

European and External Affairs Committee

EUR2 04-05 (p3)

Date: 12 May 2005

Time: 9.00 to 12.30

Venue: National Assembly for Wales, Cardiff Bay

Title: Subsidiarity Early Warning System

Purpose of paper

To draw members attention to the proposed EU Subsidiarity Early Warning System which will come into effect if/when the draft EU Constitution is ratified and to discuss the procedures that might need to be followed if a specific case arises which requires its use.

Background

The attached note (Annex A) provided by the Members Research Service sets out the background to 'subsidiarity' in the European Union and latest developments in relation to the application of the principle in practice.

COSAC pilot

The paper refers in particular, at the foot of page 2, to a recent 'pilot' project launched by COSAC (the Conference of Community and European Affairs Committees of Parliaments of the European Union) which brings together the committees of the national parliaments dealing with European Affairs. This was carried out in the context of a real example, namely, the proposals for legislation in the 'Third Railways Package' although it was not felt there were likely to be genuine subsidiarity issues in relation to this, at least within the UK.

Proposed UK procedure

The procedure proposed for the UK by the House of Commons Modernisation Committee is that the European Scrutiny Committee should have responsibility for identifying those proposals which potentially breach the principle of subsidiarity. The relevant part of their report is at Annex B and this includes a requirement for the Committee to consult the devolved assemblies.

The procedure has not formally been adopted by the House of Commons and this, and the fact that the European Scrutiny Committee had already considered the package several times, added elements of unreality to the pilot. Nonetheless, it was agreed that the UK would be involved and, as part of the pilot, we received the formal notification from the Committee asking for our views on whether the proposal breaches the principle of subsidiarity.

Procedure in Wales

The pilot highlighted the very short time that would be available in this formal part of the process and gave us about a week in which to consider the proposal. It highlighted in particular the need to ensure that the channels of communication between us and the House of Commons Committee were clear identified.

A second issue was the fact that the European and External Affairs Committee would in most cases probably need to consider the issue out of Committee – and even if the case had coincided with a Committee meeting there would probably have been a need to consider papers outside the normal deadlines.

Given the shortness of time we decided not to take the pilot further and seek Committee members' views because the first requirement would be to explain to them the proposed procedures and what it was that was actually being piloted. We also felt, that in the circumstances, there was little to be learned from seeking further briefing from officials about the specific issues as this aspect of the process would depend on the particular case being considered.

Conclusions

The main purpose of this paper is to draw members' attention to the EU Subsidiarity Early Warning System and its development, and the procedures that might need to be followed if a specific case arises which requires its use.

In those circumstances it seems likely that Members will need to comment quickly. It is worth noting that it is not expected the procedures will be called into use very often. While this is in one sense reassuring it also means that we are unlikely to build up much practical experience in operating them.

The lack of time also highlights the need to identify early on issues that might breach the subsidiarity principle. This will make it easier for the complex issues to be addressed early on and maybe eliminate the need to invoke the formal procedure. But, if not, it will help Members come quickly to a view in the limited time available.

Action

Members are invited to comment on the procedures.

Sandy Mewies
Chair

Annex A

EEAC Committee: 12 May 2005 – note from MRS

The principle of subsidiarity: background

Abstract

This is a briefing on the principle of subsidiarity, what it means, what the current situation is as regards its application and what developments are taking place to apply the principle following the enhanced role it has in the draft European Union Constitutional Treaty.

The principle of subsidiarity: background

The principles of subsidiarity and proportionality have increasingly guided Community legislative activity. It serves to ensure that decisions in the European Union are taken at the level that achieves the best effect and as close to the citizen as possible. In an area where there is joint competence, it will determine whether action should be taken at the EU level, or whether it should be left as a matter for the Member States, whether at national, regional or local level.

The [current Protocol](#) in force on the application of the principles of subsidiarity and proportionality, was annexed to the EC Treaty by the Treaty of Amsterdam and establishes detailed criteria for the application of the principle. The protocol has not had a significant impact. It gives some guidance on issues which should be taken into consideration when assessing a proposal for compliance with subsidiarity, and obliges the Commission to:

set out reasons for taking action in order to justify its compliance with the principles of subsidiarity;

to consult widely before proposing legislation;

and that any burdens occurring as a result, whether financial or administrative, have to be minimised and proportional to the objective to be achieved.

