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Bringing European Governance Closer to the Citizens

Cornerstones for a subsidiary and transparent performance of EU tasks

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After the two recent plenary debates the Convention held on the competence question, a wide consensus in three major issues becomes visible: a flexible model for the distribution of tasks in the European Union is preferred to a rigid catalogue of competencies. Categorisation along the lines of the varying scope and intensity of European interventions is being favoured. Moreover, there is broad agreement that the number of European policy instruments needs to be limited since their permanent "proliferation" in and outside the Treaties decisively contributes to the non-transparency of European governance. Finally, a vast majority of the Convention agrees that specific political and/or legal control mechanisms have to be established in order to effectively supervise the application of the priniciples of subsidiarity and proportionality.

The previous discussion is now to be deepened in the newly established working group on subsidiarity. Its mandate covers mainly two issues: to work on improved guidelines for the due application of the subsidiarity principle in EU decision-making, and to deal with the reform of institutional control mechanisms. It does not, by contrast, take other major aspects into consideration, which are relevant to a transparent and subsidiary performance of EU tasks. In fact, the working group would be best advised to extend its agenda to five problem areas:

1) The Nice Declaration on the Future of the Union formulated the aim to establish "a more precise delimitation of powers reflecting the principle of subsidiarity". How comprehensive does a categorisation of tasks have to be in order to fulfil this aim? To what extent do the *respective instruments and decision-making procedures have to be clearly assigned to the different categories of tasks*?
2) Which *instruments* ought to be primarily available to the EU in the future? How to mark them off more distinctly from each other so as to guarantee that the principles of subsidiarity and proportionality be more strictly obeyed?

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3) How to make the existing rules for the execution of competencies more efficient? Which additional *guiding principles for the performance of tasks* ought to be integrated?

4) The Amsterdam Protocol on Subsidiarity defined *criteria for the application of the subsidiarity principle in EU decision-making*. Are these test criteria sufficient, or do they need to be made more precise and supplemented?

5) Which *institutional mechanisms are conceivable to make the principle of subsidiarity more efficient*? What are their respective advantages and disadvantages?

1. Task-related Assigment of Instruments

In order to simplify the European Treaties, the current system of competencies needs to be reorganised, e.g. by a categorisation along the lines of constitutional, exclusive, joint, complementary, and merely coordinating tasks of the *EU (cf. our proposal in Convention Spotlight 2002 / 01*). However, simply establishing such a new system of competencies is insufficient if we want to do justice to subsidiarity. Competencies will, also in the future, happen to overlap between the Union and the Member States.

The question of how to guarantee a "well-measured Europeanisation" in the respective policy area, is, thus, closely related to the question of how tasks may be performed. If reorganising EU competencies shall not be reduced to a merely editorial exercise, it is necessary also to assign the instruments and decision-making procedures available in each category of tasks. However, to remain flexible with regard to the selection of adequate means this assignment must not be too rigid. A relatively open system could look as follows:

- *Exclusive and joint tasks* should, as a rule, be regulated by European laws adopted via co-decision and with a qualified majority in the Council. Depending on the issue, regulations, directives or binding decisions could be resorted to.
- In the case of *complementary competencies* of the EU the consultation and co-decision procedure, again with a qualified majority in the Council, would be applied. However, only directives or recommendations or other forms of support, such as financial programmes, would be acceptable.
- Ultimately, in the *category of merely co-ordinating functions* only non-binding instruments like recommendations, opinions, reports and target indicators unanimously agreed on would be available to the EU. Here the Council would decide after having informed or consulted the European Parliament.

The main advantage of this approach is that a comprehensive categorisation of tasks creates a stringent framework pattern which facilitates the distinction between regulations, directives, decisions, and recommendations, by defining their different fields of application. Compared to the present Treaty structures, transparency would be considerably increased.

2. Simplifying the Instruments for EU Action

More transparency requires a manageable number of instruments available and their clear delimitation from each other. In the present situation, there is a plenitude of different instruments which exist rather inconsistently side by side, and are only partially provided for in the Treaties. For the first pillar of the EU Treaty, for example, apart from regulations, directives, decisions, recommendations, and opinions, we also find terms such as framework regulations, guidelines, and implementing decisions. The second and the third pillar of the EU Treaty on foreign and home affairs list another nine measures. In addition, there are merely "declamatory competencies", such as presidency conclusions or declarations and solemn declarations.

Another problem is the insufficient substantial definition of the individual instruments. The difference between the main instruments regulation and directive is blurred by the increasing tendency also to include detailed implementing provisions into directives. Moreover, the lacking distinction between legislative and executive acts contradicts all principles of horizontal separation of powers. These deficiencies could be overcome in mainly two ways:

- Every single instrument available ought to be listed in the Treaty. The instruments ought to be limited in number and marked off against each other more clearly. *Incorporating a hierarchy of norms* into the Treaties would allow to distinguish more strictly between regulations and directives according to their respective effect. The latter ought to be exclusively used as European framework laws. The category "implementing provisions" ought to be listed separately so as to clarify the difference between executive and legislative acts. This distinction would have to be supplemented by a basic rule which clarifies that, in general, Member States are responsible for the implementation and administrative application of community law whereas the Commission is responsible only in exceptional cases.
- *Abolishing the pillar structure of the EU Treaty* would also open the opportunity to simplify the present system of legal instruments. The framework decisions provided for in the third pillar could, thus, be replaced by the instrument of the directive. Instruments which, to date, have been little used, such as the "common strategies" within the framework of the second pillar on foreign policy, ought to be deleted.

