ARTICLES

How to Sharpen a Dull Sword – The Principle of Subsidiarity and its Control

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A. Introduction

The Treaty Establishing a European Constitution seems to have failed. The problems continue to exist: a centralizing tendency is inherent in the European Union like in supposedly every federal or supra-national system. This is why, for years, there has been a growing demand for a barrier against the subtle loss of competence for the Member States and their sub-national units, which also potentially threatens the acceptance of the Union's legal acts and therefore the progress of European integration overall.[1]

For that reason the incorporation of the principle of subsidiarity into what is now Art. 5 of the EC Treaty is one of the important achievements of the Treaty of Maastricht.[2] This principle was supposed to serve as a "magic cure against the unbeloved Euro-centrism."[3] The principle of subsidiarity, however, introduced

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[1] *Compare* Paul Craig, *Competence: Clarity, Containment and Consideration*, 29 EUROPEAN LAW REVIEW 324 (2004); George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUMBIA LAW REVIEW 344 (1998); Gerhard Konow, *Zum Subsidiaritätsprinzip des Vertrages von Maastricht*, 46 DIE ÖFFENTLICHE VERWALTUNG (DÖV) 405 (1993).

[2] *See generally* Grainne de Búrca, *Reappraising Subsidiarity's Significance after Amsterdam*, HARVARD JEAN MONNET WORKING PAPER, 7/99; Armin von Bogdandy & Jürgen Bast, *The Vertical Order of Competences*, *in* PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW 65 (Armin von Bogdandy & Jürgen Bast eds., 2006); Nicolas W. Barber, *Subsidiarity in the Draft Constitution*, 11 EUROPEAN REVIEW OF PUBLIC LAW (ERPL) 197 (2005). For a critical voice, *see* Gareth Davies, *Subsidiarity: The wrong Idea, in the wrong Place, at the wrong Time*, 43 COMMON MARKET LAW REVIEW (CML Rev.) 63 (2006).

[3] *See* Konow, *supra* note 1.

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with high expectations, did not change much in the European legal reality. This is reflected by an analysis of the case law of the European Court of Justice, as well as the high number of acts and decisions passed by the European Community since then. Therefore – especially from the view point of Prime Ministers of the German *Länder* (federal states)[4] – a noticeable limitation on the exercise of European power does not appear to have been achieved.

Against this background there was sufficient reason for the latest reforms in the European Convention,[5] which was elaborated by the European Council of Laeken[6] in December, 2001, to grant high significance to the issues of subsidiarity[7] and restraining competences. Since the principle of subsidiarity has achieved only little effect in the European legal reality as far as substantive law is concerned, it was one of the premises of the European Convent and its working groups to support it by procedural precautions of control, which have been proposed in various forms.[8]

On 18 June 2004 the European Heads of State or Government agreed upon the results of the consultations of the European Convent and the subsequent Intergovernmental Conference. The "Treaty Establishing a Constitution for Europe" was solemnly signed in Rome by the Heads of State or Government on 29 October 2004. But the required ratification by all the 25 Member States has suffered a severe setback by the negative outcome of the referendum in France and the failure of the referendum in the Netherlands.

Initially, the Heads of State and Government held on to the goal of a Constitutional Treaty, despite the problems during the ratification process. At the European

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[4] Compare with the view of former prime minister from North Rhine-Westphalia. Wolfgang Clement, *Europa gestalten – nicht verwalten, Die Kompetenzordnung der Europäischen Union nach Nizza*, *in* FORUM CONSTITUTIONIS EUROPAE, VORTRÄGE ZUM EUROPÄISCHEN VERFASSUNGSRECHT, FCE 3/01 (http://www.whi-berlin.de/clement.htm).

[5] See the homepage of the European Convent at: http://european-convention.eu.int.

[6] *See Laeken Declaration on the Future of the European Union*, *in* PRESIDENCY CONCLUSIONS OF THE EUROPEAN COUNCIL MEETING IN LAEKEN 19, at http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/ec/68827.pdf.

[7] One of the main objectives of the European Convention was to establish a transparent system to better distinguish between competences given to the European Community, on the one hand, and the Member States, on the other hand. Compare the section "A better division and definition of competence in the European Union" *in Laeken Declaration on the Future of the European Union*, *id*.

[8] *Compare* CONV 286/02.

Council of 16/17 June 2005 they agreed upon a one-year "period of reflection."[9] After this period, the last European council in Brussels of 15/16 June 2006 agreed on a "two-track approach" to reach concrete results. On the one hand, the possibilities offered by the existing treaties for realizing some aspects of the Constitutional Treaty should be examined. [10] On the other hand, the German Presidency was asked to present a report to the European Council during the first term of 2007. The requested report should contain an assessment of the state of discussion with regard to the Constitutional Treaty and explore possible future developments. The following examinations should then "serve as the basis for further decisions on how to continue the reform process during the second term of 2008" under French Presidency.[11]

As far as the reform regarding subsidiarity is concerned the respective provisions can basically be found in the new Protocol,[12] which was attached to the Constitutional Treaty as it was done before to the Treaties establishing the European Union. Against this background it seems advisable to replace the "Protocol on the Application of the Principles of Subsidiarity and Proportionality" currently in force by the Protocol proposed and attached to the Constitutional Treaty. In this way an essential part of the proposals regarding a reform in the area of the division of competences could be preserved for the current European Community Law.

In this article the principle of subsidiarity will be examined according to current law, including the question as to why it played such a minor role in the case law of the European Court of Justice (ECJ) so far. Subsequently, the article will set forth how the reform proposals can be integrated into current European Law after the

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[9] Declaration of the Heads of State or Government on the Ratification of the Treaty Establishing a Constitution for Europe (European Council, 16 and 17 June 2005), Document No. SN 117/05, 2, http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/ec/85325.pdf.

[10] It is certain that – irrespective of the fate of the Constitutional Treaty – a reform of the primary law continues to be in the best interest of the European Union and indispensable in order to work on the "Leftovers of Nice." For that reason, different solutions have already been discussed among scholars. Regarding the options of a partial ratification despite of the failure of the Constitutional Treaty, *see* Joachim Wuermeling, *Die Tragische: Zum weiteren Schicksal der EU-Verfassung*, 38 ZEITSCHRIFT FÜR RECHTSPOLITIK (ZRP) 149 (2005); Jörg Monar, *Optionen für den Ernstfall: Auswege aus einer möglichen Ratifizierungskrise des Verfassungsvertrags*, 5 INTEGRATION 16 (2005).

[11] See European council Brussels 15/16 June 2006, presidency conclusions, 16/6/2006 (English), Nr: 10633/06 http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/90111.pdf.

[12] Protocol No. 2, OJ EC, C 310/207 (http://europa.eu.int/eur-lex/lex/LexUriServ/site/en/oj/2004/c_310/ c_31020041216en02070209.pdf), hereinafter "SubsProt".

failure of the European Constitutional Treaty, what can be accomplished by the new proposals and how they can be evaluated.

B. The Principle of Subsidiarity and Current European Law

I. Substantive Law

The idea of subsidiarity[13] derives from a catholic social doctrine[14] and developed to a self-contained Community law principle. According to the principle, as it is put down in Art. 5 sec. 2 EC, the Community – in areas outside its exclusive competence – shall "take action, only if and in so far 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". Therefore, the smaller units (the Member States) shall have priority in their actions *vis-à-vis* the higher unit (the European Community), limited only by their capability.[15] At the same time, the principle of subsidiarity aims to devolve the administration of the law so that it is closer to the people and to the issue in question. This is meant to promote higher efficiency and transparency of political decisions and respond to demands for accommodation of historically developed traditions.[16] As unambiguous and unmistakable the language may seem at first glace, subsidiarity has nonetheless been given diverse interpretations by the various European institutions, Member States and national doctrine.

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[13] As to origin and significance of the principle of subsidiarity, in general, *see* JOSEF ISENSEE, SUBSIDIARITÄTSPRINZIP UND VERFASSUNGSRECHT – EINE STUDIE ÜBER DAS REGULATIV DES VERHÄLTNISSES VON STAAT UND GESELLSCHAFT (2nd ed., 2001); HELMUT LECHELER, DAS SUBSIDIARITÄTSPRINZIP – STRUKTURPRINZIP EINER EUROPÄISCHEN UNION (1993); STEFAN PIEPER, SUBSIDIARITÄT (1994); CHRISTOPH RITZER, EUROPÄISCHE KOMPETENZORDNUNG, REFORM DER KOMPETENZVERTEILUNG ZWISCHEN DER EUROPÄISCHEN UNION UND DEN MITGLIEDSTAATEN DURCH DEN VERTRAG ÜBER EINE VERFASSUNG FÜR EUROPA 72 (2006).

[14] See the encyclical of Pope Pius XI. *Quadragesimo anno* "on reconstruction of the social order": "Still, that most weighty principle, which cannot be set aside or changed, remains fixed and unshaken in social philosophy: Just as it is gravely wrong to take from individuals what they can accomplish by their own initiative and industry and give it to the community, so also it is an injustice and at the same time a grave evil and disturbance of right order to assign to a greater and higher association what lesser and subordinate organizations can do. For every social activity ought of its very nature to furnish help to the members of the body social, and never destroy and absorb them." See the encyclical online under: http://www.vatican.va/holy_father/pius_xi/encyclicals/documents/hf_p-xi_enc_19310515_quadragesimo-anno_en.html.

