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Rethinking the Methods of Dividing and Exercising Powers in the EU: Reforming Subsidiarity and National Parliaments

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RETHINKING THE METHODS OF DIVIDING AND EXERCISING POWERS IN THE EU: REFORMING SUBSIDIARITY AND NATIONAL PARLIAMENTS

Anna Vergés Bausili[1]

Abstract

The Nice and Laeken Declarations put at the top of the agenda of EU reform the attainment of a clearer delimitation of the EU powers. This project is taking place in the context of a system of competences which is problematic in various senses. One of the items falling within the mandate of the Convention on the future of Europe includes the reform of the principle of subsidiarity. The emerging proposals for the reform of subsidiarity are, however, more directed towards legitimacy deficits than towards tensions in the competence system. Indeed, parallel to the competences issue, the claim for a larger role for national parliaments in the EU has come to intersect with the competence dossier, and to a larger extent this claim has reconstructed subsidiarity procedures into an answer to legitimacy deficiencies in the EU.

Introduction

With some changes in the actual formulation of the mandate, both the Nice and Laeken European Councils put at the top of the post-Nice process of reflection and Treaty revision the consideration of a more precise delimitation of powers between the EU and its member states.[2] Various issues are included under this rather broad mandate: a search for clarity; an attempt to appease critical public opinion; a search for better appraisals as to when and how the Community should intervene; and an overall search for legitimacy. Thus, among other likely changes in the Treaty the principle of subsidiarity is very likely to be reformed. Changes in its current conception (as defined by Maastricht and Amsterdam Treaties) appear as largely procedural - which nonetheless might affect and extend the substantial scope of the principle. If the IGC confirms these proposals, onal parliaments will for the first time enter the domain of EU law and policy-making with a specific remit: the monitoring of the application of subsidiarity. Although the introduction of national parliaments into the EU system is broadly a desirable change, the actual format of that entry, and the considerations on which it rests, deserve full consideration.

Thus, while the debate on subsidiarity is gradually shifting away from the competence context into the legitimacy agenda, this paper will aim first of all, at placing and assessing the role of subsidiarity within the wider context of a *problematic* EU competence system, and secondly will look at various aspects emerging from charging national parliaments to monitor subsidiarity. Thus, a first section, will aim at painting the contours of the current system and some problematic aspects against the mandate of delimitation of powers; second, it will evaluate subsidiarity as a solution; and thirdly, it will look at controversial aspects of the solutions proposed by the Convention.

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[2] See the mandate to achieve a clearer delimitation of powers (as specified in Declaration 23 of the Treaty of Nice) and retaken by the Laeken Declaration (Annex I to Presidency Conclusions of European Council meeting at Laeken 14-15 December 2001 [SN 300/1/01 rev1]).

1. The *problematic* EU competence system and the limits of the Nice and Laeken 'delimitation' mandate

Any consideration of the notion of subsidiarity ought to depart from and be based upon an assessment of the nature of the EU system of competence as it stands, and upon a broad understanding of its peculiar nature.

The first point to emphasise about the EU system of powers is its complexity. In the EU competence system, political, legal and institutional dynamics interact aiming to produce an overall balance between national and Community interests. In addition, policy dynamics, legal provisions, institutions and values all combine to shape and define outcomes.

The EU competence system is more than a listing of transferred or attributed powers: it involves systemic and sub-systemic dynamics. Rather than being designed as a classic public international organisation, the EU was devised to generate a practice of common governance, where the division of powers is played out at the sub-systemic level. Indeed, the governance of its policies, the nature of procedures (whether intergovernmental or Community) and the various decision-making arrangements (whether requiring unanimity or QMV) determine in *de facto* terms the division of competences between the EU and member states.

Although the principle by which EU powers are attributed powers is central to the system, the statement of the principle says very little about the actual operation (and also evolution) of the system. In truth, the EU powers have evolved over the years through a succession of Treaty revisions (IGCs) where, through interstate bargaining of various preferences and relative power, EU powers have been altered (Moravcsik 1995, 1998). Yet, not only has the primacy of the rule of intergovernmental attribution has been challenged over the years on various fronts, it is also the case that the 'governance' aspects of attributed powers have proven their significance alongside the 'high politics' of IGCs. The input of governments' preferences and power is central, particularly at Treaty reform stages, yet one cannot deny the existence of processes well beyond either the strictly intergovernmental attribution of competences or agency/delegation structures which reside in the political praxis and the legal and institutional arrangements for the operation of the system. In fact, one can argue that the mechanisms of jurisdictional attribution have over the years mutated towards a more institutional rather than intergovernmental model, that is, where (rather than the resorting to IGCs to increase formal powers) demands from and responses within the system have become dynamic forces for the expansion of the competence system itself. Without attempting to enter into theoretical analyses, the purpose here is simply to consider the assumptions made in the Nice and Laeken mandate for a clear delimitation of powers, and subsequently, to assess the role of the principle of subsidiarity in the context of the problematic competence system.

1.1. A largely limitless competence system and the sub-systemic governance processes

EU powers are attributed, but that attribution is peculiar in many respects. Attribution of powers itself has, over the years, lost its 'enumerative' and limited character (Weiler 1991). As an international organisation, of course, EU powers are conferred by member states (Article 5 EC Treaty);[3] yet the EU displays a practice of intergovernmental attribution of powers far from the classic international mould. Although originally a 'contractual' approach to Community competence was adopted, and this approach was confirmed by the Court in early cases,[4] by the early 1960s already, the original conception based on the primacy of an

[3] The principle of attributed competences was clearly stated for the first time outside the jurisprudence of the ECJ by the Maastricht Treaty.

[4] The Court had in the early cases defended a strict restrain to expressly delegated powers. See Weiler (1991) p. 2433-4. In *Van Gend & Loos* the Court stated that the Community constitutes 'a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit in limited fields'; or relating to the Coal and Steel Community 'the Treaty rests on a derogation of sovereignty consented by the member states to supranational jurisdiction for an object strictly determined. The legal principle at the basis of the Treaty is a principle of limited competence. The Community is a legal person of public law and to this effect it has the necessary legal capacity to

explicit attribution of powers, had eroded in some quarters: notably, the major challenge to the limitative and enumerative character of attribution being the doctrine of implied powers as developed by the Court of Justice. In other words, according to the Court, powers would be implied in favour of the Community where they were considered necessary in order to serve legitimate ends pursued by it under the Treaty. Indeed, from the teleological approach to competence of the Court, the Community *extended* the *scope* of attributed powers.[5]

Subsequently, over the early 1970s and 1980s the extended recourse to article 308 EC (ex. 235) made by the Council on the basis of 'unmatching' objectives and actual means, *extending* and *expanding* Community competence into new policy areas, meant a further blow to the original intergovernmental contractual approach to competence. To start with, expansion occurred away from resort to IGCs i.e. within the system; but also as Community expanded its competence into new policy areas and the single market programme started to unfold, the limits of the classic enumeration principle on which attribution of Community powers originally had rested, started to be less and less significant.

