

Chairman of the European Affairs Committee

Parliament of Denmark

To participants in the XXXI COSAC

Copenhagen, 22 April 2004

J. no. EEU 223/LBM

Considerations in the Danish Parliament on the application of the principle of subsidiarity

Dear Colleagues,

I am very pleased that we will have an opportunity to discuss the “Scrutiny of EU Business in accordance with the Protocol of the Amsterdam Treaty on the Role of National Parliaments in the European Union” at the coming COSAC meeting.

The Danish Parliament finds the subject extremely important. At present we are considering how to re-organise our procedures in order to improve our scrutiny of the principle of subsidiarity. In this respect, we have been inspired by the interesting and constructive ideas of the Dutch Parliament. I would especially like to point out the inventive suggestions from the Netherlands on how to organise and visualise the exchange of information between the national parliaments with regard to subsidiarity.

For your information and inspiration I have enclosed a memorandum describing how the scrutiny of the principle of subsidiarity could be organised in the Danish Parliament. We plan to implement these new procedures in the coming autumn.

I am looking forward to discussing these subjects with you at the XXXI COSAC in Dublin and learning from your experience.

Yours sincerely,

Claus Larsen-Jensen

Memorandum regarding the involvement of the Folketing and sector committees in controlling the principle of subsidiarity

The Folketing's control of the principle of subsidiarity is relevant, partly in relation to the opportunities that will be provided by the coming Treaty establishing a Constitution for Europe, and partly in relation to the opportunities that are already present in the existing treaty.

The following is a brief attempt to list a possible approach to this control.

This takes the form of a proposal regarding how the **procedure** for such a control could be organised under the given circumstances (I), and partly the form of a proposal regarding which **concrete criteria** control could be based on in the given case (II).

I - Procedure

The schematic presentation below indicates how the control of the principle of subsidiarity on the part of the Folketing and the sector committees could be organised if it were based on the six-week deadline mentioned in the current draft Treaty establishing a Constitution for Europe.

It should be noted in this connection that six weeks is not a long time in consideration of the many parties that would be involved in the procedure¹ in the given case.

Treatment of the principle of subsidiarity in the sector committees and the European Affairs Committee

Step	Procedure		
(1)	<p>1. The Commission tables a motion for a legislative proposal².</p> <p>2. The proposal is immediately distributed to the European Affairs Committee and the sector committees involved.</p> <p>3. The proposal is forwarded from the Folketing for a hearing³ with the aim of obtaining comments for use in connection with a control of subsidiarity.</p>		
(2)	No later than two weeks after the proposal has been tabled	The government has forwarded an explanatory memorandum to the sector committee and the European Affairs Committee. The government's independent position on the motions conformity with the principle of subsidiarity must be evident from the explanatory memorandum.	
(3)	No later than four weeks after the proposal has been tabled	The sector committee has reviewed the proposal ⁴ and has forwarded a statement to the European Affairs Committee.	If the sector committee finds that the principle of subsidiarity has not been respected, COSAC is informed of this for the purpose of passing the message on to the other national parliaments.
(4)	No later than five weeks after the proposal has been tabled	<p>The proposal is reviewed by the European Affairs Committee on the basis of the statement from the sector committee, the government's explanatory memorandum, as well as on the basis of a possible co-ordination with the attitudes of foreign sector committees and European affairs committees, via COSAC's website, for example.</p> <p>A joint meeting will be convened in the case of a discrepancy between the statement from the sector committee and the attitude of the European Affairs Committee.</p>	
(5)	No later than six weeks after the proposal has been tabled	<p>The recommendation from the European Affairs Committee is signed by the chairperson of the European Affairs Committee and/or countersigned by the Speaker of the Folketing.</p> <p>The recommendation is forwarded to the Commission, the Council, and the European Parliament by the Speaker of the Folketing.</p> <p>The Folketing's final recommendation is forwarded to COSAC's website, for example, as a source of orientation and inspiration</p>	

II - Concrete criteria for scrutinising the principle of subsidiarity

The principle of subsidiarity implies that decisions must be made as close to citizens as possible. The principle of subsidiarity is defined in article I-9-3 in the draft Treaty establishing a Constitution for Europe:

"Under the principle of subsidiarity in areas that do not fall within its exclusive competence the Union shall act only if and insofar as the objectives of the intended action cannot be sufficiently achieved by Member States, either at central level, or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level."