[15] *Compare* ISENSEE, *supra* note 13, at71; CHRISTIAN CALLIESS, SUBSIDIARITÄTS- UND SOLIDARITÄTSPRINZIP IN DER EUROPÄISCHEN UNION - VORGABEN FÜR DIE ANWENDUNG VON ART. 5 (EX-ART. 3B) EGV NACH DEM VERTRAG VON AMSTERDAM 32 (2nd ed. 1999).

[16] Dieter Blumenwitz, *Das Subsidiaritätsprinzip und die Stellung der Länder und der Regionen in der Europäischen Union*, *in* GEDÄCHTNISSCHRIFT FÜR EBERHARD GRABITZ 1, 5 (Randelzhofer ed.,1995).

The principle of subsidiarity of Art. 5 sec. 2 EC always needs to be seen as part of the "Trias of Competences," that is, in connection with the principle of conferral[17] of Art. 5 sec. 1 EC and the principle of proportionality of Art. 5 sec. 3 EC. Section 1 of Art. 5 EC asks whether the Community "can" basically take the respective measure. Section 2 asks "if" the Community, in the individual case, has to give way to the Member States taking the respective measure. Section 3 asks "how" the respective measure needs to be taken, for example, whether the measure taken by the Community was suitable and necessary.[18] Since the Treaty of Amsterdam these principles have been substantiated by the Protocol (No. 30) on the application of the principles of subsidiarity and proportionality.[19] The principle of subsidiarity serves as a rule concerning the exercise rather than the division of competences.[20] The language, spirit and purpose of the law show that the demand for subsidiarity is only addressed to the institutions of the Community.[21]

The subsidiarity-test can be divided into three steps.[22] First, it must be determined whether the Community action is based on a non-exclusive competence. Second, if not, it must be determined whether the objectives of the respective action also could

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[17] This principle is as well known as the "principle of attributed competences" or by the term "enumerated powers." *Compare* von Bogdandy & Bast, *supra* note 2, at 340.

[18] *Compare* DETLEF MERTEN, DIE SUBSIDIARITÄT EUROPAS 77, 78 (1993); Christian Calliess, *Art. 5*, *in* KOMMENTAR DES VERTRAGES ÜBER DIE EUROPÄISCHE UNION UND DES VERTRAGES ZUR GRÜNDUNG DER EUROPÄISCHEN GEMEINSCHAFT - EUV/EGV margin note 6 (Christian Calliess & Matthias Ruffert eds., 2nd ed. 2002).

[19] At http://europa.eu.int/eur-lex/lex/en/treaties/dat/11997E/htm/11997E.html#0105010010. This protocol plays an important role in primary community law regarding issues of practicability and justiciability. Compare Art. 311 EC.

[20] Should the principle be interpreted as a rule concerning the division of competences, the respective competence would remain with the Member States until it was shifted to the Community according to sec. 2 of Art. 5 EC. *Compare* Detlef Merten, *supra* note 18, at 81; Wolfgang Kahl, *Möglichkeiten und Grenzen des Subsidiaritätsprinzips nach Art. 3b EG-Vertrag*, 118 ARCHIV DES ÖFFENTLICHEN RECHTS (AöR) 414, 433 (1993); Peter M. Schmidhuber & Gerhard Hitzler, *Die Verankerung des Subsidiaritätsprinzips im EWG-Vertrag - ein wichtiger Schritt auf dem Weg zu einer föderalen Verfassung der Europäischen Gemeinschaft*, 11 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT (NVwZ) 720, 722 (1992).

[21] WOLFRAM MOERSCH, LEISTUNGSFÄHIGKEIT UND GRENZEN DES SUBSIDIARITÄTSPRINZIPS - EINE RECHTSDOGMATISCHE UND RECHTSPOLITISCHE STUDIE 331 (2001); Rudolf Streinz, *Die Abgrenzung der Kompetenzen zwischen der Europäischen Union und den Mitgliedstaaten unter besonderer Berücksichtigung der Regionen*, 47 BAYERISCHE VERWALTUNGSBLÄTTER (BayVBl) 481, 486 (2001).

[22] *Compare* Manfred Zuleeg, *Das Subsidiaritätsprinzip im Europarecht - Inhalt, Justiziabilität, Entwicklung* -, *in* MÉLANGES EN HOMMAGE À FERNAND SCHOCKWEILER 640 (Rodriguez a.o. ed., 1999). For further details to the debate about a two-part or three-part analysis, *compare* RITZER, *supra* note 13, at 82.

have been sufficiently achieved by the Member States. Third, if the answer to the second inquiry is negative, it must be determined whether the respective action therefore would have been better achieved by the Community. As far as the notion of "non-exclusive competence" (the first inquiry) is concerned, however, neither a definition nor a list of competences is included in the Treaty. Therefore, the question whether a legal area can be characterized as falling under the exclusive competence of the Community has been highly controversial. A broad interpretation of this notion, as has been urged by the European Commission,[23] leaves little space to the principle of subsidiarity[24] and restricts its scope of application too much.[25] In the meantime, the ECJ[26] has developed a list of areas that belong to the exclusive competence of the EC.[27] This, however, has not brought an

[23] The Commission takes the view in its "Communication [...] to the Council and the European Parliament concerning the principle of subsidiarity" that the notion of exclusive competences needs to be interpreted in a broad way. For that reason it encompasses not only the areas expressly mentioned as exclusive, but also the areas of the four fundamental freedoms, the general rules on competition, the common organization of agricultural markets, and the essential elements of transport policy. Art. 71 lit. a and b EC, (*reprinted in* Merten, *supra* note 18, at 112.). Art. 71 sec. 1 lit. a and b presumably referring to ECJ, decision of 22 May 1985, Case 13/83, 1985 E.C.R. 1513 (*European Parliament/Council*).

[24] Some scholars go even further and consider the establishment of a common market (Art. 94 et seq. EC) an exclusive competence of the Community. *See* Peter Müller-Graff, *Binnenmarktauftrag und Subsidiaritätsprinzip?*, 159 ZEITSCHRIFT FÜR DAS GESAMTE HANDELRECHT UND WIRTSCHAFTSRECHT (ZHR) 66 (1995). Some scholars follow the view that the notion of exclusive competence is extrinsic to the Treaty and just a mere consequence of the Primacy of Community Law. *See* Ulrich Everling, *Subsidiaritätsprinzip und "ausschließliches" Gemeinschaftsrecht – ein "faux problème" der Verfassungsauslegung*, *in* VERFASSUNGSSTAATLICHKEIT - FESTSCHRIFT FÜR KLAUS STERN ZUM 65. GEBURTSTAG 1234 (Burmeister ed., 1997).

[25] Also, this interpretation is contradictory to the fact that, for example, the competence for the harmonization of law requires that the competence in this area still remains with the Member States. *See* Christian Calliess, *supra* note 18, at margin number 24; Hans D. Jarass, *Die Kompetenzverteilung zwischen der Europäischen Gemeinschaft und den Mitgliedstaaten*, 121 ARCHIV DES ÖFFENTLICHEN RECHTS (AöR) 173, 190 (1996).

[26] The ECJ has implicitly disagreed with a narrow interpretation in its decision on the biopatent-directive, by explicitly reviewing Art. 5 sec. 2 EC – in opposition to the comments made by the Advocate General. Case C-377/98, Biopatent Directive, 2001 E.C.R. I-7079, para. 30. *See* Ninon Colneric, *Der Gerichtshof der europäischen Gemeinschaft als Kompetenzgericht*, 13 EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT (EuZW) 175, 184 (2002).

[27] Among them are the commercial policy, substantive law of customs, the protection of resources for fishing, and the law of internal organisation and procedure; the same must be true, for logical reasons, for areas connected with the monetary union. *See* Art. 105 et seq. EC. *See also* Manfred Zuleeg, *Art. 5*, *in* I KOMMENTAR ZUM VERTRAG ÜBER DIE EUROPÄISCHE UNION UND ZUR GRÜNDUNG DER EUROPÄISCHEN GEMEINSCHAFT margin note 7 (Hans von der Groeben & Jürgen Schwarze eds., 6th ed. 2003); Reimer von Börries, *Das Subsidiaritätsprinzip im Recht der Europäischen Union*, 29 EUROPA-RECHT (EuR) 263, 274 (1994); Reimer von Börries, *Gedanken zur Tragweite des Subsidiaritätsprinzips im Europäischen Gemeinschaftsrecht*, *in* EUROPARECHT, KARTELLRECHT, WIRTSCHAFTSRECHT - FESTSCHRIFT FÜR ARVED DERINGER 22 (Ulrich Everling ed., 1993).

end to the discussion. The second step requires that - according to the *negative-criteria* – the Community can only take action "if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States." According to the guidelines given by the Subsidiarity Protocol, in particular its No. 5, the issue under consideration must have transnational aspects that cannot be satisfactorily regulated by actions taken by the Member States.[28] As a third step the *better-criteria* demands that the action at the Community level would produce clear benefits by reason of its scale or effects compared with the action taken by the Member States. According to the Commission the better criteria must be considered as a "comparative *surplus* test" of an action taken by the Community as opposed to the action taken by the Member States.[29]

Problems arise in particular with the second and third criteria of the principle of subsidiarity. While the question of exclusive competence can basically be clarified by a catalogue of areas, developed case-by-case by the European Courts, the second and third criteria pose legal problems. These notions are vague and are subject to political argumentation.

