

SUBSIDIARITY AND DIVISION OF COMPETENCIES BETWEEN EUROPEAN UNION, ITS MEMBER STATES AND THEIR REGIONS

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1. Anti-Subsidiarity of the Origins

That the Maastricht Treaty marked a radical turning-point in the process of European integration is a statement few would dispute today. For the purposes of this paper, what should also be underscored is that this treaty signified a watershed in the division of competencies between the Community and member states. The pre- and post-Maastricht Treaty phases were to head in opposite directions. This is readily understood if one considers that the integration process was at first driven by what was in essence a centralizing logic leading to massive shifts of "blocs of competence" from member states to the Community. The measure of integration which today goes under the name of the Community *acquis* was the result of this shift.

Lest there be any misunderstanding, it should be recognised that this trend was by no means due to eccentric or deviant praxis. Rather, to a large extent, it was written into the treaties' own DNA. In fact, the treaties did not ever venture to adopt a definitive solution regarding the allocation of competencies between E.C. and member states. As Antonio Tizzano was to aptly comment, they merely took a baseline snapshot of the situation. In particular, having on more than one instance recognized the Community organs' *competence over competencies*, the treaties empowered these bodies to shift the borderline between their own attributions and those of members states.

The legal techniques that were used for this purpose are familiar. To focus on the E.C. Treaty, the first set of cases to come to mind is that in which the choice of the legal instrument to be used - directive or regulation - was left to the Community. This meant recognizing the Community's power to determine the allocation of competencies between itself and member states as it saw fit. Similar considerations can be made for those cases in which Community competence was built on a finalist basis, that is as a function of the *end* to be pursued rather than the area concerned. Obviously, competencies of this sort tend to define themselves through their own implementation, and the balance of relations between Community and member states is determined by the subjects addressed on a case-by-case basis.

The breadth of the objectives set for Community action by the Treaty and its Preamble is another factor that should not be overlooked. Broad objectives led to a substantial enlargement of the Community's scope of action, also by virtue of Art. 235 (now 308) of the ECT. In a consistent approach of this sort - and owing also to the direction followed by the Court of Justice (i.e. the case-law on detailed directives) - it is small wonder that the system that came to be established was one in which the balance of powers was markedly tipped towards the Community.

2. Why Subsidiarity?

In this state of affairs, the introduction of the subsidiarity principle was to signify a revolutionary swing in direction. Based on a preferential decision (*Vorrangentscheidung*) in favour of the member states, the subsidiarity principle reversed the hierarchy of values that had prevailed up to that point. Basically, there were two reasons why the states envisaged this turn-about (or, to put it differently, there were two reasons why they changed their approach to the allocation of competencies).

The first reason may be described as the incremental process of expansion of Community action. With the Maastricht Treaty, it swelled past the high-water mark. The Treaty did not simply lay down in codified language the outcome of past evolution (for instance, referring to the protection of basic rights). It went much further than that: on the one hand, it reinforced the direct relationship between the Community itself and member states' citizens through the provisions on *European citizenship*; on the other hand, it expanded the (at least potential) sphere of action of the Union, by encompassing matters such as defence, foreign affairs, security and justice, which are the typical prerogatives of nation states.

The consequence was obvious: the Community lost its character of a sectorial organisation to become a general institution (or one having general purposes), and thus found itself competing with member states in the furtherance of the interests of their respective communities. The second reason that most likely induced member states to change their approach to the Community (and to the expansion of its competencies) was of an institutional order, and, specifically, it was the lessened control they came to exercise over Community decision-making processes. Originally, these processes had rested firmly in the hands of member states because the Community worked on the basis of what was fundamentally an internationalist logic. This approach was taken to an extreme in the immediate wake of the Luxembourg-compromise period (1965), which required unanimity and thus determined what Jacques Delors was to call the lethargy of Europe.

In actual fact, member states in that phase were not guaranteed so much by the allocation of competencies as they were by their determining participation in the decision-making processes. My personal belief is that the theory of *political safeguards* of federalism, worked out on the basis of the United States experience, is much more suitable to explaining events in the European Community during the phase in which Community instruments took the shape of *self-limitations* that were individually agreed upon by the states adopting them. Subsequent periods witnessed a gradual heightening of the supranational character of the system. The particular reference here is to the extension of the majority principle and the strengthening of the role of the organs that are not controlled by the member states, such as the Commission and the European Parliament. In this context, the member states' veto power was drastically retrenched. All of these developments explain why the member states felt the need to endow themselves with guarantees that would offset their losses in terms of political safeguards.