In sum, substantial jurisdictional changes have occurred without being the result of actual Treaty amendments, but rather originating at the sub-systemic level, in the operation of the system, or triggered by its institutions; or in other words, the institutional system and its policies do not seem a neutral or passive factor, but rather influence interests and demands on the system (Sandholtz 1993, Bulmer 1998).

1.2. The institutions' power of autonomous organization

Intergovernmental attribution has also been challenged by the capacity of EU institutions to work autonomously and, linked to the functional delimitation of powers and the institutional balance of powers in the EU, the institutions' power of autonomous organization has been conducive to material expansion of competences,[6] or to the development of new policy directions (Hooghe 1996).[7]

In the context of the work of EU institutions -which, *de iure* and in practice, are autonomous - the values, beliefs, norms and identities embedded in them shape events. Indeed, the Treaty imposes *obligations* on Community institutions to pursue Treaty objectives (particularly on the Commission for its power of initiative to pursue the general interest). Policy initiative is not only entrenched in the Treaty (article 211 EC) but is also coloured by intra-institutional values and culture. The Commission has assumed the role of defender of the Community interest and has often proclaimed its 'duty' to submit proposals, to explore and launch policy

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exercise its functions but only those. Joined Cases 7/56, 3-7-57, *Dinecke Algera* v. *Common Assembly of the ECSC*, [1957-58] ECR 39. Even so, one could argue whether a strict enumerative approach was ever intended. That is so if one considers that the original design combined general unlimited objectives (but limited means and instruments) together with institutional balance. Indeed, the Community was empowered (on the basis of the principle of express attribution of powers) with narrower powers in the form of means and instruments (those powers framed in diverse governance regimes for a handful of policy sectors) while at the same time the Community was made 'responsible' for broader general objectives defined mostly in horizontal terms rather than vertically. The relationship with national powers in the general and sectoral Community objectives was not specified but left to be agreed at a later stage and within the framework of the European institutions. Also clauses to allow development of the system itself were inserted (ex Article 235 EEC, now Article 308 EC).

[5] The ECJ also established the doctrine of exclusivity and pre-emption.

[6] That is, for instance the Commission power to trigger new policy dossiers such as regional policy in the early 1970s independently of IGCs (see Verges 2000).

[7] Hooghe argues that the Commission transformed EU regional policy from an original 'pork-barrel' intervention based on budgetary transfers, into a European regional policy (where support was conditional on assessment of projects and modulated according to common guidelines, and generally speaking where Community rather than national criteria determined eligibility and allocation of funds).

initiatives at its own discretion, independently and irrespective of the existence or not of a legal base. Where those objectives are defined in wide functional terms (like in the context of programmes such as the pursue of EMU or the single market), the room for autonomous policy activism has been larger. Indeed, the Commission has historically triggered policy dossiers justifying Community involvement on the grounds of pursuing the attainment of objectives of the Treaty and the operation itself of the single market. Clearly, Treaty objectives (particularly when generally defined) do not confer competence, yet in the past, the search for a legal base has by no means been an insurmountable hurdle preventing policy initiative. In brief, although general objectives do not imply the power on the Community to act, the Commission has often interpreted competences deriving from tasks and purposes and, in a good number of cases, its policy leadership has been significant.

To recapitulate, the institutions' the power of autonomous organization has in some cases been the determining factor in the expansion and extension of Community powers. The Commission has historically pushed the material limits of EU competence through its power of initiative and its privileged presence at Council tables, but with not less radical consequences, the ECJ's favouring of a teleological rather than a classic international public law approach, has developed the doctrine of implied powers, has established the supremacy and direct effect of Community law and has constitutionalised the Treaties (Stein 1981; Mancini 1989).

1.3. A multi-layered competence system

The current division of EU powers no longer concerns solely the national executives and the European institutions. The EU system relies on the sub-national levels of government for a very good deal of its policies. Not only sub-national authorities implement and manage structural policies and various Community programmes, but in countries where territorial units hold legislative powers the transposition of Community legislation into domestic law is a matter for decentralised authorities. Indeed, although law-making powers can be more easily demarcated, policy making in the EU and also programme based policy (such as regional policy, environmental policy, etc) is more multi-layered and unbound i.e. where the separation between national and European arenas has eroded, and governments' gate-keeping power appears as a thing of the past (Webb 1983). Indeed, not only is the policy arena permeable to policy networks of interest and pressure groups (Mazey and Richardson 1993), but also sub-national authorities mobilise and input policy and law-making (Jeffery 1995). The result is a complex and messy policy and law-making process with a good degree of random, irrational and unintended effects (Peters 1994; Marks *et al* 1996).

In sum, the implementation of the Nice and Laeken European Council mandates to attain a better delimitation of powers between the EU and the member states should not forget that Community powers permeate through member states' structures. In this context the mandate for a clear delimitation of powers *between EU and the member states* can only be treated with reservation.

1.4. A plastic competence system with frail buffers

The EU competence system is one that facilitates the development of further material co-operation when there is sufficient political will. The problematics of the system are largely definable in horizontal terms. The functional approach to competence, the possibility to expand the range of common actions through article 308, the 'relaxation' of national control in adopting legislation through QMV, and in particular, the lack of strict legal and/or political limits to competence development are substantial features of the system. These features (accompanied with vertical democratic aspects - on which more later) have led to concerns about 'creeping competence'. Three types of situations are usually identified under the title of creeping: the adoption of unjustified/unwanted legislation under QMV procedures, expansion

of material competence under article 308, and EU legislation entering domains where the Community has no explicitly attributed powers.

Firstly, Treaty provisions on the approximation of laws for the purposes of the operation of an internal market (articles 94, 95 EC) are broad and limitless and particularly poignant in conditions of QMV decision-making. In addition, as the Treaty does not explain the *principles* governing the exercise of attributed competences (apart from the principle of subsidiarity) the limits of EU intervention are perceived as rather loose. Indeed, no guidance, apart from a rather general pledge to act, there where the two conditions of subsidiarity and proportionality in article 5 are met,[8] is available. Furthermore, the institutional guarantees of compliance with the division of competences are perceived as inadequate (with the Community over-regulating and intervening where it should not). In addition, since the mid 1980s, as the single market programme gradually unfolded, the public perception of interference, over-regulation and intrusion has grown to take centre stage.

