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The Judicial Review of the Principle of Subsidiarity at the Court of Justice of the European Union

DRAFT BEFORE DELIVERY (REVISED)

Introduction

Your Excellences, Dear Friends, Dear Colleagues, Ladies and Gentlemen

I feel honoured and privileged to address you today in Berlin on the judicial control of the Principle of Subsidiarity.

Many of you will know the legend about the Miller at castle Sans Souci in Potsdam and the Prussian king, King Friedrick the Great, the Miller having perhaps almost too big a confidence in the fact that "**there are still judges in Berlin**" – assuming that these judges in Berlin would protect him and his property, the mill, from the powers of the King, who wanted rather strongly to acquire the mill.

This legend on judicial control may have only a little to do with our subject today, but at least there are **also some** (European) **judges in Luxembourg**. Today, however, I stand before you as a **single judge from Luxembourg in Berlin**. What I say to you reflects my **personal views**, not necessarily those of my Court or my colleagues in Luxembourg.

Definition and Origin

I believe that the Principle of Subsidiarity has its origins in German Law governing the relationship between the Federal and the Regional (Länder) level of law making.

It was first laid down in Primary Union Law by the Maastricht Treaty that came into force 1 November 1993, and high-lighted and explained in the conclusions from the Edinburgh European Council in late 1992 (following the narrow French YES and the narrow Danish NO at referenda on the Maastricht Treaty). The Amsterdam Treaty as well as the Lisbon Treaty contains separate protocols on subsidiarity.

As in the Edinburgh Conclusions, the **Principle of Subsidiarity** is often mentioned **together** with the **Principle of Conferred Powers** and the **Principle of Proportionality**:

- The **Principle of Conferred Powers** (the Union and its institutions can only act insofar as the Treaties have conferred a power to them to do so) – is a constitutional principle which applies in all areas of Union Law,

- The **Principle of Subsidiarity** (who is in the better position to legislate in a certain field) applies **only in areas where the Union and the Member States share legislative competence**. This implies that the principle does **not** apply in areas where the Union has an exclusive legislative competence.

- The principle was never intended to restrict the scope of the EU's competences. It is **not** a rule for the allocation of competences (Kompetenzverteilungsregel), but for the use of competences (**Kompetenzausübungsregel**).

- The **Principle of Proportionality** (the **Goldilock and the Three Bears Principle**: "Not too big, not too small, but just right"), which is a general principle of Union Law, supplements the Principle of Subsidiarity, in areas where the latter applies – and may sometimes lead to confusion, as the **discussion of subsidiarity tends to be intertwined with issues of proportionality and purely political considerations**. This may happen both at the legislative level, and when the issue of subsidiarity is argued before the ECJ.

This is in fact **my first general observation**.

My **second general observation** being: That the Principle of Subsidiarity plays **its major role** in the **preparation and consideration of (potential) new EU**

legislation – and has perhaps a more subtle role in the judicial control of the constitutionality of EU Law.

The **control of subsidiarity** is **two-fold**; an ***ex ante*** control carried out by national parliaments and an ***ex post*** judicial control by the Union Courts.

***Ex Ante* Control by National Parliaments**

The Subsidiarity Protocol to the Lisbon Treaty (Protocol No 2) has its system with **yellow card** and **orange card** procedures (but **no true red card** procedure) allowing national parliaments to submit reasoned opinions with specific legal effects, when they believe that a Commission proposal for new EU legislation violates the Subsidiarity Principle.

The **yellow card has so far only been pulled twice**.

It was **first** done (**yellow card**) when the Commission suggested a new Regulation on the right to strike following the debate triggered by my Court's judgments in *Viking* and *Laval*. It has been argued in the doctrine that this was an example of **"a yellow card, but no foul"**, since the draft Regulation was limited to transborder issues, and because the arguments of the concerned national parliaments were not limited to issues of subsidiarity, but drew on issues of proportionality and purely political considerations in this sensitive area. Perhaps understandable, but maybe

not in full conformity with the Protocol. Nevertheless, the Commission took the message (perhaps more the political than the legal?) and withdrew the proposal.