II. Controlling Subsidiarity

The efficiency of the principle of subsidiarity highly depends on the efficiency of the procedure that leads to its enforcement. This procedure is two-fold: legislative proceedings and judicial proceedings.

1. Legislative Control

To enforce the principle of subsidiarity procedural requirements within the legislative process have been developed. By the ratification of the (binding) "Protocol on the application of the principles of subsidiarity and proportionality" as an annex to the Treaty of Amsterdam, the "guidelines"[30] used in examining, whether the principle of subsidiarity has been fulfilled, have been codified as primary Community Law. The protocol puts down requirements for the legislative

[28] It is irrelevant, from the view of the European Community, on what national level the action is taken.

[29] Mitteilung der Kommission an den Rat und an das Europäische Parlament betr. das Subsidiaritätsprinzip (*reprinted in* MERTEN, *supra* note 18, at 112. *Compare* No. 4 and No. 5 of the Protocol of Subsidiarity, *supra* note 12.

[30] *Compare* Conclusions of the Council of Edinburgh of 12 Dezember 1992 (*published in German* CALLIESS, *supra* note 15, at 391); Interinstitutional Agreement on Procedures for Implementing the Principle of Subsidiarity 1993/XX, 1993 O.J. (C 329/132) (EC) (*republished in German in* 20 EUROPÄISCHE GRUNDRECHTE ZEITSCHRIFT (EuGRZ) 602 (1993)).

process, primarily addressed to the commission.[31] Among them are, in particular, mandatory hearings, the duty to give qualified reasons [32] and the duty to present annual reports.[33] These legislative precautions, however, have not noticeably reduced the quantity of European legislation. A reason for this might be that these precautions are not put down in a sufficiently specific way and, therefore, leave much space for political considerations. In addition to this rather inefficient legislative control occurring prior to the legislative process, the principle of subsidiarity can also be controlled afterwards by the European Court of Justice and the European Court of First Instance (*judicial control*).

2. *Judicial Control*

In its previous case law the European Court of Justice and the European Court of First Instance have, to a large extent, avoided a "true" examination of the principle of subsidiarity by using mere formulaic statements.[34]

2.1 Justiciability, Procedural Standard

Judicial control requires, first and foremost, that the principle of subsidiarity is justiciable. Whether it is observed or not, however, is not entirely open for judicial review. Judicial control must be exercised by the European Courts with different intensity for the different elements of the respective provision.[35] Mere legal issues are subject to unlimited judicial control.[36] The question of the non-exclusive nature of the respective competence of the Community certainly belongs here. As to further procedural requirements that have to be observed, the question whether the

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[31] According to No. 1 of the Protocol in exercising the powers conferred on it, each institution shall ensure that the principle of subsidiarity is complied with.

[32] Any proposed Community legislation has to state the reasons on which it is based, also having considered the financial or administrative burden falling upon the Community, national governments, local authorities, economic operators and citizens. *See* No. 4 and No. 9 of the Protocol; Art. 253 EC.

[33] The Commission submits an annual report to the European Council, the European Parliament, the Committee of the Regions and to the Economic and Social Committee on the application of Art. 5 EC (No. 9 of the Protocol). The Council takes this report into account in its report on the progress achieved by the Union that it is required to submit to the Parliament in accordance with Art. 4 EU. It considers the consistency of each proposal of the Commission as well as amendments that the Council itself, or the Parliament, envisage making with respect to the principle of subsidiarity (Nos. 10 et seq. of the Protocol).

[34] *See, e.g.*, Cases C-154/04 and C-155/04, Alliance for Natural Health, para. 99, *available at* http://eur-lex.europa.eu/LexUriServ/ LexUriServ.do?uri=CELEX:62004J0154:EN:HTML.

[35] *See* von Börries, *supra* note 27, at 283.

[36] *See* Zuleeg, *supra* note 22, at 642.

European institution has observed its duty to give substantiated reasons for its action can also be subject to judicial review. The lack of sufficient reasoning signifies that the respective action is void due to the infringement of an essential procedural requirement according to Art. 230 sec. 2 EC.

The criteria of Art. 5 sec. 2 EC contain notions of discretion deriving from Community Law, which often makes it necessary to make a political decision based on arguable facts. Due to the systematic position of Art. 5 sec. 2 EC between the principle of conferral in Art. 5 sec. 1 EC and the principle of proportionality in Art. 5 sec. 3 EC, both of which are undeniably subject to judicial review, it must be concluded that the negative-criterion as well as the better-criterion of the principle of subsidiarity are open to judicial control by the European Court of Justice and the European Court of First Instance as a mandatory substantive restriction of non-exclusive competences of the Community.[37]

2.2 Applicability

For the Court of First Instance the principle of subsidiarity became relevant for the first time in the matter T-29/92 (SPO/Commission) in the beginning of 1995.[38] The Court, however, avoided a clear comment by merely stating that the principle of subsidiarity had not been a general principle on a European level before the Treaty of Maastricht entered into force (the case took place before 1993) – in opposition to the opinion of some scholars[39] – since it had not yet been established by a legislative act.[40] This view was confirmed by the European Court of Justice in the *Kellinghusen* case.[41]

The case C-209/94 (Buralux),[42] which was at first pending before the Court of First Instance, was about a regulation on the import of waste into the Community.

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[37] *See* No. 13 Subs. Prot; MOERSCH, *supra* note 21, at 305; PIEPER, *supra* note 13, at 271. According to a different opinion the principle of subsidiarity is only an abstract political guideline and – because of its indefinite character – could not serve as a basis for precise legal consequences. *See* Dieter Grimm, *Effektivität und Effektivierung des Subsidiaritätsprinzips*, 77 KRITISCHE VIERTELJAHRESSCHRIFT FÜR GESETZGEBUNG UND RECHTSWISSENSCHAFT 7 (1994); Georg Lienbacher, *Art. 5*, *in* EU-KOMMENTAR para. 25 (Jürgen Schwarze ed., 2000); Michael Schweitzer & Oliver Fixson, *Subsidiarität und Regionalismus in der Europäischen Gemeinschaft*, 14 JURISTISCHE AUSBILDUNG (Jura) 579, 582 (1992).

[38] Case T-29/92, SPO, 1995 E.C.R. II-289.

[39] As to the different approaches, *see* PIEPER, *supra* note 13, at 197; CALLIESS, *supra* note 15, at 35.

[40] Case T-29/92, SPO, 1995 E.C.R. II-289, para. 331.

[41] Cases C-36/97 and C- 37/97, Kellinghusen, 1998 E.C.R. I-6337, para.

[42] Case C 209/94, Buralux, 1996 E.C.R. I-615.

Buralux SA collected household waste in Germany and shipped it to France for deposit. The import of household waste into France, however, was forbidden by a French decree. The plaintiffs in this case argued against this act of a Member State invoking, among other arguments, that aspects concerning the principle of subsidiarity[43] had not been sufficiently considered; France should have been granted *less* discretion. In the proceedings before the European Court of Justice, Advocate General Lenz correctly pointed out that the principle of subsidiarity protects the Member States only against the exercise of competence *by the Community* that goes *beyond* what was referred to it, but not against the negative outcome of the exercise of discretion by the Member States within the scope that is left to them.[44]

In a recent decision on the legitimacy of the food supplements directive[45] the Court of Justice has interpreted No. 3 of the Protocol (No. 30) on the application of the principles of subsidiarity and proportionality such that the principle of subsidiarity basically does not put the competence of the Community into question.[46] This wording seems a bit unfortunate insofar as it could be interpreted that the principle of subsidiarity has no limiting effect.

2.3 Exclusive Jurisdiction

In the matter C-415/93 (Bosman),[47] the German government, for the first time, put the principle of subsidiarity into the centre of its argumentation. In the opinion of the German government the far reaching autonomy of sports associations granted by national law– according to the general principle of subsidiarity – would preclude an institution of the Community taking action in this area beyond a level that is absolutely necessary. Advocate General Lenz responded that the principle of subsidiarity does not apply in the areas of exclusive competence of the Community. And, since the fundamental freedoms belong to the exclusive competence of the

[43] The plaintiffs referred to EC-regulation No. 259/93 which unified the rules for the conveyance of garbage on a European level. According to this regulation the Member States can pass acts to prohibit the conveyance of garbage in general or in part.

[44] AG Lenz, Advocate General's Opinion of 23 November 1995, Case C-209/94 , ECR 1996, I-615, para. 83 et seq. (*Buralux*).

[45] Directive 2002/46/EC of the European Parliament and of the Council of 10 June 2002 on the approximation of the laws of the Member States relating to food supplement.