Secondly, although the principle of attributed powers (article 5(1)) boils down to the requirement of legal basis for each EU act i.e. the identification of legal base, it does not appear intrinsically difficult to find a legal base to launch initiatives in the EU; in other words, competence expansion truly resides in the collection of sufficient political will. Article 308 has been used in close to 700 instances by the Council acting unanimously, and thus, given sufficient (unanimous) political acceptance, the EU system allows for the launching of initiatives as need arises. In short, even though recently the Court has adopted a firmer stance (tobacco case), the limits to Community co-operation are mainly political, not legal, and as article 308 requires unanimity, it has often been the political will of governments which has been the key to go beyond Treaty provisions. Creeping has in some cases been unintended (the same intergovernmental dynamics have led to unwanted effects, a there are a few cases of clear supranational drive), but often creeping has occurred with the acceptance of national governments. In sum, it holds true (not only through article 308, but also through sectoral provisions and also outside the Community pillar) that where there is sufficient political will, there is a (legal) way.

Thirdly, the intervention of the Community has been particularly contested in areas of complementary competence i.e. in areas in which the intervention by the Community is limited to supplementing, supporting, or co-ordinating the action of the member states.[9] In these areas, although the Treaty lays down a negative delimitation of competence, such as excluding legislative harmonisation, Community intervention is to be limited to executive provisions, and it cannot have the effect of pre-empting or excluding intervention by the member states - who retain the power to adopt legislative rules.

In sum, objective-based Community intervention have meant availability for the legislator of legal bases to launch actions from a variety of policy fields which could be justifiable for the ultimate purpose to be attained. In these cases there have been occasional abuses of the principle of subsidiarity (sometimes under QMV arrangements, sometimes with full governmental consent) and of the principle of proportionality in the attempt to ensure full compliance from all member states.

1.5. No 'external' (democratic) control of competence matters

The question of whether the Treaties do (or do not) confer competence on the Union to act in a specific case, and to what extent the subsidiarity principle is being complied with, is a

[8] Notably, that the objectives of the proposed action cannot be sufficiently achieved by member states' action in the framework of their constitutional system; and that by reason of the scale or effects of the proposed action, it can therefore be better achieved by action on the part of the Community.

[9] Definition as given by the Convention Working Group on complementary competences: see p. 2 of Convention, Mandate of the Working Group on complementary competences, 31 May 2002, [CONV 75/2].

political judgement that rests largely on the Community institutions participating in the legislative process - and in fact, only on some[10]. Indeed, monitoring of the compliance with jurisdictional limits is for the most part exercised by the institutions of the Union. Although the Commission and the European Parliament have traditionally been in favour of growth in EU powers, the Council has been not less disrespectful.[11] The Committee of the Regions and the Economic and Social Committee, as consultative rather than legislative bodies, do not hold any advisory role in competence matters, however, they can and do raise subsidiarity concerns within their advisory legislative capacity or through own-initiative opinions.

Thus external bodies (national parliaments, regional parliaments, public opinion) have been outsiders on competence matters, and have been able to influence and control the EU competence system to the extent that they have managed to input decision-making either in an informal manner, or by controlling the positions adopted by their governments' representatives in the Council. Generally speaking, governments have taken advantage of insufficient involvement by national and regional parliaments in EU competence matters and, to a good degree, they have benefited from screening out domestic scrutiny and opposition. Expansion of material competence through article 308 (as opposed to via IGCs) has been convenient in avoiding domestic scrutiny.

There is, however, another sense in which external control of competence matters is lacking. Through the doctrine of the unity in the representation of the state before European institutions, government executives have gained control on competences outside their remit, or on powers which were devolved. At the same time, neither regional levels of government, nor the Committee of the Regions can act against encroachment. There is little possibility of review by the European Court of Justice of the competence question as national parliaments and regional authorities do not have standing at present to bring direct actions for the annulment of EU measures before the Court. But, furthermore, the European Court of Justice's review capacity under article 230 is largely procedural in nature, as the Court has repeatedly considered subsidiarity as ultimately a political appraisal as to which level is best to carry out a public function. That is, subsidiarity is justiciable on the grounds of observance to legal bases or otherwise in recourse, in an *ex post* basis, to article 230 where annulment of decisions can be brought before the Court on the grounds of the rights of institutions in EU decision making processes not being fully respected.

In sum, there is no direct external control on the political appraisals involved in competence attribution (through article 308) nor in the exercise of attributed competence; and in addition, there is no judicial remedy for encroachment of regional competences.

To recapitulate, the EU competence system is complex and peculiar in many respects. Attribution of powers occurs by explicit conferrals resulting from intergovernmental dynamics but it is influenced just as much by the nature of the institutional, legal and organisational set up of the system. Thus the EU competence system is in fact a rather plastic matter which, rather than being definable by intergovernmental attribution of powers, is evolving and played-out institutionally through different methods and procedures at the governance level. Indeed, although the system is based on the express intergovernmental attribution of powers, the system is largely defined in horizontal terms and has its own mechanisms to develop, extend and expand competence, which have shaped the system's evolution. Neither the intergovernmental nor the governance levels are impermeable, independent from each other or water-tight.[12]

The importance of the governance level, the functional multi-disciplinary approach to competence, the autonomous capacity of its institutions and its flexible legal arrangements to

[10] States can also challenge Community abuse of powers before the European Court of Justice (article 230). This mainly entails a judicial analysis as to whether there is legal base for the Community to act, and/or the legal base used (where there is a choice) by the Commission.
[11] See Directive on animals in zoos.
[12] One could ask whether unanimity is a sufficient mechanism to check creeping.

permit further integration (where political will exists) have all contributed to a system of powers which is easily expandable and evolving as new needs appear. Yet the competence system with its flexible and plastic qualities is problematic in at least two major senses: it has no significant qualitative limits, and its democratic control is insufficient. Indeed, the system appears as largely limitless *ratione materiae,* but more importantly, the control of its limits and its management is inadequate. As the EU is a peculiar and complex system, the methods of dividing and controlling competence shifts in the EU (but also competence sharing) will consequently have to be fit to the double challenge.

