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EDITORIAL COMMENTS

Subsidiarity: Backing the right horse?

The Edinburgh European Council devoted considerable attention to what was euphemistically labelled the "Overall Approach to the Application by the Council of the Subsidiarity Principle and Article 3b of the Treaty on the European Union". A text of five pages goes a considerable way towards meeting some of the concerns that have been expressed in recent literature.[1] And it is on the whole surprising that "Edinburgh" has fleshed out a text of such substance. The text will, no doubt, be the subject of fresh commentaries. Some preliminary comments may therefore be appropriate.

The first section, explaining the basic principles, states that

> "the three paragraphs of Article 3b cover three distinct legal concepts which have historical antecedents in existing Community Treaties or in the case law of the Court of Justice:
> (i) The principle that the Community can only act where given the power to do so – implying that national powers are the rule and the Community's the exception – has always been a basic feature of the Community legal order. (The principle of attribution of powers).
> (ii) The principle that the Community should only take action where an objective can better be attained at the level of the Community than at the level of the individual Member States is present in embryonic or implicit form in some provisions of the ECSC Treaty and the EEC Treaty; the Single European

1. Cf. A.G. Toth, "The principle of subsidiarity in the Maastricht Treaty" and D.Z. Cass, "The word that saves Maastricht? The principle of subsidiarity and the division of powers within the European Community", 29 CML Rev. (1992) 1079 et seq. and 1107 et seq.

Act spelled out the principle in the environment field. (The principle of subsidiarity in the strict legal sense).

(iii) The principle that the means to be employed by the Community should be proportional to the objective pursued is the subject of a well-established case-law of the Court of Justice which, however, has been limited in scope and developed without the support of a specific article in the Treaty. (The principle of proportionality or intensity)."[2]

It is rather unusual for Presidency conclusions to go into so much legal detail. According to this part of the Annex's "Basic Principles", the Treaty on European Union defines principles in explicit terms and gives them a *new* legal significance. This is precisely the opposite of what was maintained by those who criticized the way the subsidiarity principle was phrased in the Maastricht Treaty. However, the text goes on to provide useful guidance, especially in Part II, "Guidelines". These guidelines do indeed substantiate the rather nebulous concepts contained in Article 3b. Nevertheless, even these guidelines have to make use of several normative expressions such as: "the institutions need to be satisfied that the proposed action is within the limits of the powers conferred by the Treaty" and "the Community should only take action ... where this is necessary to achieve the objectives of the Treaty".

Part III of the Annex deals with procedures and practices that will be applied for the implementation of the basic principles. Given its right of initiative, the Commission has a crucial role to play. It should consult more widely before putting proposals to the Council. It must also justify its proposals. Moreover, an annual report on the subject should be provided.

The Council is to incorporate a subsidiarity test in its examination of the Commission's proposals. In the second Annex to part A, the Commission provided a list of examples of pending proposals and existing legislation that could be scrapped or adapted in line with the subsidiarity principle. This list is hardly revolutionary, e.g. proposals for conditions in which animals are kept in zoos may be withdrawn and a

2. Annex I to Part A of the Conclusions of the Edinburgh European Council, *Europe* No. 5878 bis.

proposal for radio frequencies for remote processing facilities in road transport has been dropped.

So much for the Edinburgh Presidency conclusions. Incidentally the title of the conclusions erroneously makes mention of Article 3b of the Treaty on European Union. It is, of course, Article 3b of the amended EEC Treaty and curiously enough Titles III and IV, amending the ECSC and Euratom Treaties, do not provide for the insertion of a provision similar to Article 3b EC. In view of the clear language in the penultimate recital and the last paragraph of Article B of the Maastricht Treaty this is not necessarily an omission with far-reaching consequences.