[46] Cases C-154/04 and C-155/04, Alliance for Natural Health, para. 102, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do? uri=CELEX:62004J0154:EN:HTML.

[47] Case C-415/93, Bosman, 1995 E.C.R. I-4921.

Community, the principle of subsidiarity cannot be held against an application of Community law in the field of professional football.[48] The European competences defining the fundamental freedoms (such as Art. 40 EC) do not, however, automatically fall into the exclusive competence of the Community[49] so that the principle of subsidiarity is basically applicable in this area. The European Court has assessed this point in the same way, [50] basing its reasoning on the principle[51] and, by doing so, apparently considering it to be basically applicable. Farther reaching conclusions as to the European Court's understanding of the principle of subsidiarity can not be drawn from its more general comments on the subject.

Concerning the proceedings to obtain the permission for the transmission of television broadcasts via cable, Belgium argued in the matter C-11/95[52] that the principle of subsidiarity covers actions by the Member States as long as there is no evasion of Community Law. Advocate General Lenz again noted that the principle of subsidiarity is not applicable in a field that belongs to the exclusive competence of the EC, such as the freedom of services or the internal market. Additionally, Advocate General Lenz argued that it is in the interest of a uniform audio-visual region to have the Community coordinate national law.[53] The ECJ only stated that Member States can not elude their duty not to hinder the free reception of television broadcasts as well as the free transmission thereof by invoking the principle of subsidiarity.[54] Thus, the Court simply clarified that the immediate application and the absolute priority of the basic freedoms have to be distinguished from the

[48] AG Lenz, Advocate General's Opinion of 20 September 1995, Case C-415/93, ECR 1995, I-4930, para. 130. (*Bosman*).

[49] This is contrary to the fact that the competence to harmonize requires that some competence was still left to the Member States, which again leads to the assumption of a shared competence between Community and Member States. *See supra* note 22.

[50] Case C-415/93, Bosman, 1995 E.C.R. I-4921, para. 81.

[51] "Finally, the principle of subsidiarity, as interpreted by the German Government to the effect that intervention by public authorities, and particularly Community authorities, in the area in question must be confined to what is strictly necessary, cannot lead to a situation in which the freedom of private associations to adopt sporting rules restricts the exercise of rights conferred on individuals by the Treaty."

[52] Case C-11/95, Commission v. Belgium, 1996 E.C.R. I-4115.

[53] AG Lenz, Advocate General's Opinion of 30 April 1996, Case C-11/95, Case 1996, I-4115, para. 60. (*Commission/ Belgium*).

[54] Case C-11/95, Commission v. Belgium, 1996 E.C.R. I-4115, para. 52.

principle of subsidiarity,[55] that can only be the benchmark for derivated Community Law.[56]

2.4 Duty to Give Reasons

In the matter C-223/94[57] the point of departure was the directive deposit-guarantee schemes. In its reasoning within the complaint the German Government asserted a violation of the duty to give reasons that is laid down in Art. 190 ECT (Art. 253 EC) in regard of the principle of subsidiarity. However, Attorney General Léger again saw an exclusive competence of the Community, at least as far as the actual measures of coordination are concerned, and therefore held that Art. 5 sec. 2 EC can not be applied in this case.[58] The ECJ did not follow this line of arguments, but pointed out that it was not a violation of the principle of subsidiarity that was challenged here, but the duty to give reasons.[59] The Court interpreted some considerations contained in the reasoning and concerning the directive and referred to the "better-" or "not-sufficient"-criteria, respectively, according to which the principle of subsidiarity was found to be sufficiently considered in the matter, despite the fact that the principle of subsidiarity was never mentioned. It seems positive, however, that, according to the Courts language, some formulaic reasoning, which only refers to insufficient attainment of the goal on the Member State level and therefore some better attainment on the Community level, no longer shall be sufficient to fulfill the duty to give reasons. This, the ECJ explained, is because the standard for the reasoning is linked to the respective level of discretion.[60] Thus, a multitude of justifications spread across the reasoning in the hopes that the Court would pick and choose what it considers relevant, cannot meet the requirements given by this article.

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[55] *See* Bernhard Schima, *Die Beurteilung des Subsidiaritätsprinzips durch den Gerichtshof der Europäischen Gemeinschaften*, 54 ÖSTERREICHISCHE JURISTEN-ZEITUNG (ÖJZ) 761, 766 (1997).

[56] The Advocate Generals had already discussed issues concerning the principle of subsidiarity in their opinions, which have not been adopted, however, by the European Court of Justice. *See* CALLIESS, *supra* note 15, at 351.

[57] Case C-233/94, Deposit-guarantee Schemes, 1997 E.C.R. I- 2405.

[58] AG Léger, Advocate General's Opinion of 10 December 1996, Case C-223/94, ECR 1997, I- 2405, para. 80 et seq. (*deposit-guarantee schemes*).

[59] Case C-233/94, Deposit-guarantee Schemes, 1997 E.C.R. I- 2405, para. 24.

[60] *Compare* CALLIESS, *supra* note 15, at 330. An example of a too formalistic reasoning can be found at Schima, *supra* note 55, at 769.

2.5 Recent Decisions, Examination of the "Better-" and "Not-sufficient-criteria"

In the matter C-84/94 (working hours directive)[61] the United Kingdom, among other claims, asserted that "the Community legislator has neither completely verified nor sufficiently shown, that the directive concerning the organization of working time aims to provide for transnational aspects, which could not be sufficiently governed on a national level, […] and finally, that it was therefore evidently preferable to act on the Community level instead on the Member state level."[62] Advocate General Léger in his opinion,[63] and later the ECJ in its judgment,[64] agreed, concluding that, with respect to the working time directive, that Art. 118a ECT (Art. 137 EC) constitutes the legal basis for the competence of the EC and that, within the scope of this shared jurisdiction, the principle of subsidiarity is applicable. Furthermore the Advocate General stated that the predetermined goal of harmonization necessarily called for supranational action. Even though shared competence in principle leads to the applicability of the principle of subsidiarity, the Advocate General went further and deduced from this the unlimited permission to act. This does not take into account that the existence of shared competence is not the outcome of the application of the principle of subsidiarity according to Art. 5 sec. 2 EC but only its point of departure.[65] The objective of the principle is to limit the competence given to the Community, which basically seems to be the view shared by the European Court of Justice, by demanding that "the actual level of health protection and the protection of workers have to be improved and the existing conditions in the area have to be harmonized in the course of constant development."[66] This mandatory language ("have to") can be interpreted as a call for a preceding assessment in the light of the negative and better criteria of Art. 5 sec. 2 EC.[67] This judgment, however, is left entirely up to the Council, which can be taken from the formulation "as soon as the Council has determined […]."[68] The European Court of Justice saw no reason for further

[61] Case C-84/94, Directive Concerning Working Time, 1996 E.C.R. I-5755.

[62] *Id*. at para. 46.

[63] AG Léger, Advocate General's Opinion of 12 March 1996, Case C-84/94, ECR 1996, I-5758, para. 125 et seq. (*directive concerning working time*).

[64] Case C-84/94, Directive Concerning Working Time, 1996 E.C.R. I-5755, para. 12-45.

[65] *See* Schima, *supra* note 55, at 767; MARION SIMM, DER GERICHTSHOF DER EUROPÄISCHEN GEMEINSCHAFTEN IM FÖDERALEN KOMPETENZKONFLIKT 150, note 593 (1998).

[66] Case C-84/94, Directive Concerning Working Time, 1996 E.C.R. I-5755, para. 47.

[67] *Compare* SIMM, *supra* note 65, at 151.

[68] Case C-84/94, Directive Concerning Working Time, 1996 E.C.R. I-5755, para. 47.

elaborating limitations to the discretion given to the Council in this regard, because the statements of the United Kingdom contained no "autonomous challenge" regarding the principle of subsidiarity.[69]

The more recent jurisprudence also does not contain anything more concrete concerning the principle of subsidiarity. In the matter C-376/98 (tobacco advertising directive)[70] Advocate General Fennelly again referred to the long established argumentation that measures of harmonization are always of exclusive competence with the result that Art. 5 sec. 2 EC was not applicable.[71] In the opinion of the Court the tobacco advertising directive was not even supported by a proper legal basis[72] and, for this reason, there was no reason to further examine Art. 5 sec. 2 EC. In the judgment concerning the bio patent directive, as far as the principle of subsidiarity was concerned, Advocate General Jacobs[73] as well as the Court[74] only repeated the recitals of the directive and the conclusion that the principle of subsidiarity was observed "implicitly, but evidently,"[75] most of all since the development of the national provisions and practises would be opposed to a functioning of the internal market without any friction.[76] In the matter C-491/01 (tobacco products) the European Court of Justice repeatedly stated that measures of harmonization on the basis of Art. 95 EC do not constitute an exclusive competence of the Community and that, therefore, Art. 5 sec. 2 EC in principle is applicable.[77] Furthermore the European Court of Justice confirmed the observance of the principle of subsidiarity in this case, since the directive aims for the removal of the obstacles that have been the result of the legal differences in the Member States; this

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[69] This is referred to at AG Léger, Advocate General's Opinion of 12 March 1996, Case C-84/94, ECR 1996, I-5758, para. 124 (*directive concerning working time*).