In addition, public opinion has, since the early 1990s, gradually come to perceive the competence system as expanding in an unconditional and almost unstoppable fashion; or in other words, the political appraisals involved in competence attribution and competence-sharing have gradually become a matter of public concern. With this strong background of public hostility the Nice and Laeken declarations called for a clear delimitation of powers between the EU and the member states. To what extend the search for legal certainty in the EU competence system is chimerical? Where delimitation means clarification of the competence system, some actions can be put into place to attain some transparency - such as explicitly specifying that the EU is an evolving system and a structure that permits common governance, classifying competences into categories, defining the meaning of exclusive/shared/complementary competences, making provisions more readable, etc. Where beyond clarification, delimitation of powers means setting limits to Community involvement, the system could not be changed into one incorporating a rigid demarcation of powers unless this occurred at the cost of restraining future evolution and flexibility (de Búrca 2001). In sum, the competence system has frail buffers and lacks democratic control and, at least in this sense, there is need for reform. In addition, political appraisals on competence attribution and competence sharing (as most Community powers are shared powers) are no longer matters capable of being kept away from public scrutiny. To what extent is the principle of subsidiarity, as currently operational, a solution in the context of the various problematic aspects of the EU competence system?

2. The subsidiarity solution: which kind of solution?

As a response to the peculiarities of the EU competence system, subsidiarity accommodates to the functional, open, evolving and dynamic nature of the EU polity.

Subsidiarity in the EU is not, however, a substantial principle guiding decisions as to what is the best level to allocate powers. Substantial allocation of powers is dealt with at the highest intergovernmental level where subsidiarity, as a normative principle, does not apply. Subsidiarity applies only in the exercise of conferred powers either shared or complementary [13] , and it does not have force to review or challenge the *acquis communautaire*, nor the Commission's right of initiative.

Although there is no direct link between subsidiarity and QMV, as the use of qualified majority voting increases, subsidiarity acts as a principle of political restraint in the EU in that it requires that proposed actions falling under the sphere of shared powers must be those which cannot be achieved by member states alone, or can be better achieved by the Community (due to the scale or effects). In brief, subsidiarity cannot prevent states being outnumbered in the Council but it can set, in areas of non-exclusive competence, material limits to the horizontal nature of Community competence. Subsidiarity, rather than a normative principle (as to what is the *best* level of action on the grounds of efficiency and proximity to the citizen), is a political appraisal on the *need* of policy or law-making at EU

[13] Complementary powers are those where both national authorities and Community institutions hold competence, and where Community action is not supreme.

level, and on the value added of Community action under attributed shared powers, and which pre-assumes a preference for national over European action.

Concerning the problematic institutional autonomy, subsidiarity is applied differently by each of the European institutions but, basically, subsidiarity is, across institutions, a catch-phrase for legislative and policy restrain. In practice, legislative and policy restrain is translated, under the Amsterdam Protocol on the application of the principle of subsidiarity,[14] in the obligation for the Commission to proceed to wide internal and external consultations before formal proposals are made, to justify each proposal in the preambles of its documents,[15] and to ensure that financial and administrative impact of new proposals is kept to a minimum.[16] Subsidiarity, in the sense of a better assumption and application of the principle by institutions, can provide a remedy for abuses of power of initiative. However, the perception of a hyper-active Commission and Court is to a good extend over-rated. A change in Commission's attitudes has been underway since the late 1980s and the early 1990s.[17] Indeed, after a period of large legislative activity (part of the internal market programme), the Commission has moved to a 'do less but do better' approach. Not only have proposals been withdrawn. The number of proposals has quantitatively fallen since the 1990s[18] and, in addition, the Commission has also entered an almost 'apologetic' phase where not only it claims that it has reduced the number of legislative proposals, but also claims that it consults widely before submitting a proposal. In other words, not only cultural and institutional values matter, but also the socio-political environment do condition institutional activism, and the post-Danish ratification period is one of policy restrain. Furthermore, while a better implementation and monitoring of subsidiarity is instrumental as a device to monitor abuses, the respect of subsidiarity and proportionality should also be considered as regards the legislator. The Commission claims that its duty to submit proposals has come to be aggravated by legislative pressure from other institutions, interest and pressure groups; and also Council and EP have increased their submissions of detailed draft proposals. Indeed, according to Grevi, about 80% of proposals over the last ten years have been tabled by invitation of the Council or member states, and as he notes, 'domestic politics are perhaps more relevant to this debate than the balance of powers in Europe'.[19] Proportionality has not always been respected by the legislators either.[20] In sum, if power of initiative is a source of creeping competence one has to recognise that *de facto* (policy and legal) initiative is not exercised alone by the Commission.

As a normative principle, subsidiarity (as currently defined) has little value. The democratic value of the current understanding of subsidiarity rests solely on an absolute and general assumption that governance by member states is more democratic than governance by EU institutions. Although there is a fundamental difference between the principle as it appears in the (non-binding) preamble and its definition in article 5(2) EC and in the Protocol on

[14] See point 9 of the Protocol.
[15] See Inter-Institutional agreement on the quality of Community legislation.
[16] The notion of administrative and financial impact assessments of regulation have been introduced in the recent Commission White paper on Governance (COM(2001) 428 of 25.7.2001) and detailed in the Communication on Better law-making and Impact Assessments (COM(2002) 275 and 276 of 5.6.2002) together with the pledge to 'upgrade' subsidiarity commitments by undertaking wider and more transparent pre-legislative consultations of interested parties.
[17] Well before Maastricht into the early 1990s the Commission (Delors) started an action of sensibilisation (Ross 1995) and changing culture of the Commission.
[18] In 1995 the Commission presented 71 proposals for directives and 290 proposals for regulations. In 2000, the number of Commission's proposals for directives fell to 48 and proposals for regulations at 193. See Grevi G. (2001).
[19] Grevi (2001) *Op. cit.*, p. 13.
[20] Directive of 1999 on the animals in the zoos: Commission had proposed a Recommendation but it became, through the legislative procedure, a Directive.

subsidiarity appended to the Amsterdam Protocol,[21] as a postulate, subsidiarity applies solely to the actions of European institutions. Indeed, while the preamble of the Treaty refers to the democratic principle of governance as close as possible to the citizen, article 5 and the Protocol place subsidiarity as a principle to set limits to Community involvement, and it is applied as putting the burden of proof on the Community to justify involvement, while guiding solely the relationship between Community and the member states. Subsidiarity understands the EU polity as a classic intergovernmental organisation governing competence conflicts between Community and national institutions. Its application not only ignores the multi-level nature of Community actions but deliberately avoids entering into the actual exercise and implementation of EU law and policy. By choosing not to enter into intra-national divisions of powers the principle of subsidiarity means an effective bias towards national centralisation and not surprisingly subsidiarity is silent on central governments' encroachment on regional prerogatives -and even in contradiction with the framework of the constitutional system in various member states. Thus, while regions with legislative power have *obligations* within the legislative work of the Union i.e. they are responsible for converting EU directives into their own legislation, and also responsible for implementing EU policies in all areas falling within their legislative remit,[22] their capacity to influence policy and law making in the areas where they hold legislative competence has been curtailed.