In other words the principle of subsidiarity shall apply after an evaluation of **whether** a given circumstance should be regulated at EU level.

By its nature the principle of subsidiarity is highly political and not very easy to put into **operation**. This can also be seen from the practice of the European Court of Justice, for example, as up to the present it has not set aside a legislative proposal on the grounds that it failed to respect the principle of subsidiarity⁵. In a sense, the same could be said of the principle of proportionality, which has not, however, prevented the European Court of Justice from establishing a comprehensive practice for interpreting this principle. In other words, the fact that a principle may be difficult to handle does not necessarily mean that it cannot have considerable practical relevance⁶.

The principle of subsidiarity as opposed to the principle of proportionality

The principle of subsidiarity is referred to in a number of different places, both in the existing treaty⁷ and in the draft Treaty establishing a Constitution for Europe⁸, often together with the principle of proportionality. It could perhaps be said that the two principles overlap each other to a certain extent – however, the basis of the following is that they are two separate principles, independent of each other:

The principle of subsidiarity implies that the EU will only act insofar as the intended action cannot be sufficiently achieved at national level. In other words, the principle of subsidiarity is a kind of **supplementary principle for conferring competence**. If the principle of subsidiarity has not been respected the EU has no competence to act within the area in question.

The principle of proportionality, on the other hand, is not a principle for conferring competence. The application of the principle of proportionality is notably only relevant when a decision **has been made** to act at EU level – subsequently it is the **principle of proportionality** that is used to establish which measures can be applied, and how radical these measures will be.

In other words, and in a slightly simplified form, it could be said that the **principle of subsidiarity** can be applied after an evaluation of **whether** there is a problem that can and should be solved at EU level, whereas the **principle of proportionality** is applicable when evaluating **how** the problem should be solved. It could also be said that the **principle of proportionality** regulates the type of tool that should be used – should the nail be hammered in with a carpenter's hammer or a sledgehammer? – while the principle of subsidiarity is applied in connection with an evaluation of whether there is a nail at all.

The Convention's working team 1, which was responsible for formulating the principle of subsidiarity, stated the following on the principle of subsidiarity: As *"the principle of subsidiarity is a principle whose chief concern is of a political character, and whose performance implies a broad margin of assessment for institutions, the control of compliance with this principle should mainly be political"*.

The following proposals for criteria for assessing the principle of subsidiarity are based on Protocol 30, subsection 5 and subsection 6 of the EEC Treaty.

Guidelines for assessing the principle of subsidiarity:

General objective: Community objectives can better be achieved at Community level than at national level
1. Does the matter that is regulated by a motion for a legislative proposal have cross-national aspects that cannot be satisfactorily regulated through action on the part of the Member States?
2. Would a lack of action on the part of the Community or action solely on the part of the Member State be at variance with the requirements of the Treaty?
3. Would action at Community level be clearly advantageous due to the scale or effects of this by comparison with action on the part of the Member States?

For the sake of form it should be noted that it expressly appears from the draft Treaty establishing a Constitution for Europe that the European Court of Justice (still) has the competence to make statements regarding violations of the principle of subsidiarity. Given the sharpened focus on violations of the principle of subsidiarity it might be expected that more cases on the principle would be brought before the Court.

At some time or another it will therefore probably be possible to derive guidelines for the more detailed contents of the principles for the European Court of Justice's practice.

¹ On average it takes eight months to conclude the matters that are adopted after the first reading. This also includes the Council's treatment of proposals. The question is whether an attempt should be made to prolong the six-week deadline in the draft Treaty establishing a Constitution for Europe. It was apparently the case that the six-week deadline did not give rise to lengthy debate in the Convention, ostensibly because the establishment of a control scheme was in itself already a great step forward for the national parliaments.