[70] Case C-376/98, Ban on Advertising of Tobacco Products, 2000 E.C.R. I-8419.

[71] AG Fennelly, Advocate General's Opinion of 15 June 2000, Case C-376/98, C-74/99, ECR 2000, I-8419, para. 131 et seq. (*ban on advertising of tobacco products*).

[72] Case C-376/98, Ban on Advertising of Tobacco Products, 2000 E.C.R. I-8419, para. 76.

[73] AG Jacobs, Advocate General's Opinion of 14 June 2001, Case C-377/98, ECR 2001, I-7079, para. 77 et seq. (*Biopatent-directive*).

[74] Case C-377/98, Biopatent-directive, 2001 E.C.R. I-7079, para. 30.

[75] *Id*. at para. 33.

[76] AG Jacobs, Advocate General's Opinion of 14 June 2001, Case C-377/98, ECR 2001, I-7079, para. 59 (*Biopatent-directive*).

[77] Case C-491/01, Tabakprodukt, 2002 E.C.R. I-11453, para. 177. *See* Christian Calliess, *Kontrolle zentraler Kompetenzausübung in Deutschland und Europa: Ein Lehrstück für die Europäische Verfassung - Zugleich eine Besprechung des Altenpflegegesetz-Urteils des BVerfG*, 20 EUROPÄISCHE GRUNDRECHTE ZEITSCHRIFT (EuGRZ) 181 (2003).

objective can not "sufficiently" be achieved by the Member States alone as is proven by the heterogeneous development of the national laws in this case.[78] In the face of the formalistic way these statements have been made the value added by them to the discussion is rather little.

III. Evaluation of the Control of Subsidiarity

The jurisprudence of the European Court and the European Court of First Instance has contributed only little to the clarification of the principle of subsidiarity. The Commission's analysis that the principle of subsidiarity above all should be viewed against the background of effectiveness as "better-clause," shows that the Commission can hardly serve as the sole, adequate controlling instance.[79] Using this approach, Art. 5 sec. 2 EC is interpreted not so much as a substantial competence barrier, but rather as a flexible legal basis to justify the exercise of competence by the Community.[80] Against the background of the success of constructive objections against the violation of the principle of subsidiarity in the Council[81] the "*a-priori*-control" by the institutions that take part in the legislative

[78] Cases C-154/04 and C-155/04, Alliance for Natural Health, para. 106, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do? uri=CELEX:62004J0154:EN:HTML.

[79] *Id*. at para. 104.

[80] Davies, *supra* note 2, at 75; Markus Kenntner, *Das Subsidiaritätsprotokoll des Amsterdamer Vertrags – Anmerkungen zum Begrenzungscharakter des gemeinschaftsrechtlichen Subsidiaritätsprinzips*, 51 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 2871, 2874 (1998); Konow, *supra* note 1. Combining both aspects, *see* Peter M. Schmidhuber, *Das Subsidiaritätsprinzip im Vertrag von Maastricht*, 108 DEUTSCHES VERWALTUNGSBLATT (DVBl) 418 (1993). This view seems to be confirmed in No. 3 of the Protocol of Subsidiarity, according to which, first, the principle of subsidiarity does not question the competences of the Community, second, the principle of subsidiarity is a dynamic concept and, third, actions of the Community can be extended within its competences. Critical statements of the Committee of the Regions remained a dull sword due to their lack of binding authority. See thereto, on the one hand, the resolutions of the German Upper House (*Bundesrat*) from December 18, 1992, BR-DRs. 810/92, II.3, 3 and, on the other hand, Konow, *supra* note 1, at 411.

[81] A less effective instrument seems to be the rigorous disapproval by one Member State within the Council, even more since decisions are often taken by qualified majority. It seems much more promising to bring forward potential concerns in a constructive way. See Sibylle Rompe, *Der Subsidiaritätsbericht der Bundesregierung für 1999*, ZEITSCHRIFT FÜR GESETZGEBUNG (ZG) 275 (2000). Compare the reports on subsidiarity of the German Government of 1999 and 2000: 12 EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT (EuZW) 111 (2001) and 13 EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT (EuZW) 3 (2002). Compare, further, remarks, according to which attention is paid to the compliance with the principle of subsidiarity by the Member States and the Regions and its compliance is demanded, challenges, however, are explicitly reserved to problematic constellations. Compare the reports on subsidiarity of the German *Länder*, the Upper House (*Bundesrat*) and the Government, e.g. BUNDESTAGSDRUCKSACHEN BT-DRs.14/4017, BR-DRs.508/00 bzw. BT-DRs.12/7132, 13, No. 43; BT-DRs.13/10109, 14, Nr. 11; BR-DRs.215/99, 18, No. 31: 12 EUROPÄISCHE ZEITSCHRIFT FÜR

process seems to be promising. An appropriate and as well already applied option to use the principle of subsidiarity as a barrier for the exercise of power is the *mutual recognition* (for example, of university diplomas), where the subject of national law is considered to be on a par with the respective other national law according to the respective directives among the Member States.

C. Perspectives for Reform: Acceptance into Applicable Community Law of the Subsidiarity Protocol from the Treaty Establishing a Constitution for Europe

As already shown, the main aim of the European Convention was to revise the system of competences and, in doing so, to better enforce the principle of subsidiarity. To this end the Convention sought to improve the previously unsatisfactory application of the principle, but without creating the risk of undesirable delays or stalemates in the European legislative process.[82] Alongside this was the requirement for the Union institutions to maintain wide political discretion while, at the same time, enabling political scrutiny in the lead up to a legal act without devaluing subsequent judicial control.

This political scrutiny was supposed to take into account each protagonist in the European legislative process who would be disadvantaged by a shift of competences in favor of the Union and who had been the most critical of the Member States' loss of potential to act.

The possibility of action is principally expanded on the European level; an opportunity to influence falls, above all, to the executive representatives of the Member States in the Council.[83] This shift corresponds, however, with a limitation on the range of action of the national legislative organs on a central and federal level. The concerns of both these political actors should therefore be taken into account, above all with respect to the "Protocol on the principles of subsidiarity and proportionality."[84] This not only concerns "guidelines" but also mandatory procedural and organizational requirements and the duty to give reasons with

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WIRTSCHAFTSRECHT (EuZW) 111 (2001); 13 EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT (EuZW) 3 (2002).

[82] Compare the report of the Chairman of the Group on Subsidiarity of the European Convent of September 23, 2003, CONV 286/02, 2.

[83] Christian Calliess, *Der Binnenmarkt, die europäische Kompetenzordnung und das Subsidiaritätsprinzip im Lichte der neuen Europäischen Verfassung*, *in* EUROPARECHT IM ZEITALTER DER GLOBALISIERUNG: FESTSCHRIFT FÜR PETER FISCHER 417 (Heribert Köck & Alina Lengauer & Georg Ress eds., 2004) .

[84] Protocol No. 2 of the Treaty Establishing a Constitution for Europe,: OJ C 310/207 of 16 December 2004.

unlimited official power. However, contrary to the former subsidiarity protocol, only procedural and judicial specifications and reforms are included, whereas the legally relevant explanations are not carried on, while at the same time the *acquis* developed so far is to remain unaffected.

From this stems the question how the consensus achieved up to this point can be guaranteed in relation to a stronger safeguard of the principle of subsidiarity on the procedural level after a feared and final failure of the Constitutional Treaty in a "*post Laeken process*" for current Community law. Enforcement of the "Protocol on the principles of subsidiarity and proportionality" on the basis of applicable Treaty law is therefore suggested.[85]

A simple agreement under international law outside the framework of the Treaty, such as that which provided a way out of the "French policy of the empty chair" with the Luxembourg Compromise, once again could prove to be a useful tool in the case of a deep rooted crisis on the European level – even if its legal position is disputed.[86] Implementation through the agreement of inter-institutional accords similar to that of Edinburgh mentioned above may also be possible, in the form they are foreseen by the Treaty between the Council, Commission and Parliament. In any case it would be problematic if, in this way, no actionable right could be established for the national Parliaments.[87] The same problem may arise in the case of implementation through the corresponding adoption of rules of procedure of the Council, Commission and Parliament.

Consequently the complete acceptance of the new "Protocol on the principles of subsidiarity and proportionality"[88] into applicable Community law through the usual procedure for Treaty amendment under Art. 48 EC continues to be a legally effective solution; all the more so now that a consensus to this effect has been achieved between the Heads of State and Government at the last inter-governmental conference, which can be viewed as a starting point. And as long as the said protocol primarily provides for a strengthening of the national level in the European legislative process and the control of the same, political resistance within the Member States need not be expected.

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[85] Wuermeling, *supra* note 10, at 151; Monar, *supra* note 10, at 16.

[86] Wuermeling, *supra* note 10, at 152; Monar, *supra* note 10, at 22, 26.

[87] Wuermeling, *supra* note 10, at 152.

[88] OJ 2004 C 310/207 of 16 December, 2004.

Therefore this new Protocol will be examined and its perspectives for reform assessed.