Overall, subsidiarity offers a flexible response to the broad, facilitative expanding nature of the EU system but (as it is applied today) it has no broad normative value. As the EU defines its objectives in functional and broad terms, and as it is the gathering of sufficient political will that determines the limits of Community involvement, subsidiarity takes due notice of the dynamic nature of the system and works in a preventive manner as a way to counterbalance the horizontal limitless and evolving nature of the EU competence system. Subsidiarity consists of a political assessment of the virtues of Community intervention (which can be made from a variety of senses) in a system facilitating common ventures. By setting material limits to the involvement of Community in the exercise of shared powers subsidiarity is a jurisdictional safeguard against functional creeping. As a political judgement subsidiarity cannot bring legal certainty to the EU competence system; rather, subsidiarity will act upon institutional activism, upon broad legal bases, upon intervention into complementary competences, and overall, setting buffers to the expansive character of the system. Yet, the constitutional challenge is to design a system which builds on the *sui generis* character of the EU system of powers, and is more transparent, and allows evolution but, last and not least, that is more democratic. Under current arrangements, the use of subsidiarity is being monitored by European institutions alone. The deeper democratic problem underlying the EU competence system are not only the encroachment of constitutional rights of some regions with legislative power, but the insufficient accountability of governments and European institutions in political decisions regarding *division* and *exercise* of competences.

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[21] The provisions on subsidiarity in the EU Treaty can be broadly categorised into those relating to subsidiarity as a principle and its definition (preamble and article 5); and secondly, on provisions relating to its actual materialisation i.e. its implementation (Protocol no 30 on the application of the principles of subsidiarity and proportionality annexed to the EC Treaty -as modified by the Amsterdam Treaty). Article 5 defines subsidiarity (in paragraph 2) in the context of two other principles: the principle of attribution of powers (paragraph 1) and the principle of proportionality (paragraph 3). Article 5:

> 'The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.
>
> 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.
>
> Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.'

[22] *Op. cit.* [CONV 152/02].

Besides some pros and cons of the principle, subsidiarity deficiencies are deceptively over-stated and to a large extent victims of misperception. It has been estimated that in 5% of cases of legislation, the Community has trespassed the limits as to what was necessary or better achieved by the Community.[23] Yet at the same time, and although it has been quantified as only a 5% of cases where subsidiarity and proportionality have not been observed, pervasive public perception is that the proportion is higher and Community action is too intrusive. The Court itself has never found a violation of the principle of subsidiarity by legislative actions of the Community.[24] Its overuse is also made by using it as a catch-phrase or reassuring measure for hostile public opinion's perceptions of creeping federalism[25].

In conclusion, the principle of subsidiarity does play a role in the EU competence system as a form of setting limits to the exercise of multi-disciplinary policy and law-making powers. The principle suffers from over-publicity, and its role is partial if not minimal in the context of the broader problematic aspects of the EU competence system (such as the no-return to unanimity rules, legal uncertainty, the unchecked use of article 308, encroachment of sub-national powers, supervision of political decisions regarding the exercise of shared competences, etc). The reform of subsidiarity has a point but necessarily it will have to be as a part of a larger package involving other possible amendments to the Treaties such as a categorisation of EU competences, clarifying the distinction between general objectives and actual powers, a clarification of EU legal instruments, inserting a declaration that powers which have not been attributed to the EU are national powers (as in the German constitution), defining material limits to EU power (through negative competence provisions)[26] in various complementary competences, amending article 308, etc.[27]

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[23] A study by the German Federal Finance Ministry reported on the application of the principle of subsidiarity for 1999 and 2000 that the number of proposal contestable on subsidiarity grounds is very reduced (2 out of 60 new proposals for 1999 and 5 out of 84 for 2000) and that in all these cases the 'constestations' apply to partial aspects of the proposals. See Convention, *Groupe de Travail I 'Subsidiarité, Objet: Intervention de M. Michele Petite, Directeur Général du Service Juridique de la Commission, a la réunion du groupe, le 17 Juin 2002, Bruxelles, 27 Juin 2002* [WGI WD3 p. 6].

[24] The European Court of Justice has annulled acts for violation of the principle of conferment of competence or the principle of proportionality, and on Commission's choice of legal base, but never on the basis of a violation of the principle of subsidiarity. See evidence given by Advocate General Jacobs to WG on subsidiarity: Secretariat Convention: Note. Working Group I on the Principle of subsidiarity, Summary of the meeting of 25 June 2002, Brussels 28 June 2002, [CONV 156/02 WGI 5].

[25] See for instance the link between the UK government shift towards accepting a EU Constitution and the emphasis put on subsidiarity as a counterbalance to what eurosceptic public opinion would perceive as another leap forward. See 'Strength in Europe begins at home', Speech by UK Foreign Affairs minister Jack Straw in Edinburgh, 27 August 2002.

[26] Case of Directive 93/7/EEC on the return of cultural objects unlawfully removed from the territory of a member state. This is a measure covered by internal market, yet it affects member states cultural policy (where the Community does not have legislative competence). In the case where an harmonisation measure has been adopted, the member states may retain national provisions justified by certain requirements.

