RMM Vol. 0, Perspectives in Moral Science,
ed. by M. Baurmann & B. Lahno, 2009, 327–334
http://www.rmm-journal.de/

Peter Bernholz

How to Safeguard Subsidiarity and Competition in the European Union

Abstract:

The assignment of rights to as low political levels as possible recommends itself because preferences of citizens are better known at the communal, provincial or state level, because their influence is greater, political powers are more distributed and since decentralization furthers efficiency and innovation in a system. Thus subsidiarity requires that only the necessary framework and those decisions related to cases with strong externalities or to public goods covering the whole society are taken at the highest level. Looking from this perspective at the Lisbon Treaty proposed for the European Community several important shortcomings are found which are mainly related to the fields of overlapping competencies of the Union and the member states. It is shown that the principle of subsidiarity, which has to be safeguarded by introducing adequate institutions, would be much better served by the proposals of the European Constitutional Group.

1. Definition of and Reasons for Subsidiarity

By subsidiarity we understand the assignment of the rights to take decisions to as low a level of society as is appropriate for the wellbeing of citizens. This implies that as many decisions as possible are left to individuals and to the organizations and institutions formed by them at their own discretion. All tasks that cannot be handled adequately at this level are assigned to communities like villages and cities, or following similar criteria to cantons, Länder or states, then to nations and only to international federations like the EU as a last remaining level. Several reasons exist for an assignment of decision rights following the principle of subsidiarity:

a. The lower the level of decision-making the more the preferences of individuals are known and can be taken into account.
b. The smaller the number of people involved in the decision-making process, the greater their influence that outcomes are brought about which weigh their preferences and situations.
c. The more decentralized the rights to take decisions the more efficient and innovative the system, provided that enough competition and no externalities or important economies of scale or scope exist.[1] However, competi-

[1] Already David Hume, Immanuel Kant and Max Weber showed the importance of the competition

tion can at least partly only be secured by a framework monitored at a higher level. Note also that any collective decision-making, for instance by majority voting, implies negative externalities in the form of outvoted minorities.

d. The chances that powers are misused are more restricted.

For the practical application of the principle of subsidiarity several important questions arise:

1. Who should have the right to assign and, if necessary, to re-assign decision-making rights to different levels of society? It is obvious that in the beginning the distribution of these rights has to be determined by a constitution or treaty (treaties). But even then remains the problem on who should have the right to change them and to judge whether the constitution or treaty (treaties) have been violated.
2. Which externalities and economies of scale or scope should be taken into account in assigning decision rights to higher political levels, given the problems of less information, efficiency and information, the negative externalities of outvoted minorities and the danger of the misuse of power at higher levels?

In the present paper we are only concerned with the application of the subsidiarity principle between the EU and its member states. We will thus mainly analyze the arrangements for subsidiarity in the Lisbon Treaty, which are in our view rather inadequate, and those proposed by the European Constitutional Group (ECG).

2. The Subsidiarity Arrangements Contained in the Lisbon Treaty

To establish and to maintain a free, economically efficient, innovative and therefore wealthy society, it is of the greatest importance to limit as far as possible the jurisdiction of the European Union. The same principle should, of course, also rule decisions on the competencies of member states vis-a-vis their citizens, but this is not our present subject. Though it is clear that the EU needs to have the competence to remove and to prevent any obstacles to the free movement of people, goods, services and capital within the Union, or for Europe-wide environmental problems, there are no reasons to harmonise pension systems or taxes. Such a limitation of the EU's jurisdiction also implies that its institutions, that is the European Parliament, the Council, the Commission and the European Court have no right to increase their jurisdictional domain and that they have to be monitored by adequate and independent institutions. For it is obvious that

among several states for the rise of Europe. This theory of the beneficial consequences of systems competition has been revived and empirically supported during the last decades. See the introductions to the volumes edited by Bernholz, Streit and Vaubel (1998) and Bernholz and Vaubel (2004) for an overview and discussion of this literature.

an expansion of the Union's competencies will in general be favoured by the Commission, the European Court, the European Parliament (at least the single chamber foreseen by the Convention's proposal) and in many cases also by the European Council.