The Convention on the future of Europe, which was charged with drawing up the new draft EU constitution, provided the opportunity to debate better allocation of power within the EU and how to ensure compliance with the subsidiarity principle. It resulted in a new definition of the subsidiarity principle, which recognises for the first time the local and regional dimension, and mechanisms for implementation and monitoring in the framework of a new Protocol. The draft constitution is still subject to ratification in most Member States.

The three relevant articles in the draft Constitution are:

[Article 1-11: fundamental principles](#) (Part 1, title III – Union Competences), recognises for the first time the regional and local dimension of the principle of subsidiarity, as well as the national level. The role of guardians of the subsidiarity is entrusted to National Parliaments, who have to ensure compliance with the principle.

[Protocol on the Application of the Principle of Subsidiarity and Proportionality;](#)

[Protocol on the role National Parliaments.](#)

The principle of subsidiarity in the draft Treaty establishing a Constitution for Europe

The draft EU Constitutional Treaty strengthens the principle of subsidiarity by providing a role for national parliaments, and through national consultation if they so wish, regional legislative parliaments, in the EU legislative process. If the Treaty is adopted they would be responsible for monitoring the application of the principle, establishing what is referred to as the "early warning system" or ex ante political monitoring which is laid out in the protocol on the application of the principles of subsidiarity and proportionality.

The Commission's legislative proposal would be sent to national parliaments at the same time as it is sent to the Council of Ministers and the European Parliaments. National parliaments would then have six weeks to publicly notify the European institutions and their own government through a reasoned opinion if they consider that the principle of subsidiarity has not been complied with. The Institutions would have to take this opinion into account. If one third of parliaments share the same view, the Commission would be obliged to review its proposal. For initiatives relating to matters of freedom, security and justice, the threshold is set at a minimum of one quarter. The Commission may decide to maintain, amend or withdraw its proposal, and must give reasons for its decision.

Each national Parliament or each chamber of a national Parliament would have the responsibility to consult, where appropriate, regional parliaments with legislative powers.

Ex post judicial monitoring of the application of the principle of subsidiarity is broadend and

strengthened by the draft Constitution. Currently, an action can be brought before the European Court of Justice on the basis of a breach of the principle of subsidiarity; however, only by those persons directly affected, Member States, the Council, the Commission and the European Parliament. The draft constitution extends the right of recourse to national parliaments and the Committee of the Regions to police the application of the subsidiarity principle.

Application of the protocol

Since the draft Constitutional Treaty was signed by Heads of Member States, the National Parliaments, Committee of the Regions, CALRE (Conference of European Regional Legislative Assemblies) and other EU associations representing regional and local authorities have been exploring the implications of the new draft protocol and how it can be applied effectively.

Cosac

COSAC is a co-operation between committees of the national parliaments dealing with European affairs as well as representatives from the European Parliament. COSAC agreed at its meeting on 23 November 2004 to conduct a 'pilot project' on the 3rd railway package in order to assess how the subsidiarity early-warning mechanism provided for in the Constitutional Treaty might work in practice. COSAC launched the pilot project on 1 March and it was completed by 12 April (six weeks later). The national delegations will exchange information on their experience of the pilot project at the next meeting of COSAC in Luxembourg on 17-18 May.

The Houses of Parliament have already indicated that they would consult the UK's devolved assemblies and parliament, as part of the early warning system.

The role of the Committee of the Regions

The CoR held a conference in May 2004 to discuss its role in relation to the proposed subsidiarity monitoring mechanism (see report by Rosemary Butler AM for EEAC – 1 July 2004). It is keen to reinforce inter-institutional contacts at this stage to prepare for the potential implementation of the new mechanism. Peter Straub, President of the Baden Wurttemberg Landtag and President of CoR, as the rapporteur has since produced draft recommendations on the application of the protocol which is being discussed in its Constitutional Affairs Commission and is due to be adopted in the CoR July 2005 plenary session.

Although no legal role is provided for the Committee of the Regions (CoR) in the early warning system, it can effectively participate as it has the right to examine the compatibility of an EU legislative proposal with the principles of subsidiarity and proportionality. It is not bound by a

six week deadline as the national parliaments are, but it recognises that this assessment will only be effective if it responds to the EU institutions and national parliaments within the deadline.

The rapporteur is therefore proposing that the CoR sets up a subsidiarity commission to check the compatibility of legislative proposals issued with the principle, in the ten areas where consultation of the CoR is mandatory. In order to respond within the six weeks, the subsidiarity commission would be supported by a virtual subsidiarity network of local and regional authorities, and establish a written and voting procedures. The usual substantive opinions on legislative proposals will continue to take place outside the early warning system (i.e. outside the six week period).