The **second yellow card** was issued only a couple of months ago in respect of the Commission's draft regulation on the establishment of an EPPO – a European Public Prosecutor's Office. The Commission has reacted very quickly, announcing the intent to go on with the proposed legislation at Union level.

It cannot be excluded that my Court will be asked to look into this matter, which **does raise issues of principle**, in one or another way at a later stage, so I will limit my observations on the EPPO draft regulation to highlight the following special circumstances:

- All Member States have in Lisbon agreed to include an article in Primary Union Law (Article 86 TFEU), which **expressly foresees the possibility** of establishing an EPPO

- This article (Article 86, 1 para, 2-3 part, TFEU) also **contains a special procedure** for setting up an EPPO as **reinforced cooperation** inside the Union structures by a group of at least 9 Member States, in case not all Member States will accept a joint (unanimous) setting up of EPPO

Even though actual yellow and orange cards are rarely "pulled" (as a **last resort** when other measures have failed) by national parliaments, I do **not** think that this should lead to the conclusion that they are merely **paper-tigers** or that subsidiarity is just a **"dancing step"** or a **"stepping stone"** "box" on the check-list that the

Union Legislator(s) must remember to tickle and pay their respect to, when preparing new proposals. It **reflects a reality** from a legal constitutional point of view as well as a political science point of view.

I am making this observation also as a former head of the Law Department of the Danish Ministry of Justice. In that function, **I experienced** that when Danish ministers and their officials are preparing new draft legislation and are obliged to include specific chapters on economic and administrative consequences, the compatibility with EU Law and fundamental rights etc., it has in fact the **effect** that **sincere additional attention** is given to these issues. I see no reason why a similar effect should not be found at the level of the Union legislator.

Ex post Judicial Control by Union Courts

I turn now to the *ex post* judicial control. It is **beyond doubt** that the Principle of Subsidiarity **is subject to judicial control**. Thus, all acts which have come into force after the Maastricht Treaty can be subject to a subsidiarity control. The real question in practice is rather to what extent and with which level of intensity the Court of Justice controls the EU Legislator's compliance or lack of compliance with the principle.

When examining the approach taken by the Court in cases where the Principle of Subsidiarity is in play, it is appropriate first to recall the main characteristics of the principle and the circumstances under which it applies. In particular, it is worth

recalling that the **principle only applies in areas where the Union does not possess exclusive competence**. Furthermore, the scope of application of the Principle of Subsidiarity is as such restricted to the exercise of Union legislative powers – in sharp contrast with for instance the Principle of Proportionality, which – by virtue of its close connection to the protection of fundamental rights – has a much broader application (something which has been well reflected in the judicial application of the Principle of Proportionality).

As appears from the definition laid down in what is now Article 5(3) TEU, the Principle of Subsidiarity comprises a two-fold test in the form of a **decentralization criterion and an efficiency criterion**: the Union acts only in so far as the proposed objectives *cannot be sufficiently achieved* by the Member States, *and if* they can be *better achieved* at Union level. It follows from this definition that Union action will conflict with the Principle of Subsidiarity only where it can be shown that the objective sought can be achieved just as well in all Member States – either by individual action or by cooperation between the Member States concerned.[1]

It is clear that the assessment of whether an EU objective cannot be sufficiently achieved at Member State level and better achieved at Union level at least to some extent builds on political considerations. When facing **complex practical** and

[1] In that respect, it makes little difference whether the comparison with Union action is carried out at the level of the Member State or at the level of decentralized authorities. This has now been confirmed with the Treaty of Lisbon, where the formulation of the Principle of Subsidiarity in Article 5(3) TEU explicitly refers to Member State action "either at central level or at regional and local level".

political circumstances, a **certain leeway must be left to the EU institutions in the decision-making process**. In such cases, the Union Courts cannot simply replace the assessment of the EU Legislator with their own, if they want to remain within the limits of the competences assigned to the judiciary. Hence, the very nature of the subsidiarity test imposes certain limitations as to the level of scrutiny to be undertaken by the Court.