I. Substantive Reforms

Without complete ratification of the text the material innovations foreseen by the Constitutional Treaty in the area of the subsidiarity principle will probably be difficult to salvage. The protocol itself provided no material reforms and the innovations of Art. I-11(3) of the Constitutional Treaty in any case had little material content since they were essentially only of a clarifying character, as exemplified by the inclusion in the text of the regional and local levels[89] and the clear linguistic association of the criteria of "cannot be sufficiently achieved" and "can … be better achieved."[90] The substantive explanations for the interpretation of the current subsidiarity principle in Art. 5 sec. ECT, as the European Council in Edinburgh[91] concluded them, and the inter-institutional agreement[92] of the European Parliament, Council and Commission for the application of the subsidiarity principle continue, in any case, to have effect in Community law.

The planned conclusive catalogue of the exclusive competences of the Community in Art. I-13 of the Constitutional Treaty would have represented a considerable advance by the Constitutional Treaty in comparison with the previous Treaty provisions.[93] The former problems with the distribution of powers[94] would have been resolved.[95]

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[89] Motivated by two members of the Convent, the Prime Minister of Baden-Wuerttemberg, Erwin Teufel, and the British Member of the European Parliament, Duff. Comp. CONV 724/03, 62. This, however, does not constitute a substantive change, since so far the test following the not-sufficient-criteria has taken into account every national level of the Member States.

[90] The words "and therefore" would have been replaced by the words "but rather", which would have underlined the cumulative relation between the two criteria as parts of a two-fold test. *See* Clemens Stewing, *Das Subsidiaritätsprinzip als Kompetenzverteilungsregel im Europäischen Recht*, 107 DEUTSCHES VERWALTUNGSBLATT (DVBl) 1518 (1992); CLEMENS STEWING, SUBSIDIARITÄT UND DER FÖDERALISMUS IN DER EUROPÄISCHEN UNION 108 (1992). Following this, there should not be a presumption in favour of the smallest unit. Rather the Community should feel encouraged to further expand its competences.

[91] BullEC 12-1992, 1 (13 et seq.) No. I.15.

[92] OJ 1993 C 329/135; 20 EUROPÄISCHE GRUNDRECHTE ZEITSCHRIFT (EuGRZ) 603 (1993).

[93] One basis for the distribution of the subjects was a report set up by a working group of the European Parliament which referred to the "current division of competences" according to current Community Law. Therefore part of the exclusive competence of the Community was considered primarily competences that have already been declared exclusive by the case law of the European Court of Justice. *See* European Parliament, Committee for Constitutional Issues, Allain Lamassoure (reporter): Report on the division of competences between the European Union and the Member States (2001/2024[INI]), 20 et seq. at http://europa.eu.int/constitution/futurum/documents/other/oth150601_en.pdf.

II. Development of Subsidiarity Scrutiny

The procedural safeguards that were supposed to have an increasing significance in securing the notion of subsidiarity formed the developmental core in the field of the principle of subsidiarity, according to the proposals of the Constitutional Treaty. However, even after the failure of the Constitutional Treaty there is no reason to view these hard won advances as nothing more than mere documents of legal history. Indeed it is worth taking a second look at the actual background of the intended reforms: a desire to counter the doubts and fears of an ever increasing loss of power and meaning for national parliaments and the regional political level – after the introduction of the principle of subsidiarity with the Maastricht Treaty along with the previous mechanisms both failed to meet expectations.

An amendment to the Treaty according to Art. 48 EU and a reform of the subsidiarity protocol in the form proposed by the Constitutional Treaty would only be justified if the reforms with regard to subsidiarity control represented an actual step forward. The question is what value those *procedural* and *judicial* achievements could actually have in legal practice for the guarantee of the principle of subsidiarity.

1. Procedural Controls

According to the new protocol proposed here, the Commission must, before each proposal of a legislative act, carry out extensive consultations with regard to the "regional and local" dimension.[96] Thus, sub-national units receive, for the first time, a right of consultation[97] against the Commission; the non-observance of which is an essential procedural defect leading to the nullity of the legal act.[98] In extraordinarily urgent cases the Commission may

[94] The internal market according to Art. I-14 sec. 2 lit. a) of the Treaty Establishing a Constitution for Europe would be part of the shared competence, which would have expressly rendered the principle of subsidiarity applicable also for measures on the basis of harmonization of the internal market.

[95] Even though it was sporadically demanded to keep the list of competences contained in the Treaty Establishing a Constitution for Europe by any means, a "fast" reform seems difficult, since this part reaches out to all other areas of Primary Law.

[96] Art. 2 SubsProt.

[97] The Commission, however, within its consultations shall „where appropriate, take into account the regional and local dimension of the action envisaged", Art. 2 SubsProt.

[98] Meinhard Schröder, *Vertikale Kompetenzverteilung und Subsidiarität im Konventsentwurf für eine europäische Verfassung*, 59 JURISTENZEITUNG (JZ) 8, 11 (2004); Carsten Glietsch, *Kommunale Forderungen im EU-Verfassungsentwurf weitgehend berücksichtigt*, DIE GEMEINDE 674, 676 (2003); Rolf Grawert, *Wie soll Europa organisiert werden? – Zur konstitutionellen „Zukunft Europas" nach dem Vertrag von Nizza*, 38

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dispense with consultation. In this lies a potential conflict of competences, if the Commission would let the duty to consult become virtually meaningless by regularly claiming extraordinary urgency. In the event that the European judiciary would be called upon to test such urgency, the Commission would not be allowed to claim too much discretion, since that would otherwise come close to giving the Commission a completely free hand.

As already happens in part, the Commission has to base its proposal in a "subsidiarity arch" under the elements of subsidiarity and proportionality.[99] This basis must cover qualitative, and if possible, quantitative aspects,[100] it must, in the case of framework laws, contain details as to the effects on national law at all levels and also express an opinion on the financial burdens to be expected and the costs of administration, for citizens and for business. Practixce will show the extent to which this detailed duty to give reasons expands the scope of judicial control or leaves legislative discretion unchanged.

Perhaps the greatest innovation of the new protocol proposed here consists in that, "for the first time in the history of European integration, it involves national parliaments[101] in the European legislative process"[102] – at least formally,[103] by giving them the opportunity to scrutinize the observance of the subsidiarity principle in accordance with an "early warning system" given shape by the subsidiarity protocol. Every institution involved in the legislative process – Commission, Council and European Parliament – must lay procedurally relevant contributions, proposals, points of view and legislative decisions before the parliaments of the Member States.[104] Within six weeks after the presentation of a proposal for a European legislative act each national parliament or each chamber of such a parliament can notify, with reasoned opinions, the President of the European Parliament, the President of the Council and the Commission of possible

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EUROPA-RECHT (EuR) 971, 983 (2003); Rudolf Hrbek, *Die deutschen Länder und der Verfassungsentwurf des Konvents*, 3 INTEGRATION 357, 365 (2003).

[99] Art. 5 SubsProt.

[100] Comp. also No. 4 of the previous Subs. Prot.

[101] Generally, on the role of the national parliaments, *see* ANDREAS MAURER, PARLAMENTARISCHE DEMOKRATIE IN DER EUROPÄISCHEN UNION. DER BEITRAG DER NATIONALEN PARLAMENTE UND DES EUROPÄISCHEN PARLAMENTS (2002).

[102] Report of the Chairman of the Group on Subsidiarity of the European Convent of September 23, 2003, CONV 286/02, 5.

[103] An exertion of influence already takes place in the existing system (see the Conference of Community and European Affairs Committees of Parliaments of the European Union [COSAC], n. 132).

[104] Art. 4 Subs. Prot.

breaches of the subsidiarity principle.[105] Additionally the national parliament or one of its chambers can also consult regional parliaments with legislative functions, subject to relevant national rules.[106] The period of only six weeks provided for the reasoned opinion may however give rise to the concern of a factual neutralization of the rule.

In principle the reasoned opinions are to be "taken into account"[107] in the wider outcome, for which, in fact, mere acknowledgement by the Union institution suffices. A procedure is, however, provided for amplifying stronger political pressure. Accordingly, each national parliament has two votes, which are shared between both chambers in a bicameral system. If reasoned opinions are given by national parliaments, or their chambers, which represent a third[108] of the total number of votes, then the legislative proposal must be reviewed by the institution that produced it. This leaves open the question how thorough the review must be and whether non-observance of the obligation to which the renewed duty to give reasons in relation to the decision (on maintenance, amendment or withdrawal) after effective review relates is justiciable.

As a further innovation the annual subsidiarity report of the Commission is consequently to be forwarded to the national parliaments as well as the former addressees: Art. 9 Subsidiarity Protocol.

2. Judicial Control

Corresponding to the provisions of Art. 230 ECT the Member States may, in the future, bring an action before the ECJ under Art. III-365 of the Constitutional Treaty for infringement by a legislative act against the principle of subsidiarity. The range of claimants has now been expanded by Art. 8 of the Subsidiarity Protocol to the effect that an action brought by a Member State can be notified by it "on behalf of

105 Comp. Art. 6 Subs. Prot in connection with Art. 3 of the „Protocol on the role of national parliaments in the European Union", see also Protocol No. 1 of the Treaty Establishing a Constitution for Europe, OJ EC C 310/204 (under http://eur-lex.europa.eu/LexUriServ/site/ en/oj/2004/c_310/c_31020041216en02040206.pdf).