[27] The range of issues involved in the delimitation of competences has been dealt with at the Convention with the creation of three working groups: one concerning the delimitation of complementary competences, another concerning the role of national parliaments and, finally, one focusing on the principle of subsidiarity as such. The broader mandate for classification of competences has been taken over by the working group on complementary competences. It has focused on the issue of drawing up a list of areas covered under three major categories of competence (exclusive, shared and complementary) and also on a possible review of article 308. Judging from the proceedings of the WG on complementary competences, a list of categories of competencies in the Treaty (rather than a catalogue of competences) is acceptable as a form of delimitation of competences as the system of competences must be capable of evolving and adapting to social, economic and political changes that might take place in the future. The Group has also made some general recommendations on the need for a hierarchy of legislative acts and instruments. While the issue of complementary competence is an important part of the broader discussion of EU competence delimitation, the working group on subsidiarity has limited itself to examining how the compliance

What it is really at stake in the EU competence system as a whole, and in the notion of subsidiarity in particular, relates to the politics of competence shifts and competence sharing. In fact, as most EU powers are shared powers, the Nice and Laeken mandate for a clearer delimitation may be deceptive. Besides the worthy aim of clarity, strengthening a *partnership* model (rather than clear demarcation of 'who does what') appears as a more appropriate departure point and democratic way to address division and exercise of powers in the EU. Indeed, the EU institutional system itself does not rest on the traditional separation of powers but, rather, the Treaties sketch a system where institutions, national and Community, co-operate. One can add that as volume of legislation has been decreasing and Community intervention becomes 'softer', partnership at all stages of law-making becomes more important to the attainment of pursued objectives (Grevi 2001). Subsidiarity has a role in this context and its reform is desirable in direction to its normative credentials, that is, in the sense that decisions ought to be made as close as possible to the citizens, but also that those decisions on competence and its exercise are to be more democratically conducted. That is particularly so as the political appraisals on attribution and exercise of competences are increasingly contested within the member states. Competence sensitivity calls for the opening up of those political decisions concerning which is the best level for action.

3. The reform of subsidiarity: the meeting of the two agendas of subsidiarity and the role of national parliaments

The single largest novelty on the reform of subsidiarity which has so far emerged from the Convention on the Future of Europe is the proposal spelled out by the Working Group (WG) on subsidiarity and supported by the Working Group on the role for national parliaments[28] to set up of an 'early warning system'. Through this procedural change, alongside the main task of national parliaments to influence and to scrutinise their respective national executives, a new role is being carved out for national parliaments to inspect directly the work of European institutions, namely the Commission and the legislators, as regards the exercise of Community powers (that is shared and complementary).

Particularly as regards the scrutiny of European institutions the mechanism being proposed (the early warning system) is likely to be similar to the scrutiny system in force in the UK House of Commons:[29] notably, a rapid scrutiny and reporting consisting of sifting to identify documents of 'political or legal importance', with the capacity to raise 'reserves' on measures proposed.

The subsidiarity scrutiny performed by national parliaments will apply to all legislative proposals under co-decision and falling under the category of shared competences, but also to wide policy proposals such as Green Papers, White Papers, the Commission's annual work programme, etc.; but it is unlikely to apply to other draft texts such as proposals under article 308.

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with the principle (as currently defined and applied from the guidelines of the subsidiarity Protocol) could be enhanced and also monitored by either judicial or political type of procedures. Proportionality has largely been left aside of the deliberations of the group. Proportionality issues may be possibly dealt with by a second batch of working groups, notably by a WG on simplification of Legislative procedures and Instruments announced on 19 July 2002 [CONV 206/02]).

[28] The Working Group on the role of national parliaments took as its task to examine scrutiny at the national level comparatively, whether national parliaments could/should have a role in controlling subsidiarity, and the role of national parliaments in the European architecture (examining the role of COSAC, increasing information flows).

[29] The scrutiny system in the UK Commons is in a large sense an early warning system. See House of Commons, European Scrutiny Committee, 'European Scrutiny in the Commons', Thirtieth Report of the Session 2001-2002, HC 152- xxx. A separate and different scrutiny system is used in the House of Lords. Peers' scrutiny is a more selective documents and in depth review of fewer documents. In the UK the different systems are considered complementary.

The subsidiarity scrutiny will be largely a task of sifting proposals on the grounds of subsidiarity rather than policy merits, as is currently the case in the UK House of Commons. In other words, the subsidiarity scrutiny is not to enter into the substance of the proposals, but will solely assess whether subsidiarity and proportionality have been adequately respected by the Commission but also by the Council and European Parliament. Should national parliaments individually consider that such respect has not been fully honoured, they will have the right to raise a warning directly to the Commission or the legislators. Depending on the number of warnings raised by national parliaments, the Commission/ legislators will be obliged to reconsider, redraft or withdraw the draft proposal under consideration. Parliaments will have six weeks to give a reasoned opinion on the subsidiarity aspects of Community proposals (which seems sufficient, as the current scrutiny system in the UK normally allows less time). Finally, a litigation channel is proposed to be opened to those parliaments which believe their opinions have not been duly considered. How final decisions (on the subsidiarity and proportionality of Community proposals) are reached domestically and, particularly, how to reach single positions in countries with bicameral systems is a matter left for domestic political settlement.

Thus, as regards legislative processes, national parliaments would input the process at various stages of the law-making process in order to consider subsidiarity aspects. First, national parliaments are to receive legislative proposals directly from the Commission. Second, within six weeks of the transmission date, national parliaments are to be entitled to issue a reasoned opinion on the proposal (or an aspect of it) concerning subsidiarity (and not the substance of the proposal). Depending on the number of objections, the legislator is to give further reasoning for the necessity of the act, or the Commission would re-examine its proposal (meaning either a withdrawal, an amendment or the maintenance of the proposal). Thirdly, provision is made for the involvement of national parliaments at the final stages of the co-decision procedure. National parliaments would be able to assess subsidiarity considerations at the time of the convening of the Conciliation Committee and thus examine the Council's common position and amendments introduced by the European Parliament.

The scrutiny by national parliaments, beyond the establishment of an early warning procedure, is also to include the possibility to call Commissioners to give oral evidence in the national parliaments, and will expectedly take on board other proposals being made in the Commission White Paper on Governance, such as the inclusion of 'subsidiarity sheets' looking at the justification for Community intervention -rather than its substantial or policy contents.

But what will the subsidiarity scrutiny involve? The principle of attribution entails that the Community can only act if power to act has been expressly conferred to the Community by member states -in other words, when appropriate legal base exists for the Community to act. Judgements on the legal basis of proposals, although they are political in the sense that legal base may condition institutional balance, are ultimately objective legal appraisals, and discrepancies can be resolved through resort to the European Court Justice (article 230 EC). Subsidiarity judgements however go beyond legal base considerations, in fact, they do not refer to the existence of competence, but entail a substantial political judgement on the adequacy of any level to attain more efficiently and democratically whatever objectives pursued.