3. Subsidiarity and Member States

This is the backdrop against which the introduction of the subsidiarity principle should be viewed. By subordinating the increase in Community competencies to insufficiencies of the member states, the subsidiarity principle put the brake on the centralizing drive that had prevailed in the previous phase. Needless to say, a thorough analysis of the principle and its implications would require an *ad hoc* seminar.

In this paper, two questions will be addressed. The first is whether subsidiarity is an effective defence for the prerogatives of member states. The second is whether subsidiarity also protects the sub-state entities that exist in some of the member states: the German and Austrian *Länder*, the Italian, Portuguese, and Belgian Regions, the Spanish *Comunidades Autonomas*, the Belgian Communities.

Regarding the first question, the issue really is whether the subsidiarity principle is justifiable or not. Obviously, if this principle does not enable Community judges to annul instruments adopted by the European Union in pursuance of objectives which could have been pursued by the member states themselves, then the guarantee afforded by this principle is of a vaguely platonic character.

But why, exactly, is this an issue? Chiefly because the preference criteria set out in TUE Art. 5 are based on parameters that cannot be rigorously measured. These criteria, therefore, do not enable the judge to review the logical path leading to a Community decision. For instance, these criteria are very different from those adopted by German communal legislation (*Gemeindeordnungen*) which provides that the commune may directly exercise entrepreneurial activities only in the case in which the market does not offer a convenient supply. Obviously, the assessment of whether it is or is not economically advantageous to set up a communal typography is the sort of assessment a judge may make. The situation is very different when the criteria that are used are more complex or involve evaluations of a political order.

An interesting example in this regard is offered by the experience gained in Germany in the area of *konkurrierende Gesetzgebung*. Art 72 II GG subordinates action by federal lawmakers to preliminary conditions that are difficult for a judge to assess, namely securing equivalent living standards and the guarantee of unity of the law and the economy. It is therefore quite understandable that the federal Constitutional Court has maintained an attitude of cautious self-restraint in this matter.

The issue is similar in the case of Art. 5 TCE. This latter article empowers the Community to intervene only in the case in which member states cannot sufficiently achieve the actions envisaged. This provision, therefore, sets out a requirement – that of *sufficiency* – which, by its very nature, is difficult for a Court to evaluate. Another variable that needs to be taken into account may further compound this difficulty: the difference in efficiency standards in the various member states.

Undoubtedly, this sort of parameter entails a two-fold risk: either the judge *judges* (by superimposing his own political assessment on the assessments of the political bodies which are also authorized to make them) or the judge does *not judge*, and adopts a deferential attitude vis-à-vis the decisions issuing from political bodies.

To avoid these risks (and to offer the judge a parameter with at least a modicum of objectivity), the Community has in practice chosen the only truly effective approach: proceduralisation. I am referring to the fact that the Community decision-making process is structured in such a way that it includes an in-depth preliminary investigation by the Commission which includes *inter alia* a process of consultation with all of the parties involved. The results of this preliminary phase are included in the grounds of the instrument. The grounds are not meant to be a ritual or repetitive listing of the normative parameters to be applied but must instead shed light on the interplay of the different interests at stake.

Personally, I believe that more could be done in this sense, for instance by tightening the rules that apply to the consultation process. Nonetheless, this praxis-based approach is clearly the right one. Proceduralisation enables the judge 1) to assess whether the elements on the basis of which the Community instrument was adopted were grounded and 2) to assess whether the final instrument is congruous with these elements.

Having said this, however, I also must admit that Community judges do not appear to have grasped the full potential of proceduralisation as illustrated above. For instance, in a 2001 ruling on the legal protection of biotechnological inventions (C-377/98), the Court of Justice appears to have dealt somewhat lightly with the subsidiarity principle. Specifically, the Court considered implicit and, basically, tautological grounds to be adequate. Clearly, only if and when the Court demands explicit (as against implicit), effective and non-tautological grounds will proceduralisation have achieved its full objective: that of affording the subsidiarity principle juridical (and not merely rhetorical) substance.