Notwithstanding the progress made in Edinburgh in defining the subsidiarity principle, one may wonder whether the Community is following the right track towards further integration. The traditional legal approach to bringing order in new and complicated areas of society is to start by laying down procedures and forms. Traditional societies have developed rituals to shape and stabilize human relations. Roman law largely developed following the principle of *ubi remedium, ibi jus.* This principle is also applied in modern constitutional law and economic law, for example. In complex new areas of the law procedural law often precedes substantive law. By getting procedures right and initiating mediation, conciliation and adjudication processes, a gradually developing line of precedent is created which will in due time lead to substantive principles. It is this traditional legal approach which has been ignored in the run-up to Maastricht. It may be that the successful developments with the formulation of the rules embodying the EMU led people astray. To the surprise of many involved in the drafting of the provisions on the EMU, it proved possible to reach agreement on stringent economic criteria (and procedures!). This may have been facilitated by the fact that monetary policy and economic policy are largely pursued outside the scope of substantive legal norms. That fact may also go some way to explain the public acceptance of such norms at Community level.

In most areas of society, however, the formulation of substantive norms is an esoteric activity which confirms to the citizens of the Com-

munity the abstract, Eurocratic and non-democratic character of the Union. The citizens of the Union who voted against Maastricht did not do so because the Union did not get the definition of the subsidiarity principle right. The subsidiarity principle has become a sort of black box, a sorcerer's device to lead the public into believing that everything will be all right. The historical background of the subsidiarity principle may have something to do with this. The principle was adopted by the Catholic church to delineate the division of power between the different parts of society i.e. the State, the Church and private enterprise and industry.[3] The concept of subsidiarity is not a hard and fast rule in constitutional law, as comparative studies have demonstrated.[4] It is like quicksand, and allows only for short respite.

In the longer run, more solid ways have to be resorted to. Such solutions should address the heart of the feeling of discomfort of Europe's citizens, i.e. the feeling of being left out of the decision-making process. This feeling is accompanied by uneasiness about the dominant forces in the Community, be they large Member States (the FRG in Denmark, in France, and even in the UK), multinational enterprises, or more vaguely and ideologically "the forces of capital". It is this concern that should be addressed. It can be met by focusing on procedures. This also fits the role of lawyers. Let us look therefore at ideas that involve the citizens of the Community in decision-making.

At the same time we should explain to the citizens of the Community that nation-states can no longer be relied upon to protect the national backyard. Increased travel, transborder activities such as T.V. broadcasting, telecommunication connections, greatly increased volumes of imports and exports, have made efforts to keep one's own garden tidy futile at best. More realistically, purely national orientations in law and policy seriously reduce chances of achieving the best overall results. National nimbyism will ultimately ruin the efforts to achieve the closer – and more stable – Union among the peoples of Europe.

In the meantime a few ideas may be offered. One such an idea would

3. Cf. Editorial Comments "The Subsidiarity Principle" 27 CML Rev. (1990) 182 and Cass, op. cit., at 1110.

4. Cf. L.A. Geelhoed, "Het subsidiariteitsbeginsel: een communautair principe?", SEW 1991, 422.

be to create the possibility of calling a referendum to decide on the demarcation of Community matters *vis-à-vis* national matters. There are several ways to trigger a referendum: a certain number of voters may ask for it (as in, for instance, the Italian system), the majority or minority of the Council, the European Parliament or a combination of Council and European Parliament. Why should not the peoples of Europe decide whether they want the Community to enact a ban on advertising for tobacco or a television without frontiers? The institution of a referendum has been criticized. Major objections centre around the difficulty of formulating the right question to put to the voters, and the protection of minorities. It may be possible however to avoid these pitfalls if the conditions for calling the referendum are clearly spelled out. The specifications of the Edinburgh summit on subsidiarity may be useful for this purpose.

Short of a referendum there is the possibility of turning to the European parliament. Even though there is still considerable hesitation whether the EP has acquired sufficient maturity and democratic standing, it is nevertheless the closest representation of the peoples of Europe. A further strengthening of the position of the EP will then also increase the say of the citizens in deciding whether certain subjects should be taken up by Brussels or at the national level.