In the early warning system prototype national parliaments are not to consider matters of content of the proposals, but only subsidiarity considerations. One could wonder how easily substantive issues can be separated from subsidiarity and proportionality considerations for, in fact, subsidiarity involve political judgements as to what is the best level of action. Can a sifting through the contents of a proposal in order to identify added value and benefits of Community level action be made without entering into policy choices? In short, to what extent are subsidiarity and substance not related? The Commons scrutiny system provides some clues on the type and scope of scrutiny proposed. If a similar model is followed, a legal analysis would look at legal bases in order to review cases with doubtful bases, or review

options made in the choosing of legal base by the Commission; and also to scrutinise Commission's (or the legislators') assertions of power to act.[30] But, as mentioned before, the appraisals of legal bases are ultimately judicial and relatively uncontroversial. The most problematic aspect relates to the political argumentation on the need for Community action and its added value. Here the drafters of the early warning system insist on one point: national parliaments are not to become co-legislators. In other words, a distinction is being insisted upon: that is, a distinction between judgements on substance and judgements of subsidiarity, or in other terms, between appraisals of policy merits and appraisals on subsidiarity. So, could simply *unwanted* legislation (under QMV for instance and 'unwanted' on policy grounds) be able to be stopped on the grounds of subsidiarity? The answer will have to be no. Equally the criteria to define what is beyond the limits ought not to question attributed powers, nor decision-making procedures, but only unnecessary or unjustifiable Community intervention in areas of shared or complementary competence, or otherwise disproportionate intervention (proportionality). In other terms, either with or without the consent of member states i.e. under QMV arrangements, only the legislation which appears as dubiously justifiable for Community action, or interfering in areas of complementary competence, could be challenged by national parliaments under the early warning system.

Thus on the nature of the political appraisals of subsidiarity, the opinions by national parliaments are likely to echo the pre-legislative consultation stages, that is, national parliaments reasoned opinions are to consider not the policy choices made, but to argue the added value of Community intervention and/or intensity questions -that is, proportionality. In other words, national parliaments will be listened on questions such as the impact of proposals, likely effectiveness, cost, consistency or result of a proposed Community measure. Parliaments therefore will be given the right to question European institutions' reasoning on the latter,[31] and although they will not be requested to express a view on the merits of the proposal (for they are not co-legislators), their opinion will indicate *indirectly* their concern or approval on the contents. These concerns, in turn, are likely to be tainted by domestic cultural and socio-economic values.

The limited scope of subsidiarity inquiries seems to also rest on the fact that, should substantial assessments be conducted, evidence would have to be gathered thus overloading the tasks of national parliamentarians and Departmental Committees. In this sense, the observations made by UK MPs in favour of the current scrutiny procedures in the UK are totally relevant to the early warning system scrutiny:

> The main reasons for not paying more attention to the merits are that far more evidence would have to be gathered, making our task unmanageable, it would be difficult or impossible for a cross-party committee to reach agreement on documents which address issues of party political controversy, and we could duplicate the work of Departmental Select Committees (DSCs) and European Standing Committees. (…) A more comprehensive examination of merits would require a radical reorganisation of the scrutiny system -for example splitting the European Scrutiny Committee into a number of committees (or subcommittees) which combined the functions of the Scrutiny Committee and the Standing Committees, each responsible for several departments. However, in a system such as that, committees would often

[30] Other legal searches run by UK Commons scrutiny relates to drafting difficulties or impact on existing law so these may also be taken place under the early warning system procedures.

[31] The standing order of the Committee does not require the Committee to assess the merits of EU documents -only their legal or political importance and whether they should be debated. In practice we do often look at the merits, especially when requesting further information, and the conclusions of our reports sometimes express a general view on a EU proposal. In particular, we frequently question the likely effectiveness, cost, consistency or result of a measure, or ask the Government to justify its policy towards it, and we certainly regard it as an important part of our work to ensure that the Government has considered any potential problems and has done what it can to remedy them. However, we do not usually express views in our Reports on controversial aspects of the merits of documents.

> find it impossible to agree on the merits of documents, they would have heavy workloads covering a range of departments, and there would be a continuous risk of overload with the work of DSCs. Greater involvement of DSCs in EU matters, thereby integrating consideration of EU and UK policy and bringing specialist knowledge to bear on it, is a better option if it can be achieved.[32]

Time constraints, the scarcity of human resources and overload will determine the quality of subsidiarity checks. The performing of the scrutiny of subsidiarity by national parliaments should not involve a radical overhaul of parliamentary structures and procedures, as the scope of the subsidiarity checks does not require examination of contents.

A number of other controversial issues are also on the table. The early warning system acknowledges that subsidiarity and proportionality breaches are not exclusive from the Commission. Thus warnings will amount to a political exercise of re-examination that proposals are justified at the Commission College or in the Council and European Parliament. But will the intervention by national parliaments be allowed to unravel the hard fought positions at the end of the Conciliation meeting? What effects will it otherwise produce concerning the global inter-institutional balance? Truly if the early warning system is, at its minimum, an information exercise, there is likely to affect policy initiative and affect informal practices such as the conciliation arrangements between European Parliament and Council.[33] Equally it will change relations with the European Parliament and it will involve changes to national parliamentary procedures and have an effect on the variety of political cultures and values that underpin them across the EU member states. One cannot expect either that national parliaments are neutral but they are very likely to be affected by domestic politics and colour imbalances between executives and Parliaments. In addition, what obligations should result from the national parliaments' views? National parliaments will gain a role of watchdogs consisting of a right to question Community institutions, and the right to issue warnings. Depending on the quantitative size of the warnings from national parliaments, the response by Community institutions can range from an obligation on the Commission to justify the proposals (where a small number of submissions have been made) to an outright re-examination of the proposals. Clearly, the warning is not proposed to amount to a veto as national parliaments are not co-legislators, and their mandatory powers will ultimately reside on their opinions being confirmed by the ECJ -albeit on procedural grounds. Indeed, broadening the right by national parliaments of resorting to the Court for judicial review (article 230) is to be available. But beyond the litigant route, the defenders of the early warning system point out that the warnings will have their political teeth in their capacity to bring to the surface subsidiarity conflicts, and that they will oblige national and European institutions to confront subsidiarity considerations. National Parliaments will not be able to propose amendments but solely to raise concerns on subsidiarity grounds, which entails an all-or-nothing power for national parliaments and with a possible right to withhold proposals in a similar sort of a 'scrutiny reserve resolution'.[34]

All in all, the early warning system confirms subsidiarity as a political judgement, and therefore not a matter of judicial review[35] except insofar as providing legal remedies to

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[32] See paragraph 34 of House of Commons, European Scrutiny Committee, 'European Scrutiny in the Commons', Thirtieth Report of Session 2001-2002. 22 May 2002, HC 152.