106 Ute Mager, *Die Prozedualisierung des Subsidiaritätsprinzips im Verfassungsentwurf des Europäischen Konvents - Verbesserter Schutz vor Kompetenzverlagerung auf die Gemeinschaftsebene?*, 6 ZEITSCHRIFT FÜR EUROPÄISCHE STUDIEN (ZEuS) 471, 478 (2003); Schröder, *supra* note 98, at 12.

107 Art. 7 Subs. Prot.

108 As to questions concerning the space of freedom, security and justice a quorum of a quarter of votes is sufficient.

their national Parliament or a chamber of it,"[109] which are therefore indirectly empowered to conduct litigation.[110] Finally Art. 8(2) of the Subsidiarity Protocol allows the Committee of the Regions a corresponding right of action insofar as consultation with it is obligatory for the legal act in question. The procedural position of the Committee of the Regions as "Guardians of the Principle of Subsidiarity" is thereby strengthened.[111]

Within the framework of this broadened opportunity for litigation – almost a "subsidiarity cause of action" – according to the wording only "an infringement by a European legislative act *against the principle of subsidiarity*"[112] may be penalized. Not mentioned in relation to this principle[113] is either individual authorization or the principle of proportionality. An express standardization that extends to the judicial examination of the adherence to both of these rules was not successful in the European Convention.[114] Therefore, the question is how narrow the standard of scrutiny would be.

This suggests that the examination of subsidiarity also requires an examination of the legal bases in relation to competences as a preliminary examination. The formulation of Art. 5 sec. ECT, which expressly gives rise to the existence of a non-exclusive competence, represents a more extensive program of examination. It is also hardly conceivable that the ECJ might find adherence to subsidiarity acceptable, even if there is no underlying Union competence. The examination of subsidiarity systematically always includes the preliminary examination of the

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[109] This procedure does not depend on (as proposed in between) a preceding statement supported by reasons.

[110] Jürgen Meyer & Sven Hölscheidt, *Die Europäische Verfassung des Europäischen Konvents*, 14 EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT (EuZW) 613, 621 (2003); Thomas Läufer, *Der Europäische Gerichtshof - moderate Neuerungen des Verfassungsentwurfs*, 3 INTEGRATION 510, 516 (2003); Matthias Ruffert, *Schlüsselfragen der Europäischen Verfassung der Zukunft; Grundrechte – Institutionen – Kompetenzen – Ratifizierung*, 39 EUROPA-RECHT (EuR) 165, 182 (2004); Martina Lais, *Die Rolle der nationalen Parlamente in einer künftigen europäischen Verfassung*, 6 ZEITSCHRIFT FÜR EUROPÄISCHE STUDIEN (ZEuS) 187, 208 (2003).

[111] Compare the contribution of the Committee of the Regions to the European Convent, CdR 127/2002, 6

[112] Like this Art. 8 Subs. Prot. (emphasis added).

[113] See Art. 8 Subs. Prot.

[114] Compare one of the members of the Convent, Joachim Wuermeling, *Kalamität Kompetenz: Zur Abgrenzung der Zuständigkeiten in dem Verfassungsentwurf des EU-Konvents*, 39 EUROPARECHT 216, 225 (2004).

relevant competence.[115] Consequently this excludes that the principle of individual authorization by the ECJ is a part of the standard of scrutiny.

The question remains in any case as to what extent the principle of proportionality can find a place in the examination program of the courts. Alongside the original standardization (Art 3b ECT) a *wider* and *narrower* principle of subsidiarity was spoken of. Thereafter the necessity proved to be a "further characteristic of the principle of subsidiarity."[116] The question is whether the principle of proportionality in Art. 5 sec. 3 ECT is to be regarded as a part of a *wider* principle of subsidiarity in the sense of the proposed subsidiarity cause of action.

The subsidiarity principle in a *narrower* sense does not concern the relationship between the EU and private society. This does not answer the question of the limits of internal and cross-border trade. For example, the question whether particular matters are better left unregulated so that market forces are left to their own devices is not dealt with. To this extent the narrower Art. I-11(3) of the Constitutional Treaty has little to do with the original socio-philosophical tradition of subsidiarity. The principle of subsidiarity, understood in a narrow sense, does not give any leeway in this direction, while the potential sphere of the principle of proportionality reaches further.[117] The question remains whether Art. 8 of the Subsidiarity Protocol in limiting the measure of examination assumes a *wider* or *narrower* understanding.

The starting point for this could be "the umbrella of subsidiarity" in Art. 5 of the Subsidiarity Protocol, which also fundamentally requires considerations of the basis of proportionality. Indeed, its primary role is showing the legislative organs the scope of their measures and obliging them to limit themselves. At the same time, however, this represents an important anchor for judicial control that could also be significant for proportionality. As long as the language is of "actions for infringement by a legislative act against the principle of subsidiarity," the concept of subsidiarity can be understood in the wider sense[118] along with the principle of limited individual authority and the principle of proportionality, thus completing the triangle of safeguards. Moreover, the title "protocol on the principles of

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[115] *Id.*

[116] Zuleeg, *supra* note 27, at margin number 37.

[117] Wernhard Möschel, *Subsidiaritätsprinzip und europäisches Kartellrecht*, 48 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 281 (1995).

[118] As to the differences between the principle of subsidiarity in the broad and in the narrow sense, *see* Calliess, *supra* note 18, at. 5, margin note 3.

subsidiarity and proportionality" appears to suggest the inclusion of the principle of proportionality.

The question of a narrow or wide understanding of subsidiarity could rely on a notion of a *wide* interpretation,[119] which derives from the doctrine of Dworkin. Dworkin methodically differentiated between *legal rules* and *legal principles*.[120] Applied to subsidiarity, a general principle that goes beyond that provided by Art. 5 sec. 2 EC does exist, in the sense of a "*new dimension of subsidiarity*", according to Schilling.[121] This is based on the classification of the practical safeguard of subsidiarity in Art. 5 sec. 2 EC as a *rule* and not a *principle* in the methodical doctrine.[122] The characteristic feature of the methodical approach, according to Dworkin, consists in a *rule* being applicable in an "all-or-nothing" fashion, while *principles* allow gradual distinctions.[123] The Union's legal regulation of subsidiarity, which is to be understood as a procedural safeguard, is not to be methodically classified as a *principle* contrary to the actual wording but rather as a *rule*.

In particular Schilling has queried whether the mention of subsidiarity in the twelfth clause of the preamble of the EU Treaty may give weight to the conclusion that, alongside the principle of subsidiarity as a *legal rule*, as it is framed in Art. 5 sec. ECT, the existence of a real *principle* of subsidiarity of overriding importance in Dworkin's literal sense may have to be accepted.[124] This quasi-superior "pervading principle"[125] of Community law may be for all Community institutions to observe the interpretation of Community law.[126] A concept so extensively understood appears to indicate that the judicial control of the standard of subsidiarity alongside the procedural safeguard of subsidiarity would have to include, in a narrowly understood sense, the examination of the standard of proportionality as a part of the wide principle of subsidiarity.

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[119] *See* Theodor Schilling, *A New Dimension of Subsidiarity: Subsidiarity as a Rule and a Principle*, 14 YEARBOOK OF EUROPEAN LAW (Yb.Eu.Law) 203 (1994).

[120] RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977), 24.

[121] Schilling, *supra* note 119. MARKUS LUDWIGS, RECHTSANGLEICHUNG NACH ART. 94, 95 EG VERTRAG 136 (2004) (Dealing with this issue and pleading for the principle of subsidiarity as a general principle, that in particular is to be used for a narrow interpretation of the basis of competence.).

[122] Schilling, *supra* note 119, at 213. (referring to Ronald Dworkin, *supra* note 120).

[123] DWORKIN, *supra* note 120, at 24.

[124] Schilling, *supra* note 119, at 215.

[125] "A pervading principle." *Id*. at 217.

[126] LUDWIGS, *supra* note 121, at 136.

In favor of a narrow concept of subsidiarity is the historic approach to the discussions of the European Convention that underlie the new protocol. Alongside the principle of subsidiarity (understood here as a *rule*) a general principle that has a wide reach may then exist. In fact, a unanimous understanding of subsidiarity so governed is assumed in a final and narrowly understood sense – without considering that alongside every "*rule*" a "*principle*" of subsidiarity that reaches beyond the scope of the rule may be found.

As mentioned, the concept of subsidiarity is to be narrowly interpreted within the framework of the new subsidiarity protocol and is only limited by the safeguard of Art. 5 sec. 2 EC (or Art. I-11 sec. 3 of the Constitutional Treaty). Even if an extensive control of competences were sensible there is no room within the scope of the new subsidiarity cause of action for an examination of the standard of proportionality by the ECJ because of the express regulation and system of the Constitution. Art. 8 of the subsidiarity protocol expressly recognizes only a right of censure that is directed at infringements of the principle of subsidiarity itself.