3. Principles Regulating the Performance of Tasks

The distribution of tasks within the European Union will, also in the future, predominantly be characterised by mixed competencies. To shape it according to the principle of subsidiarity, the concrete application of political instruments has to be guided by the obligation to take care of each other's autonomy. In order to guarantee this, the following principles regulating the performance of tasks could be developed further:

- *"Bilateralisation" of the principle of comity towards the Union:* the principle of comity towards the Union, stipulated in Art. 10 TEC, ought to be formulated more distinctly as mutual duty rather than unilaterally referring to the obligation of the Member States to act in accordance with the objectives of the Community. The Community's obligation to pay due respect to the competencies of the Member States ought to be more strongly emphasised.
- *Strengthening the principle of single-case empowerment:* the possibilities to "misuse" specific EU competencies by enacting secondary legislation that encroaches on new fields of activities not provided for in the Treaties ought to be restricted. This could be achieved, for example, by introducing a "lex specialis" clause in primary law. Moreover, the principle of single-case empowerment should be strenghtened by specifying the rules of application of Art. 308 TEC. It remains to be discussed whether this should be done by providing for the possibility to transfer responsiblities on a case-by-case basis back to the Member States if EU action no longer seems justified. A more far-reaching option would be to delete Article 308 TEC completely.
- *Supplementing the principle of proportionality:* special emphasis needs to be put on the principle of proportionality. For that purpose, the obligation fixed in the Amsterdam Protocol on Subsidiarity that European measures should leave as much scope for national decisions as possible ought to be incorporated into the Treaty. Another reform approach is to provide for the more frequent use of policy instruments below the threshold of European legislation, such as the principle of mutual recognition or the new mechanism of open coordination. In the latter case, however, it would be indispensable to clarify that the coordination procedure can be applied only within the limits of existing EU competencies.
- *Incorporation of the "principle of sufficient means" into the Treaty:* an *ex ante* control of legislative proposals could thus be attained guaranteeing that a specific European action does not overstrain the financial capacities of Member States. *Vice versa*, however, this should not imply that each European measure has to be financed from the EU budget.

- *Widening the scope for independent action on the sub-national level:* in case of cross-border problems, and depending on the constitution of each Member State, the right to transnational cooperation between regions should be fixed in the Treaty.

4. Guidelines for the Application of the Subsidiarity Principle

The newly established Convention working group on subsidiarity is to elaborate on the question, *inter alia*, whether, and how, the guidelines for the application of the subsidiarity principle listed in the respective Amsterdam Protocol ought to be supplemented. This could, for instance, happen by way of differentiating between two test levels. The first step would be to clarify whether Member States had to act jointly in order effectively to solve particular problems or to defend specific interests. The examination on this level could be based on the following criteria:

- To what extent is the respective problem transnational insofar as its settlement would exceed the political capacities and financial resources of individual Member States? *(capacity criterion)*
- To what extent do single-state actions have negative consequences for other Member States? Or, to what extent do Member States profit from single-state measures without sharing the related costs? *(externality criterion)*
- Does joint action of Member States increase their power vis à vis third states? Does this lower average production costs of specific goods or supply costs for particular public services? Does early planning and coordination of joint action result in a clear added value? *(added value criterion)*

If just one of these criteria favoured joint action of the Member States, the second question would be whether perhaps other forms of cooperation ought to be preferred to EU action. Again, three specific questions would have to be answered:

- Do all Member States have to cooperate to solve a problem effectively? Are the interests of the respective Member States sufficiently homogenous to switch to alternative forms of intergovernmental cooperation outside the European Union? *(cooperation criterion)*
- Will EU action meet widespread support among the citizens of the Union? Is the field of action dealt with perhaps characterised by particular political, social or cultural traditions? Is responsibility for this field regularly anchored on the regional level in the Member States? *(acceptance criterion)*
- Does waiving a planned measure have negative effects on the realisation of major objectives of the European Treaties? Would EU action significantly contribute to the coherence of Community policies? *(coherence criterion)*

5. Institutional Mechanisms to Control Subsidiarity

The European Court of Justice should continue to be responsible for the *legal settlement of competence conflicts*. It is difficult to recognise why the establishment of new institutions should considerably improve the efficiency and legitimacy of arbitrage compared to the present system. Legal decisions could certainly be transferred to a new court of competencies consisting, completely or partially, of national constitutional judges. However, its added value as compared to the legislation of the European Court of Justice remains unclear. Rather, further developing the European Court of Justice into a proper constitutional court ought to be considered. Endowing it with the right to assess *a priori*, i.e. even before a European legal act takes effect, whether this measure is in accordance with the principles of subsidiarity and proportionality would be an important step into that direction.

Furthermore, a number of institutional variants *to improve political control* is currently discussed. They often aim at strengthening *the role of national parliaments* in European decision-making by reinforcing their control function. This applies for models favouring the establishment of a second chamber of national parliamentarians as well as for ideas to create a subsidiarity committee consisting of national deputies and members of the European Parliament. Ultimately, both considerations would lead to forming a third chamber on the EU level. This would mean even more complicated decision-making structures. Rather could the control function of COSAC, which has already been pondered in the Amsterdam Protocol on the role of national parliaments in the EU, be made more efficient. In order to enable COSAC, more than before, to make efficient use of its right to give opinions on subsidiarity questions, it would, most of all, need to be given its own secretariat.