With regards the proposed CoR right of appeal on subsidiarity issues to the European Court of Justice, the rapporteur is recommending that the decision to lodge an appeal would be entrusted to the proposed subsidiarity commission, however, the CoR reserves the right to review this decision. It would also consider any requests to appeal against EU legislative acts from regional and local authorities and their associations, but the final decision would remain with the subsidiarity commission or the plenary assembly.

It is proposed that the CoR would hold an annual conference on the application of the principle of subsidiarity.

The rapporteur is also keen to reinforce the principles of subsidiarity during the drafting stages of the legislative proposal. As part of the revision of the CoR – European Commission co-operation agreement, the CoR is inviting the European Commission to commit to closer involvement of the CoR, for example, consulting the CoR during the preparatory work for the annual legislative programme, setting up a procedure to identify potential "problem" proposals and regularly involving it in the pre-legislative consultation process.

The CoR is seeking to establish a continuous dialogue with the national parliaments within the framework of Cosac, in order to develop joint strategies for the application of the protocol, not least the consultation of regional parliaments as provided for in the Treaty.

CALRE (Conference of European Regional Legislative Assemblies) working group on subsidiarity

At its March 2005 standing committee meeting, the CALRE agreed to set up a working group on the application of the principles of subsidiarity and proportionality. It will be co-ordinated by Mr. Straub, President of the CoR, which should ensure good co-operation between its work programme and any planned initiatives of the CoR.

The objectives of the group are to:

ensure regional parliaments' preparations for applying the Treaty are transparent, open and participatory, together with the rest of the European institutions, organisations and associations, the member states and their governments and regional governments.

As a member of CALRE, the National Assembly for Wales has been invited to participate in the working group. The main initiatives would be:

the creation of a virtual network among the regional legislative assemblies of a technical and political nature to apply the principle (including a dedicated section on CALRE's website);

a seminar on 9-10 June 2005 for representatives of regional assemblies, the national parliaments and the EU institutions and other organisations;

following Cosac's example, the application of a subsidiarity test among the regional legislative assemblies, to help regional parliaments prepare their own internal monitoring processes;

a report would be adopted by the CALRE annual assembly in the Autumn which would also consist of its contribution to a planned CoR seminar on subsidiarity which is to be hosted by the London Assembly in November 2005.

It would also facilitate regional assemblies' relations with the CoR, parliaments of member states (Cosac) and the European Parliament with respect to the application of the principle; and encourage the exchange of experience amongst different Member States.

Annex B: Extract from House of Commons Modernisation Committee Report

3 Parliament's role under the new Constitutional Treaty

112. The Constitutional Treaty envisages a role for national parliaments in two areas:

a) Ensuring compliance with the principle of subsidiarity (Art. I-9 (3) and III-259)

b) National Parliaments will be given a veto on the use of the simplified revision procedure, which provides for the extension by the Council of QMV to any area which previously required unanimity (also known as the 'passerelle') (Art. IV-444).[115]

The subsidiarity early-warning mechanism

113. Article 6 of the Protocol on the Application of the Principles of Subsidiarity and Proportionality

provides that:

'Any national Parliament or any chamber of a national Parliament may, within six weeks from the date of transmission of a draft European legislative act, send to the Presidents of the European Parliament, the Council and the Commission a reasoned opinion stating why it considers that the draft in question does not comply with the principle of subsidiarity. It will be for each national Parliament or each chamber of a national Parliament to consult, where appropriate, regional parliaments with legislative powers'.

114. The body with which the legislative proposal originates is required to take account of any opinion received under that Article. If the number of Parliaments expressing such an opinion is at least one third of the total (one quarter in some cases), then the proposal must be reviewed.[116]

115. Since individual chambers of national Parliaments can act unilaterally, there is no need for a procedure for the two Houses to reach agreement. The effect of doing so would be no different from the two Houses reaching the same decision unilaterally. Where one House believes a proposal breaches the principle of subsidiarity and the other does not, the House which objects to the proposal is free to do so without the consent of the other House. The House therefore needs to devise a procedure which will do three things:

a) identify proposals which are possibly non-compliant;

b) consult the devolved assemblies, where appropriate; and

c) decide whether the non-compliance is sufficiently serious to justify presenting a reasoned opinion.