4. Subsidiarity and Sub-State Entities

Let us now move on to the second question, that is whether the subsidiarity principle may also safeguard regions (or, to use a more general term, sub-state entities).

A paradox emerges here: while the institutional bodies that most strongly advocated the introduction of the subsidiarity principle in the Maastricht Treaty included these entities (in particular the German *Länder*), Regions are not envisaged by Art. 3B of the Maastricht Treaty (Art. 5 of the single text) which refers only to member states.

The only provision that *inter alia* addresses these entities is Art. 1, para 2, of the Treaty of the Union (Art. A of the Maastricht Treaty) which sets out among the objectives that of creating an increasingly close Union of the peoples of Europe in which decisions are to be taken as near as possible to the citizens.

This, however, is a provision which establishes an objective but which does not provide concrete safeguards to sub-state legislators or competencies.

But why did this paradox arise? Why is it that those entities which were the primary agents of the decision did not benefit from it?

In my opinion, the basic reason is that, despite all of the changes, the internal allocation of competencies between the central states and sub-state entities is a matter that falls within the exclusive domain of states.

True, the Community is no longer affected by federal blindness (*Landesblindheit*), to use Hans Peter Ipsen's felicitous expression. Indeed, from Maastricht onwards, the sub-

state entities have gained the *Community visibility* which they originally lacked. A first example is the Committee of Regions. Another is that regional representatives may participate in sessions of the Council of Ministers.

All of this, however, does not change the fact that internal competencies are regulated in a way that falls outside of Community law. It is highly significant, for instance, that the Lamassoure Report which recognises the growing role of Regions in the implementation of Community law, also stresses that state competence in this matter must be exclusive. According to this report, the most that the European Union can do is to adopt an open approach towards any possible proposals for regional involvement that may proceed from member states.

And this is the reason why I do not believe that a suggestion that has been made repeatedly by regional representatives may be taken up in practice. I am referring to the suggestion, which was recently reiterated by the conference of European ministers of the German *Länder* held in Goslar in October 2001, to recognize the right of Regions to lodge complaints directly before Community judges in the case of the alleged infringement of their sphere of competence.

As I have argued elsewhere, this hypothesis raises a very sensitive issue: namely the competence to interpret national Constitutional norms that separate powers between central and local government. Clearly, if regions can denounce infringements of their competencies by European Union instruments, then Community courts, in order to ascertain the Regions' legitimacy in the proceedings, would have to assess whether the Regions are truly entitled under the Constitutions of their respective member states to competence in that given area which is infringed upon by the Community measure. The consequence would be that European Union judges would have to interpret national Constitutions and this would mean usurping a role that is and, in my belief, should remain within the competence of the Constitutional Courts of the individual member states.

My opinion on the allocation of competencies between states and regions is that Community law may at most introduce a "homogeneity clause", which would obligate national constitutions to provide certain guarantees to sub-state entities, naturally wherever said entities exist. I am thinking of a clause that would be similar to the one contained in Art. 28 GG, with reference to communal self-government. In this approach, consistently with the models adopted by federal systems, Community law would simply point out the direction and rely on the resources of national constitutional law for its implementation.

Before concluding, I would like to mention another hypothesis that does not appear to be practicable, namely the transformation of the Committee of Regions into a full-fledged Chamber of Regions..

In this case, the main obstacle lies in the fact that not all member states are regionalized: not all states, that is, have Regions with legislative competencies. It is highly unlikely that the non-regionalized states would accept an amendment of the Treaty establishing an institution from which they would be excluded. In my opinion, therefore, the Committee of Regions is likely to maintain its current structure, that of a body which in addition to the Regions (which exist only in some states) also comprises the local authorities (which exist in all member states).

There is an additional difficulty: the marked diversity in the competencies of the various regional entities. Two examples may be cited among many: *a*) cultural sovereignty (*Kulturhoheit*), which is one of the core competencies of the German *Länder* and is not one of the prerogatives of Italian regions; *b*) the *Comunidades Autonomas* of Spain which have different competencies one from the other, (and which are regulated by the Statutes governing each *Comunidad*).

Clearly, with such diverse standards of competence, it would be extremely difficult to build the role of a representational Chamber of Regions on a European scale.