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COSAC Chairpersons Meeting

Principle of subsidiarity – possibilities and limits of judicial control in the EU (with regard to Article 8 of Protocol No. 2 of the draft Treaty of Lisbon)

– background paper –

Introduction

Subsidiarity has featured prominently among the fundamental principles of the European legislative process. The importance of subsidiarity is not only mentioned in the political concepts of further European integration but has also been translated into current European law through regular assessment of the need to adopt newly proposed legislation at the European level.

The need to assess compliance of community legislation with the principle of subsidiarity has been highlighted since the 1980's or early 1990's. The reason can be found in increasing numbers of European legal standards affecting people's everyday lives and in the transformation of what used to be a predominantly economic community into a union that has set out a number of primarily political objectives related to sensitive areas of state sovereignty.

The principle of subsidiarity therefore serves as a useful tool in that it helps to review the need and effectiveness of European decision-making on two levels. First of all, it does so in defining competences entrusted to the European Union in the Founding Treaties ratified by all Member States, and secondly in deciding whether the Union ought to use those powers in particular cases and adopt community legislation that will replace national standards applicable in Member States. As much as the answer to this question may differ due to divergent circumstances in Member States or beliefs held by centres of power, the important thing is that the question has been raised and thoroughly explored in the legislative process.

The principle of subsidiarity was genuinely incorporated into European law in 1992 with the adoption of the EU Treaty. Practical details of the application of the principle were laid down in the 13 points of the Protocol on the application of the principles of subsidiarity and proportionality adopted in 1997.

The Protocol on the application of subsidiarity and proportionality as annexed to the draft Treaty of Lisbon envisages a two-stage subsidiarity check of the EU secondary legislation.

The first phase was tentatively called the early warning system. The early warning system dovetails into the model of scrutiny of national governments by national parliaments. Furthermore, this model was tested through coordinated subsidiarity checks in the last years by COSAC.

If some legislative act should be adopted despite lasting doubts as to its compliance with subsidiarity, any Member State may, on the initiative of its national parliament or one of its houses, bring an action to the European Court of Justice (ECJ), according to article 8 of the above mentioned Protocol of the Lisbon Treaty. The judicial practice of the ECJ concerning the subsidiarity principle still has to be developed and unrolled in the future.

On the other hand, the existing domestic practice of the constitutional courts, tribunals and authorities of Member States, especially those States with the federal structure, proves the broad possibilities of unfolding the judicial feasibility of the principle. Moreover, e.g. the Federal Constitutional Court of Germany applies the subsidiarity principle for defining the framework of the application of the EU law in Germany. Therefore the experience of constitutional courts of Member States may help to develop the doctrine of judicial feasibility of the subsidiarity principle at the EU level. Such a doctrine is of eminent importance for national parliaments, taking into account their envisaged initiative role at the ECJ.

Theses of Prof. Holländer

1) Primary law of the EU does not contain any catalogue of competences that would enable the exact division of the exclusive and shared competences conferred on the Union. The draft Lisbon Treaty tries to overcome this deficit by defining the areas of exclusive and shared competences and areas of coordinating and supporting action.

2) Relations between the EU and the Member States are to be regarded through a prism of not principally application but rather negotiation or creativity. Such relation can be appraised differently using the criteria of constitutionalism on one hand and internationalism on the other.

3) The existing plurality of legal orders and the coexistence of Member States lead to the concept of pooled sovereignty, providing framework for a definition of the European Union as an entity *sui generis*, holding the features of federal and confederate structure. It does not necessarily mean diminishing the sovereignty of the Member States.

4) Internal structure of the Union is based on the legitimacy paradox evolving from the equilibrium between the postulate of direct democratic legitimacy and the postulate to respect the sovereignty of the Member States.

5) European law operates as a legal order transformed to the legal system of Member States, thus enabling the national judges to act as European judges. The tendency to minimalize the interpretative conflicts can prevail.

6) Judicial application of the subsidiarity principle is primarily entrusted to the European Court of Justice at the EU level. The ECJ prefers to limit control to minimal standards of the comparative test of efficiency.

7) Time can prove whether the experience and interpretative methods of constitutional courts or authorities of the Member States can be reflected by the European Court of Justice.

8) Diversity, creativity and order (K. Korinek) shall be accepted as the values enabling to profile the institutional and legal scheme of the European Union.