[33] See Maurer A. (1999) *What is next for the European Parliament?* Federal Trust series. Future of European Parliamentary Democracy 2.

[34] In the UK a scrutiny reserve resolution can be passed by the House. It constraints Ministers from agreeing in Council to legislative proposals and certain other proposals if the Committee has not cleared them or (when the Committee has recommended a document for debate) if the House has not yet come to a resolution concerning them. Exceptions are provided for in the resolution, including 'special reasons', but in such cases the Minister must explain those reasons to us at the earliest opportunity (or to the House if a proposal is awaiting consideration by the House).

[35] Contributions defending subsidiarity being controlled *ex post* by a judicial body: Convention, Contribution by E. Brok, J. Santer, R van der Linden and J. Wuermeling and other members:

breaches of the principle under certain conditions. The early warning system provides for resort to judicial review as a last resort mechanism for national parliaments claiming breaches of subsidiarity, and thus the second major novelty of the system will reside in opening the list of privileged applicants on the basis of article 230 to national parliaments. But the parliamentary resort to the Court is a possibility of appealing against violation of the principle of subsidiarity on procedural grounds.[36] The resort *ex-post* to the European Court of Justice therefore would not be on the grounds of contesting subsidiarity appraisals - as ultimately, it is understood that subsidiarity is a political judgement not susceptible to be undertaken by a judicial body - but a ruling on the legality of the procedures and respect of inter-institutional balances.

There is an attempt to minimise the political consequences of broadening the privilege to resorting to the Court by trying to make such a recourse limited and exceptional. Attempts to narrow down such a recourse to judicial proceedings for national parliaments are being made by linking the right to final resort to the Court dependent on actions in an early phase. Equally, the proposal to grant a right of appeal to the Court of Justice for violation of the principle of subsidiarity to those regions which, within the framework of national institutional organisation, have legislative capacities, is being ruled out. Rather, and on the procedural basis of article 230, what is foreseen is merely the granting to the Committee of the Regions (rather than regional parliaments) the right to bring an action before the Court. This referral would relate to proposals which have been submitted to the Committee of the Regions for an opinion and about which, in that opinion, it had expressed objections as regards compliance with early warning system procedures -rather than subsidiarity as such. In addition, besides the point that 'the ECJ might in the future be prepared to look beyond the precise terms of the Treaty in defining the scope of judicial review where it perceives an insufficiency of legal protection, *inter alia* with regard to a perceived need to maintain the institutional balance',[37] as the scope of the judicial route is restricted, proposals have been made to broaden up the Protocol on Subsidiarity so that it includes a reference to 'local knowledge' and a 'margin of discretion'.[38] In other words, through changes in the Protocol and the reform of article 230, one could ensure that regional prerogatives are not threatened.

In sum, the major proposal on the table proposes the setting up of an early warning system which would involve national parliaments in the political assessment of subsidiarity. A clear division of labour between national and European parliaments is made, and the early warning system squares a number of requirements. As its crafters argue, it avoids overburdening Community architecture with the creation of a new chamber or institution, it does not delay legislative processes and, in particular, it brings at the same time a larger role for national parliaments -which the Nice and Laeken Declarations also pursued. Indeed, the early warning system has the potential to establish 'connection' and dialogue between national parliaments and European institutions. Irrespective of its various limitations, the early warning system entails a broadening of the political judgements of subsidiarity and the involvement of national parliaments into the EU policy and law making process which appears as a positive development. The early warning system fails however in that it does not bring new normative grounds. The reform of subsidiarity is ultimately a procedural development in the implementation of subsidiarity, but does not bring any further light into which normative principles ought to guide the exercise of Community competence. The reform of subsidiarity

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'Subsidiarity must be controlled by a judicial body', CONTRIB 72, Brussels, 24 July 2002, [CONV 213/02].

[36] Some Convention members have argued against National Parliaments being able to take to cases on subsidiarity to the Court on the grounds that it would break the unity of the State before the Court and thus opening the door of regional authorities to take cases against the State. However, article 230 provides for respect for legal procedures and institutional balance.

[37] Weatherill S. (1992) *EC law. Cases and materials*, London: Blackstone Press.

[38] Secretariat, Contribution by Mr. Neil MacCormick, alternate member of the Convention 'Subsidiarity, common sense and local knowledge' Brussels, 18 September 2002 [CONV 275/02] CONTRIB 94.

ought to consider the amendment of article 5 and/or the Protocol. Should democratic criteria (such as true proximity to citizen or margin of local discretion) not be added into the criteria of scale and effect in article 5 of the Treaty or the Protocol?

Conclusions

The early warning system does not entail any radical overhaul of the notion of subsidiarity as understood in the EU since Maastricht and Amsterdam, but first of all, it is a development of the underlying logic of subsidiarity as responding to the perception of creeping. Subsidiarity remains a principle guiding the exercise of shared and complementary powers, and an *instrument* to set material limits to Community intervention. While the major novelty concerns the entering into the subsidiarity procedures of national parliaments, the current reform of subsidiarity is likely to be limited to procedural changes in the examination of the *application* of the principle by European institutions and in the *monitoring* of compliance with it. On its normative side, subsidiarity in the EU remains a thin concept which overlooks the multi-level nature of the EU polity, and the value of the principle in the context of good governance and administration.

In the current round of reform the major novelty in the notion of subsidiarity resides in its intersection with a parallel dossier: the role of national parliaments. This link between the two dossiers is the result of a context of increasing competence sensitivity where competence conflicts have become highly visible and controversial and, to a good degree, over-represented. The contribution of the early warning system to the large complex and problematic nature of the EU competence system is clearly limited as, first, subsidiarity will not contribute to increased legal certainty on the EU competence system and, second, subsidiarity remains strongly padlocked to the European level. The current reform of subsidiarity rests on the understanding of subsidiarity as a political judgement, and is moving towards attaining a broader legitimisation of shifts and exercise of competence, namely by allowing a limited opening of those judgements involved on subsidiarity appraisals. Notably, the political appraisals involved in the application of subsidiarity will be opened to scrutiny by national parliaments. In short, the early warning system can be more accurately pictured as a response to legitimacy issues than to strictly competence matters.

The effects of national parliaments overseeing subsidiarity considerations of both large policy programmes and individual legislative proposals are likely to be large. An increased sense of ‘ownership’ of European law can develop in national parliaments as a result of the operation of the procedure. Ultimately, however, subsidiarity as a concept remains unchanged.

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