The inclusion of the principle of limited individual authority in the standard of scrutiny in the subsidiarity cause of action arises from the circumstance that the principle of subsidiarity provides, indirectly, according to the wording Art. I-11 sec. 3 of the Constitutional Treaty, for the existence of a non-exclusive competence according to limited individual authority. The basis of the competence almost represents a way into the examination. An examination of subsidiarity without limited individual authority meant taking the second step before the first, so to speak. The judicial standard of scrutiny extends therefore to the principles of limited individual authority as well as of subsidiarity. Proportionality in the full extent of its examination is left outside. There is, however, overlap between the examination of the subsidiarity and proportionality: for example the suitability of a measure is in principle relevant for both.

Where the ECJ will draw the boundaries remains to be seen. In any case it absolutely stands to reason that it will illuminate more intensively the overlapping elements in the examination of proportionality under the catchword of subsidiarity.

III. Perspectives for the Proposals for Reform: An Evaluation

The new "early warning system" provided in the new protocol and the associated inclusion of the national parliaments in the legislative process give rise to the hope of a victory for transparency and democratic participation. Legitimate doubt in the effectiveness of the system can nonetheless exist since, in parliamentary democracies such as the German, the government's parliamentary majority will rarely oppose legal acts of the Community that have been endorsed by the

government, even in terms of subsidiarity. However, the possibility of a different majority in the *Bundesrat* (German Upper House) might be enough to guarantee this device in a similar fashion so as to put the Commission under pressure, if need be, to make amendments or at least to bring about a greater pressure to justify its actions. This could support a later action for nullification.[127] This new system could also develop an improved "culture of communication" between national parliaments and the institutions of the Union, avoiding conflicts which are otherwise worked out in the courts.[128] Thus anyone who views the national parliaments merely as having a veto in the structure of the vertical division of powers[129] has failed to see the opportunity that they could develop into a constructive participant in the process of European legislation. Equally the greater pressure to give reasons leads to the ECJ receiving a wider berth for critical arguments in the grand scheme of things when it examines a measure of the Union. The reasoned opinions in the approach to a proposal for a European legislative act allow the points of view of the national and regional parliaments to influence the considerations of a judgment and can thereby lead to a confident departure from the earlier jurisprudence of "*in dubio pro communitate*".

Thankfully, the proposals for improving the effectiveness of the principle of subsidiarity may be able to avoid complicating the institutional framework and at the same time provide a solution with a slight "potential for stalemate."[130] Even the Committee of the Regions has at hand an effective means for guaranteeing its task as "Guardian of Subsidiarity" through the conferral of a right of action. However, it remains to be seen whether the national parliaments are up to the "paper tide" and the enormous additional workload flowing from extensive European legislative activity. For the German parliamentary chambers, the Federal Parliament and the Federal Council of States, the creation of a "Subsidiarity Committee" or a "European Law Taskforce" from specialists of each of the competent committees would be conducive in order to ease the burden on the actual "European

[127] Mager, *supra* note 106, at 480; Wuermeling, *supra* note 114; Lais, *supra* note 110, at 214.

[128] The fact that the national members of parliament are much closer to their citizens could possibly lead to a higher acceptance of and trust in the European decision making process, which could at the end also lead to a decrease in the often regretted democratic deficit of the European Community. Mager, *supra* note 106 (citing NIKLAS LUHMANN, LEGITIMATION DURCH VERFAHREN (1969)).

[129] Karl-Peter Sommermann, *Verfassungsperspektiven für die Demokratie in der erweiterten Europäischen Union: Gefahr der Entdemokratisierung oder Fortentwicklung im Rahmen europäischer Supranationalität*, 56 DIE ÖFFENTLICHE VERWALTUNG (DÖV) 1009, 1013 (2003).

[130] Similarly Armin von Bogdandy & Jürgen Bast & Dietrich Westphal, *Die vertikale Kompetenzordnung im Entwurf des Verfassungsvertrages,* 3 INTEGRATION 414, 420 (2003); Thomas Oppermann, *Eine Verfassung für die Europäische Union – Der Entwurf des Europäischen Konvents*, 118 DEUTSCHES VERWALTUNGSBLATT (DVBl) 1165, 1171 (2003); Ruffert, *supra* note 110, at 182.

Committee" of these additional and extensive tasks. Above all it is worth bearing in mind that the technical breadth of European legislative proposals would by its very nature overextend an individual committee.

Forming an *ad hoc* group consisting of an expert in European law and individual legislators who possess a special qualification for the subject matter as such a taskforce for each substantial legislative proposal would therefore be open to consideration. This group could support both the European Committee and any future Subsidiarity Committee with a specialist vote. The short amount of time that national parliaments have for their work must, however, also be considered.

It is crucial to the effectiveness of the "early warning system" that a sufficient number of concerned national parliaments can move the initiators of European legislative proposals to more than a mere acknowledgement.[131] However, the bigger the Union becomes the more difficult it might be in an EU of 25 or soon even 30 Member States to achieve a sufficient quorum of national parliaments. An increase in the efficiency of scrutiny may create a network of national parliaments which follows up on the "Conference of European Committees" (COSAC)[132] and enables the work to be divided, or rather lets overstretched parliaments in smaller Member States take advantage of the capacity of the bigger ones to scrutinize.

Moreover, one should critically consider that the parliaments of the Member States are not prevented by current Community law from questioning the competence of the Community in the preparation of legislation,[133] although they could hitherto scarcely guarantee this opportunity in view of the abundance of legal acts.

Another issue arises if the effectiveness of the early warning system is viewed not only from the view of ability but also of the willingness of national parliamentarians to effectively limit European legislation.[134] As in the case of unpopular but necessary legislative intentions

[131] At the end the success of the new provisions will be measured by the case law of the European Court of Justice. Volker Epping, *Die Verfassung Europas?*, 58 JURISTENZEITUNG (JZ) 821, 827 (2003); Ralf Knöll & Michael W. Bauer, *Der Konvent zur Zukunft der EU – eine Zwischenbilanz aus Sicht der deutschen Länder*, 22 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT (NVwZ) 446, 447 (2003).

[132] "Conférence des Organes spécialisés en Affaires communautaires": COSAC is a co-operation between committees of the national parliaments dealing with European affairs as well as representatives from the European Parliament. This organization was created in May 1989 in Madrid, where the speakers of the Parliaments of the EU Member states agreed on strengthening the role of the national parliaments in relation to the community process. See http://www.cosac.org.

[133] As to the current situation in national parliaments, *see* Andreas Maurer & Daniela Kietz, *Die neuen Rechte der nationalen Parlamente: Umsetzungsprobleme und Empfehlungen*, discussion paper, March 2004, (http://www.swp-berlin.org), 11 et seq.

[134] *Compare* Andreas Mauer & Peter Becker, *Die Europafähigkeit der nationalen Parlamente: Herausforderungen des EU-Verfassungsvertrags für den deutschen Parlamentarismus*, SWP-STUDIE 2004/S 23, 2004, (http://www.swp-berlin.org), 18.

European activity is often preferred by the individual legislator to unpopular national laws which he must defend in his constituency. The European level serves well as a "political scapegoat" for national politicians. This situation is worth considering if control structures are to be created out of the Member States. With the parliaments of the Member States the long term loss of influence should always be weighed against short term political difficulties.

It remains open, whether in spite of the proposed reforms in the subsidiarity protocol this would prompt the European courts to undertake a more precise examination with reference to the principle of subsidiarity.[135]

It would furthermore be desirable to extensively take proportionality on in the standard of scrutiny of the subsidiarity cause of action, whereby the European courts would be forced into a more intense form of scrutiny.

D. Summary

In the jurisprudence of the European Courts the principle of subsidiarity has sofar only been of little value as a standard of scrutiny. First and foremost, this has been based on the difficulty of judicially examining the material content of subsidiarity and on the systemic legal distortions of constituent elements being at the borderline between law and politics. Unfortunately the criterion of insufficiency without a conclusive catalogue of exclusive Union competences in Art. I-13 of the Constitutional Treaty does not become any more manageable. However, an inter-institutional agreement of the European institutions, which rests upon the soon to be abandoned version of Art. I-13 of the Constitutional Treaty, could remove these distortions.

Saving the new subsidiarity protocol as a part of the Constitutional Treaty and implementing it independently of the Treaty is proposed here. In this way a series of necessary efforts for reform may be integrated into current Community law. Procedural safeguards are intended to raise the principle of subsidiarity to a higher standing and thereby increase its effect. In particular the inclusion of the parliaments of the Member States in the preparation of Union legislation leaves open the hope of a new desire to guarantee the new opportunities for effective scrutiny, insofar as these parliaments are willing and are increasingly prepared to be an additional burden.

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[135] Compare Marcus ter Steeg, *Eine neue Kompetenzordnung für die EU – Die Reformüberlegungen des Konvents zur Zukunft Europas*, 14 EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT (EuZW) 325, 328 (2003); Thomas von Danwitz, *Grundfragen einer Verfassungsbindung der Europäischen Union*, 58 JURISTENZEITUNG (JZ) 1125, 1131 (2003).