy fields. And some of those are limited within their own scope, like the monetary policy, which only applies to the 'euro' Member States.

In practice, this system of lists of competences may enhance the scope of cases in which the principle of subsidiarity can be applied since it potentially enlarges the number of fields with non-exclusive competences.

3.2. The New Protocol

The second change concerning the principle of subsidiarity does not find its origins in the wish to evaluate the distribution of competences between the European Union and the Member States, but in the wish to bring the European

¹⁶ See the different drafts by the European Convention for this at:<http://european-convention.eu.int>.

Union closer to the citizen through the national parliaments. At the Convention, the Working Group on the Principle of Subsidiarity sought a means through which the involvement of national parliaments in the European decision-making process could be enhanced in view of the idea of democracy. Several possibilities were discussed and several proposed.¹⁷ This is instead of strengthening an early involvement of national parliaments in the decision-making at the European level, for instance, or instead of pursuing a stronger link between the national parliaments and their national ministers in the Council, a link which differs from Member State to Member State right now.¹⁸ It was decided instead by this Working Group that the principle of subsidiarity would be a qualified tool for the national parliaments on a much larger scale, namely by giving specific rights to the national parliaments in the application of subsidiarity to each piece of EU legislation under negotiation.¹⁹

This suggestion by the Working Group was accepted by the Convention and is now laid down in a new Protocol on the Application of the Principles of Subsidiarity and Proportionality. This gives a formal role to the national parliaments of the Member States in two ways.

Firstly, the national parliaments of the Member States have been given a six-week period to apply the subsidiarity test themselves to European draft legislation, the same period as the European Parliament has been given for its first reaction (Artt. 3 and 5 of the Protocol). In this way, the principle of subsidiarity will be applied on both sides of the scale: both by the national parliaments and by the Commission, who has the obligation to justify the legislative proposal (Art. 4 of the Protocol). Secondly, the opinion of the national parliaments has to be taken into serious consideration by the European institutions, especially if one third of the national parliaments are against it in this

¹⁷ Erwin Teufel, *Effective competence monitoring and checking in the legislative process of the European Union*, Working Group I, Working document 6, 6 July 2002.

¹⁸ Although a special Protocol on the Role of National Parliaments in the European Union is meant to stress their role through early involvement and expression of their opinion on pending European legislation.

¹⁹ Conclusions of Working Group I on the Principle of Subsidiarity, 23 September 2002, CONV 286/02.

way.²⁰ This is sometimes referred to as an 'alarm bell procedure'. In the Netherlands, for instance, the two Chambers of Parliament have already begun to set up a system to work with this Protocol: when to react, how to react and how to decide.²¹ An interesting third element is the role the Court of Justice may play in this new procedure (Art. 7 of the Protocol): an emphasis on the Court of Justice to hear cases regarding the principle of subsidiarity, with a special role for national parliaments which can ask their government to start a procedure.

The result is that the position of the principle of subsidiarity could shift. Under the present structure in the European Union, the decision on subsidiarity matters lies at the European level: only the European institutions, and in the last stage especially the Court of Justice, are allowed to apply the principle of subsidiarity. It is a principle laid down in the EC Treaty, which the national governments or parliaments cannot apply themselves. In the European Constitution, this will be changed into a partly European partly national decision. Especially the role of the national parliaments may lead to this result.

4. Possible effects

In conclusion, several effects may possibly occur in the near future because of the changes concerning the application of the principle of subsidiarity under the European Constitution. This could also mean that there would be a necessity for national parliaments to consider European legislation early in the EU decision-making process, which has the potential to bring the EU closer to the citizens through an enhancement of the level of transparency and democracy for the citizens.

²⁰ When proposals in the field of Justice and Home Affairs are under consideration, this alarm bell procedure can start after a quarter of the national parliaments have this opinion.

²¹ See the *Advies van de Gemengde Commissie Toepassing Subsidiariteit betreffende de parlementaire behandeling van Europese wetsvoorstellen*, First and Second Chamber of Parliament, October 2004.

The question remains whether more involvement of national parliaments in the EU decision-making process is the preferable means to reach this goal. If the attention will move away from the European Parliament, which is another directly elected body within the European institutional structure. Where a choice could be made between strengthening the position of the European Parliament and the national parliaments in this respect, the European Parliament will not play an important role.

A second possible effect which could very well be an undesirable effect, is a growing involvement of the Court of Justice in solving issues arising from the application of the principle of subsidiarity on the basis of the Protocol. At present, the principle of subsidiarity is a more political concept. Yet, it could very well be juridified in effect through the changes in the European Constitution since there would be more legal procedures available for all institutions involved. The growing involvement of national parliaments, on the other hand, could also mean that it would become even more political with a risk of alienating the citizens when national parliaments fail to successfully claim the right to act in certain policy fields: which effect will such a situation have, when one or more national parliaments fail to successfully claim the application of the principle of subsidiarity? When one starts from the point of view that the Protocol could bring the EU closer to the citizen via the national parliaments, the one-third requirement could have the opposite effect as well. What if a national parliament is scheduling a discussion at a very late moment so that the result of the discussion will not have any effect on the application of the Protocol?

Another effect concerns the possible shift of competences resulting from the introduction of exhaustive lists of competences. This could very well lead to a shift in the number of cases in which the notion of subsidiarity could play a role, provided that some policy fields now considered by some Member States to be exclusive, are not in the list of exclusive competences. Closely linked to this is the position of the competences which are now falling under the second and third pillar. They are largely outside the EC, which is covered by the principle of subsidiarity and by giving the Court of Justice more powers to decide in disputes

concerning the second and third pillar, a shift in application of these competences is easily to be foreseen.

All the arguments above lead to an answer to the question whether the principle of subsidiarity under the European Constitution could bring the EU closer to the citizens. The application in practice of it, however, could go both ways. The intention of the texts clearly points towards a positive answer to the question. Yet, these will be elements connected to the application of both the principle itself and the Protocol, which could lead to an opposite result.