In case C-176/09, ***Luxembourg v EP and Council***, the ECJ held that, when reviewing the exercise of **broad legislative powers conferred by the Treaties**, the Court *"may not substitute its own assessment for that of the European Union legislature, and must confine itself to examining whether the legislature's assessment contains a manifest error or constitutes a misuse of power or whether the legislature clearly exceeded the bounds of its legislative discretion"* (see para. 35 of the judgment). I will argue – as **my third general observation** – that inevitably the judicial control of the Principle of Subsidiarity will show some of the same characteristics.

After a **qualified majority of the Council** has voted for a specific directive and consequently confirmed the need for action at Union level, is it then for the ECJ to conclude that this (essentially political) assessment is legally wrong, because the ECJ is convinced that the political issues at hand would be better dealt with at

national (or even more local) level? This must surely be **reserved for a very clear situation**.[2]

The number of references to subsidiarity in the case-law is not enormous. Generally, it can be observed that, **in most cases**, subsidiarity is used as a **supporting argument** by the parties to strengthen their reasoning or because the measure, which the Court is called upon to interpret, itself refers to the principle. However – so far – there are no examples of the Court annulling an EU act on grounds of subsidiarity.

From the very beginning the Court made clear that the scope of application of the fundamental freedoms cannot be restricted on the basis of the Principle of Subsidiarity. In the ***Bosman case***[3], concerning transfer rules for football players laid down by sporting associations and the compatibility of such rules with the free movement of workers, the Court rejected the attempts made by the German Government to rely on the Principle of Subsidiarity as "a general principle" so as to exclude the transfer rules from the scope of EU law.[4]

[2] In the case C-176/09, *Luxembourg v EP and Council*, Luxembourg did not succeed in convincing the ECJ that the EU legislature had violated the Principle of Subsidiarity by enacting a directive on levying of airport-charges, already because this third plea in law was not sufficiently developed by Luxembourg to be fully considered by the ECJ.

[3] Case C-415/93.

[4] See para. 81 of the judgment, where the Court states as follows: *"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."*

Similarly, in case C-11/95, ***Commission v Belgium***, the Belgian Government attempted to rely on the Principle of Subsidiarity to justify an evasion of its obligations under Directive 89/552 (the TV-Directive) to ensure freedom of reception. In this case, the Court simply noted that a Member State cannot pledge the Subsidiarity Principle as a defense for the violation of EU law.[5]

In addition to the type of cases already mentioned, there are a number of judgments dealing with the Principle of Subsidiarity in the field of harmonization and approximation of laws. These are the cases, which illustrate more clearly the judicial approach to subsidiarity.

In case C-377/98, ***Netherlands v Parliament and Council***, the Dutch Government sought the annulment of Directive 98/44 on the legal protection of biotechnological interventions. The objective of the Directive, which had been adopted under **Article 95 EC** (now **Article 114 TFEU**), was to oblige Member States to protect biotechnological interventions through their patent laws and, to that end, the Directive determined which interventions involving plants, animals or the human body could be patented. The Dutch Government argued *inter alia* that the Directive could not be adopted with Article 95 EC as the legal basis and that, in any event, the Directive was in breach of the Principle of Subsidiarity.

[5] See para. 51 of the judgment.

Article 95 EC did not confer exclusive competence on the Union to regulate economic activity on the internal market, and the **Principle of Subsidiarity was thus applicable.** However, the Court rejected a violation on grounds of subsidiarity with the following explanation (para. 32 of the judgment):

"The objective pursued by the Directive, to ensure smooth operation of the internal market by preventing or eliminating differences between the legislation and practice of the various Member States in the area of the protection of biotechnological interventions, could not be achieved by action taken by the Member States alone. As the scope of that protection has immediate effects on trade, and, accordingly, on intra-Community trade, it is clear that, given the scale and effects of the proposed action, the objective in question could be better achieved by the Community."

In the perhaps more well-known ***Tobacco Advertising case***[6], concerning the validity of the Directive prohibiting tobacco advertising and sponsorship – a Directive equally adopted under Article 95 EC – the German Government had requested the annulment of the Directive on a number of legal grounds, notably an **erroneous legal basis** and infringement of the **Principle of Proportionality** as well as of the **Principle of Subsidiarity**. In the end, the Court annulled the Directive, finding that **Article 95 EC was not the correct legal basis** for a Directive, which in reality pursued objectives of public health. However, once the Court had concluded on an erroneous legal basis, there was **no need to address**

[6] Case C-376/98.

the question of subsidiarity. You see, judges are very reluctant to make unnecessary work.