Looking at the proposals contained in the Lisbon Treaty from the subsidiarity perspective, we can state that, on the whole, it assigns meaningful decision rights to the EU as far as its *exclusive competences* are concerned (AEUV, Article 3(1)):

a) Customs Union,
b) Rules for competition necessary for the functioning of the internal market,
c) Monetary policies for the members of the European Monetary System,
d) Maintaining the biological wealth of the seas in its common fisheries policy,
e) Common trade policy.

In AEUV, Article 3(2) the exclusive competence of the Union for concluding international treaties is granted under some limiting conditions.

However, even here any rule is missing obliging the EU to work for as much freedom as possible concerning the free movement of goods, services and capital with the *outside world*.

The principle of subsidiarity is clearly violated, when the *area of shared competences* is considered, that is the area where both the member states and the Union can legislate. In this case we find a bundle of fields where the Union should not have any or at least only strictly limited jurisdiction (AEUV, Article 4(1)). Mentioned are transportation, energy, social policies, environment, research, technological development and space exploration.

Even if one can agree that the Union should play a certain role in planning transcontinental transportation networks, why should this be true for the whole of transportation? Turning to social policies, it is certainly required to establish common rules such that benefits accumulated in one member state will be preserved in case of an emigration to another. For otherwise the free movement of people would be hindered. But other rules, for instance granting each citizen a right to all benefits in any member state to which he or she moved without adequate earlier contributions are more than dubious. For this would lead to a movement of people quite independent of any motivation to work and a (an even earlier) breakdown of national social security, like old age pension systems. It would also lead to higher unemployment in countries with higher social security levels.

A role of the Union concerning environmental protection can only be justified if the problems are of a Europe-wide or even wider nature. And an intervention of the Union to protect consumers is only justified, if the free movement of goods and services is hindered. But this is already today a task of the European Court, and should remain solely its jurisdiction.

Finally, why should the EU have competences for research, technological development and space exploration, except perhaps if there existed meaningful

projects, which were so big that they could not be financed otherwise and not be accomplished by a free collaboration of several member states.

Even worse, according to AEUV, Art. 6 the EU has the competence *to assist, coordinate or supplement measures of the member states in the fields of protecting and improving human health, industry, culture, tourism, general and professional education, youth and sport, protection against catastrophes and administrative collaboration.* These measures have to imply European ends.

It is absolutely unclear, why these areas should not be left to the competition of member states, communities or even citizens themselves, and why such measures taken by the EU would not contradict the principle of subsidiarity.

The proposed rules concerning *coordination of economic and employment policies* (AEUV, Titles X and XVIII) may also turn out to be dangerous. This is especially the case for paragraphs which state first that *the Union shall adopt measures to ensure coordination of the employment policies of the Member States, in particular by providing guidelines for these policies*; and second that *the Union may adopt initiatives to ensure coordination of Member States' social policies*. Quite in contrast to these proposals, the principles of a free and productive society require according to our understanding not harmonisation but a competition of national systems. We are convinced that such competition would reach much better the aims of high employment and of social security systems which could be maintained in the long run. With the help of systems competition it would also soon be revealed which institutional frameworks were better suited to reach high employment. By contrast, a co-ordination or harmonisation of social policies following for instance the standards of France or Germany would lead to catastrophic consequences. Consider as an example setting European minimum wages at such levels. This would lead to a massive increase of unemployment in the poorer member states, consequently to a strong migration towards wealthier countries increasing even further their level of unemployment and the deficits of unemployment insurance.

This picture of only vaguely defined and excessive jurisdictions of the European Union contradicting the principle of subsidiarity is crowned by article 2(2). Here it is stated that in all cases of shared jurisdiction the member states only use their rights, if and in so far the union has not used her competency.