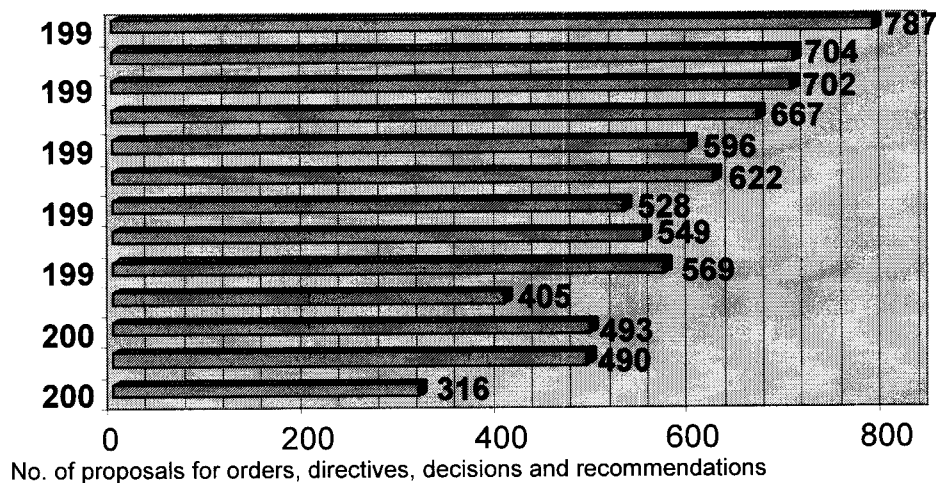
² It is estimated that about 100 motions for legislative proposals, which could give rise to a control of subsidiarity, are probably tabled each year. Perhaps only 30 – 40 of these proposals are important in relation to the principle of subsidiarity.

The Commission gave an account of the development in the number of legislative proposals in its report "Better legislation 2002" from 11/12/2002:

Development in no. of proposals from the Commission, 1990-2002

*Situation as of 27/11/2002 - Source: PreLex-basen

(1990/2001: figures from Eur-Lex-basen)



As can be seen the figure 316 for 2002 also includes decisions and recommendations which are not, as a point of departure, relevant to the application of the principle of subsidiarity. When it is also taken into account that a number of the suggestions are for amendments, etc., as previously mentioned it can be estimated that about 100 legislative proposals a year will be relevant in relation to the control of subsidiarity.

³ It has been suggested that the EU Secretariat should be responsible for the hearing during this phase. In the given case this could involve *both* a *private* and a *public* hearing at the same time, i.e. *private* in relation to permanent consultation parties, who would all be contacted by e-mail, and *public* in the form of a more informal hearing, such as a public hearing on the Internet, where everybody could make contributions. In the given case the permanent consultation parties could vary depending on which subject areas were involved in the concrete issue.

⁴ It should be noted that the principle of subsidiarity can be regarded as a "superstructure" to the ordinary principle of the conferment of competences in the European Court of Justice. In other words, a control of the principle of subsidiarity implies – similarly to the case in connection with the conferment of competences – a control of the legal base of the proposal. An investigation is carried out to discover whether or not a given legislative proposal on the part of the EU has a legal base in the Treaty. A control of the legal base is carried out with the point of departure in the wording of a given treaty provision, and is therefore typically relatively non-technical in itself.

The principle of subsidiarity could be of relevance especially in connection with the "rubber Section" – TEF article 308 and Article I-17 – of the Draft Treaty establishing a Constitution for Europe.

⁵ The European Court of Justice is generally reluctant to check politico-economic assessments.

⁶ The principle of subsidiarity could also be said to constitute a kind of presumption principle or a rule regarding the burden of proof. Presumption runs contrary to an area being regulated at EU level – if regulation at EU level is nevertheless required there must be a convincing argument for this. In other words, the Commission has a burden of proof that it must discharge. This burden of proof can be discharged through a proper justification in the motion for an EU legislative proposal.

⁷ Such as in TEU's preamble, TEU article 1, TEF article 5, and TEF Protocol 30.

⁸ Article I-9 and the Protocol on the application of the principles of proportionality and subsidiarity.