In the ***BAT case*** (British American Tobacco)[7] a few years later, the argument of subsidiarity re-emerged – once more in relation to a Directive adopted under Article 95 EC. In this case, the Court conducted an individual – although fairly brief – examination of the Directive's compliance with the Principle of Subsidiarity, however, with a **cross-reference** to its reasoning set out with respect to **proportionality** in order to conclude that the intensity of the action undertaken by the Union did not go beyond what was necessary to achieve the objective pursued.

Again, in my view, one of the main reasons, why subsidiarity hardly ever appears to constitute a separate pillar in the Court's reasoning, is that the latter principle is **almost always invoked together with other fundamental principles**, such as correct legal basis and proportionality. Thus, the examination under these principles will often overlap and perhaps even make the analysis under the Principle of Subsidiarity largely superfluous. Notably the Principles of Proportionality and Subsidiarity seem to have a tendency to **intertwine.**

Moreover, in the field of harmonization, it can be observed that Article 95 EC in itself did set up rather strict conditions for the approximation of laws, like Article

[7] Case C-491/01.

114 TFEU does today. According to the case-law, harmonization under Article 95 EC/Article 114 TFEU cannot be justified by the mere fact that differences exist between national laws. Such differences must be liable to affect the fundamental freedoms and thus to directly affect the functioning of the internal market. Finally, harmonization measures based on Article 95 EC/Article 114 TFEU must be proportionate. **In so far as these conditions are all observed, there is not much room left for an independent examination under the Principle of Subsidiarity**.

For these reasons, the Principle of Subsidiarity perhaps seems to have a **stronger potential** as a **procedural ground**. The Union Legislator(s) must always state reasons which in substance explain, why they consider that the measures adopted are necessary and satisfy the test of subsidiarity. This procedural aspect does in principle not entail a political assessment and is thus to be fully reviewed by the Court. However, in case C-233/94 concerning the ***Directive on deposit-guarantee schemes***, the Court made clear that it cannot be required that the Union legislator expressly refers to the Principle of Subsidiarity in the legislative act, as long as compliance with the principle follows clearly from the reasons stated in (the preamble of) the legislation.

In the more recent ***Vodafone judgment*** from 2010[8], the claimants brought judicial review proceedings before the High Court of Justice of England and Wales, challenging the Mobile Roaming Regulations 2007, which gave effect to certain provisions of Regulation No 717/2007 in the United Kingdom. As regards the

[8] Case C-58/08.

substance, they sought to challenge the validity of this EU Regulation on three grounds, namely that its legal basis was inadequate, the measures were disproportionate and offended the Principle of Subsidiarity, due to the fact that the EU Regulation imposed not only a ceiling for wholesale charges per minute, but also for retail charges, as well as an obligation to provide information about those charges to roaming customers.

In this case, the Court carried out **a more thorough examination** of the alleged violation of the Principle of Subsidiarity (see paras. 72-78) , but concluded, in the end, that the EU Regulation was in fact in compliance with that Principle. Nevertheless, the reasoning in this case demonstrates the Court's readiness to use, when appropriate and needed, the judicial tools available.

Conclusion

In conclusion, the Principle of Subsidiarity may well play an important role, legally and politically, in the **legislative process** – a role which might even be expanded in the future.

The principle also has its **proper place in the legal toolbox** before the ECJ, but my prediction is that, although it will be taken out of the toolbox and used whenever appropriate, it will probably **not often be deployed** as a single and separate instrument.

It is too early to say whether and to what extent the changes introduced by the **Lisbon Treaty** will have an impact on the judicial control carried out by the Union Courts in future cases. What can be observed, however, is that the subjection of the Principle of Subsidiarity to judicial review by the ECJ has become (even) more "visible" with the explicit mentioning – in Protocol No. 2 – of the national parliaments' possibility to participate in the *ex post* subsidiarity control, as well as the right (also acquired by the Lisbon Treaty) for the Committee of the Regions to bring an action before the ECJ against legislative acts for the adoption of which the Treaty provides that it should be consulted.

Thank you for your patience and attendance.