[117]

116. The European Scrutiny Committee suggests that it is the natural body to undertake the first part of the task since it is the only body which systematically reviews every EU document which is deposited before the House. The Committee's decisions would still need to be endorsed by the House, and it argues that any procedure for doing so should not take up time on the floor of the House, or require any endorsement from the Government, as any objections would then be as much Government as Parliamentary ones.[118] The Procedure Committee agreed with this view but argued that there should be an opportunity for debate in the relevant European Standing Committee.[119]

117. The Clerk of the House suggested that the six-week deadline for reasoned opinions to be presented meant that the system proposed by the two committees would be very difficult to operate in practice, particularly if the views of the devolved assemblies were to be sought. It would be impossible to adhere to the timetable, he argued, if there was a recess during the six-week period. His view was that the only way the system could operate in practice to such a tight deadline would be if the power to offer a reasoned opinion were to be delegated to the European Scrutiny Committee.[120] We note that this is in line with the arrangements proposed in Finland, that the Grand Committee carry out the subsidiarity

control.[121]

118. There is a balance to be struck between maximising opportunity for debate in the House and ensuring that the necessary processes can reliably be completed before the end of the six-week deadline specified in the Treaty. The latter consideration is clearly the more compelling, since an opinion which is lodged after the deadline falls outside the scope of the Treaty provisions and therefore has no force. While we sympathise with the Procedure Committee's proposal for a debate on the Floor of the House, we are concerned that any opinion resulting from a system which required time in the Chamber might be seen as being that of the Government—which would have to make time for the debate—rather than the House. There is also the more pressing danger that, if time cannot be found quickly, the time limit might expire.

119. We recommend that the European Scrutiny Committee should have responsibility for identifying those proposals which potentially breach the principle of subsidiarity. The system should work as follows:

- a) The Committee decides that a proposal does not comply with the principle of subsidiarity and sets out the reasons for this decision in a Report.
- b) The Chairman, or another member of the Committee acting on behalf of the Committee, puts a Motion on the Future Business Section C to the effect 'That, in the opinion of this House, [the proposal] does not comply with the principle of subsidiarity for the reasons set out in the [First] Report of the European Scrutiny Committee'.
- c) Not less than five and not more than eight sitting days after notice of the Motion has been given, the Government puts the Motion on the Order Paper.
- d) The Questions on the Motion and any Amendment to it which is selected are put forthwith in the House.
- e) If the Motion is agreed to, the Speaker forwards the text of the Resolution, together with a copy of the European Scrutiny Committee's Report, to the relevant EU institution.

The simplified revision procedure ('passarelle')

120. Article IV-444 (Simplified revision procedure) of the Treaty also envisages a formal role for national parliaments. It provides that the Council:

- a) may adopt a European decision authorising it to act by qualified majority voting (QMV) in any area or case where it was formerly required to act by unanimity; and
- b) it may adopt a European decision allowing it to adopt in accordance with the ordinary legislative

procedure laws and framework laws which it was previously required to adopt in accordance with a special legislative procedure.

It is required to notify any such decision to every national parliament and, if any national parliament makes known its objection within six months then the decision shall not be adopted.

121. The European Union Bill, currently before the House of Commons, contains a procedure for obtaining Parliamentary approval for these decisions in order that they may be recognised in law. It is as follows:

a) The House of Commons sends a message to the House of Lords asking for its opinion on whether the House of Commons should resolve to approve the initiative;

b) Not less than 20 sitting days after the Lords receives the Message, the House of Commons may approve the initiative by resolution.

Thus the decision on whether to approve the initiative or not rests with the House of Commons; the House of Lords has 20 days during which to express an opinion.[122]

122. We endorse the proposals for Parliament to exercise its veto over the simplified revision procedure contained in the European Union Bill. If the Bill is passed and the Treaty is agreed to, we invite the Procedure Committee to keep the operation of the mechanism under review

115 Treaty establishing a Constitution for Europe, done at Rome on 29 October 2004, Cm 6429. Back

116 Each Parliament has two votes, one per Chamber in the case of bicameral Parliaments. It is the number of votes which are counted. Back

117 Ev 7. Back

118 Ibid. Back

119 Ev 24. Back

120 Ev 86-87 and Q 241. Back

121 Improving EU Scrutiny, Report of the Committee to assess EU scrutiny procedures, Publications of the Parliamentary Office 4/2005 (March 2005), p. 36. Back

122 European Union Bill (Bill 45 of 2004-05), clause 2.