Let us sum up. The Lisbon Treaty clearly violates the principle of subsidiarity concerning the distribution of decision rights between the EU and her member states. It does so by assigning an incredibly broad range of shared jurisdiction, in which, moreover, the member states can only become active if the EU does not act.

But given this dismal picture advocates of the treaty may argue that the subsidiarity principle is safeguarded by other clauses contained in it. And indeed it is stated in EUV article 5(3) that the union will only become active in the domain of shared jurisdiction if and so far the measures considered cannot be sufficiently realized by the member states, and can be better realized by the union because of their extent or their consequences. Moreover, the organs of

the union apply the subsidiarity principle according the rules contained in the protocol.

The protocol contains the following rules: Each newly proposed bill has to be sent to the national parliaments together with an explanation why it does not violate the subsidiarity principle and why the proposed measures can be better realized by the union. If at least one third of the parliaments of the member states provides arguments that the principle of subsidiarity has been violated, the Commission has to check whether this is indeed the case. If it decides that the complaints are not valid it passes the bill on to the European Council and the European Parliament. They pass the bill if they think that no violation has taken place. In that case the member states or their parliaments can finally take refuge to a law suit, so that the European Court finally decides whether the principle of subsidiarity has been violated.

Such are the controls provided by the treaty to prevent that the subsidiarity principle has not been violated. Though the European Constitutional Group (ECG) admits that the rules for securing subsidiarity have been strengthened compared to the status quo by provisions contained in the treaty, they are still deplorably inadequate. For they grant the decisions whether the principle of subsidiarity has been violated to the Commission, the European Council and the European Parliament and finally to the European Court, that is to organs of the EU which are themselves interested in increasing their powers by enlarging their competencies. This means that the institutional framework for safeguarding the principle of subsidiarity is not only violated by the assignment of decision-making rights in the domain of shared competencies, but also by the set-up of the monitoring process.

3. The Proposals of the European Constitutional Group for Safeguarding Subsidiarity

After the rejection of the proposal for a European Constitution by the citizens of France and the Netherlands the ECG has sent a revised treaty containing its proposals to the governments of the member states.[2] *In Article 6, The Scope and Form of Legislation*, of this proposal it has described its view of an adequate assignment of rights following the principle of subsidiarity. Each paragraph is followed by a comment. Let me quote this article and the comments:

(i) In carrying out its tasks, the Union will not legislate in cases where the public policy concerned can be carried out by Member States acting individually or in small groupings or where methods of coordination can be used that do not require the passage of Union laws.

[2] European Constitutional Group 2003. For presentations of the proposals of the ECG see Bernholz 1994 and 2003. The ECG is a private and independent group of members from different European countries, mainly professors of law and economics.

This article on the general demarcation of powers and responsibilities creates a presumption in favour of the most local jurisdiction and in favour of the least onerous form of legislation, including the use of private market solutions.

(ii) The laws of the Union shall provide general legislative frameworks, leaving to the Member States the choice and form of methods for achieving results with comparable effect (directives). The Union will also be able to enact measures that are directly applicable in all Member States (regulations).

This defines the legal instruments of the Union in terms of the traditional distinction between a 'directive' and a 'regulation'.

(iii) The laws of the Union will apply only to cross border transactions between members, will give priority to mutual recognition of laws in the Member States and shall not pre-empt Member State legislation in the same field other than on matters agreed in respect of external trade policy.

This provision limits the law-making authority of the Union so as to give a general protection to the law-making capacity of localities, regions and Member States so that they can reflect the preferences of their voters. Specific protections follow.

The term 'cross border transactions' should be understood to apply for example to immigration and pollution and not just to goods and services. The provision limits the law making authority in this way because other criteria are too vague to offer judicial protection against the overstepping of powers (for example whether actions in one member state 'affect' another).

(iv) The Union will have no powers to interfere with the freedom of contract unless such contracts restrain competition.

This provision places a specific restriction on Union activities in order to protect a basic market principle. In particular, the power to regulate or deregulate labour markets is to rest with Member States in order to allow Member States the greatest possible flexibility to achieve full employment as well as to learn from best practice.

(v) Matters concerning the tax systems of Member States or the rates and levels at which taxes are levied are to be decided within each Member State and not by the Union or its institutions.

This means that taxes will reflect voter preferences in each member state. It will prevent high tax jurisdictions exerting pressure on low tax jurisdictions to raise their tax rates or levels.

This provision will also prevent the governments of Member States unanimously forming a tax cartel at the expense of citizens. Tax collusion raises the citizens' cost of legal tax avoidance and thereby the average level of taxes.

(vi) In cases where Union laws are envisaged they shall be prepared and implemented according to the following procedures:
Any proposed law with a significant economic effect (including those envisaged as part of an international treaty or commitment) must be supported by an assessment of its impact and a justification of why Union law

> *rather than other methods of achieving comparable results including market remedies has to be chosen.*
> *The assessments must be made publicly available in time for independent peer review as well as democratic scrutiny.*
> *The assumptions on which the assessments have been carried out must also be made public so that the assessments can be reproduced in the scrutiny process.*

The provision preventing tax collusion has also the effect to allow systems competition in this field which, according to empirical studies, leads to a more efficient allocation of public resources. One other safeguard against an ever increasing centralization which has been observed historically in all federal states is the proposal to allow no European taxes (Article 8, II).

Finally we have to discuss the question how the ECG proposes to limit the ever present and perhaps creeping and hidden tendencies for an enlargement of the competencies of the EU. This is especially important since the rules contained in Article 6 are necessarily not very specific. Two institutional proposals have been made besides the negation of European taxes. First the creation of a second chamber of parliament, the Chamber of Parliamentarians (Article 4). This chamber shall be composed of representatives of national parliaments selected by lot. It shall have the power to block legislation. Since it is composed of members of the national parliaments it is expected that it uses this right to prohibit legislation proposing an unwarranted extension of the powers of the EU violating the principle of subsidiarity.

A second institutional proposal to safeguard the principle of subsidiarity is the creation of a European Court of Review, which shall hear all cases potentially involving the distribution of competencies between the Union and the Member States (Article 6). It shall be composed of justices designated by the highest courts of the Member States for a maximum period of six years.

Only persons can become judges at this court who are at the same time a judge of a supreme court of a member state. This provision shall secure that the judges look at the cases to be decided from the perspective of the member states. Moreover, to detect, as far as possible, any violation of the principle of subsidiarity, it is proposed that any citizen, member state or institution of the Union may raise a case in the Court or request a preliminary ruling in advance of an actual case. The Court has the right to decide whether or not to accept a case or a request for a preliminary ruling.

References

Bernholz, P. (1994), "A Proposal for a European Constitution", in: Dopo Maastricht: Che Fare? Osservatorio 'Giordano Dell'Amore', Milan; Cariplo, November 10–11, pp. 244–250, Serie Relazioni 16, International Conference.

— (2003), "Eine Europäische Verfassung für Bürger statt für Politiker. Wie sich die Vorschläge des EU-Verfassungskonvents verbessern ließen", *Neue Zürcher Zeitung* 218, September 20./21., 29.

—, M. E. Streit and R. Vaubel (1998) (eds.), *Political Competition, Innovation and Growth. A Historical Analysis*, Berlin–Heidelberg–New York: Springer.

— and R. Vaubel (2004) (eds.), *Political Competition, Innovation and Growth in the History of Asian Civilizations*, Cheltenham: Edward Elgar.

European Constitutional Group (2003), *A Basic 'Constitutional' Treaty for the European Union with Comments*, June 8., unpublished, available on request.