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COVER NOTE

from	Secretariat
to	The Convention
Subject :	Contribution by Mr Neil MacCormick, alternate member of the Convention "Subsidiarity, Common Sense, and Local Knowledge"

The Secretary-General of the Convention has received the contribution annexed hereto from
Mr Neil MacCormick, alternate member of the Convention.

Subsidiarity, Common Sense, and Local Knowledge

A Statement concerning the application of the principle of subsidiarity

Submitted to the Convention on the future of Europe

by Neil MacCormick, MEP for Scotland (Substitute Member of the Convention, Greens/European Free Alliance)

Since my election to take part in the Convention as an alternate member, I have conducted widespread consultations within my constituency, Scotland. The strongest message I have received, and this has been repeated on many occasions and under many guises, is that the law of the European Union often appears to have perverse effects in its local application. Constituents who are wholeheartedly in favour of European integration according to the Community method nevertheless feel moved to protest against what seem to them to be unreasonable or perverse consequences of applying the law.

For example, on the islands of Islay and Jura, where some of the finest malt whiskies are distilled using traditional methods in copper pot stills, it has become necessary to transport large quantities of waste-water by tanker with a 65 kilometre round trip along narrow roads. This causes road congestion, blocks spaces on the Jura to Islay ferry, endangers other road users, and has environmentally undesirable effects. The waste-water comes from the washing out of the copper stills, a process which involves traces of copper and copper salts emerging in suspension or solution.

It is deemed necessary to carry this water by road tanker to the northwest point of Islay, at the Caol Ila Distillery, where a very strong tidal current achieves a satisfactory dispersal of the effluent. Tidal flows are weaker on the eastern and southern coasts of the islands, hence the former practice of pumping the waste water into the adjacent sea has been banned. Nevertheless, the level of industrialisation in that part of the Inner Hebrides is extremely low – whisky production, agriculture, and tourism are the only substantial industries, though a rapid development of tidal energy and development of a local ‘hydrogen economy’ is planned for Islay. The solution to the problem mandated by European law is wholly out of proportion with the problem, in the light of local circumstances.

This is a particularly vivid example, but many of my constituents have drawn my attention to matters that seem to them similarly anomalous. This, above all, is what makes people disbelieve the proclaimed commitment of the European Union to the principle of subsidiarity.

Concerns of this kind prompt the following question:

Could the principle of subsidiarity be refined in a way that would help to solve citizens' resentment of the improper exclusion of local knowledge and common sense from playing its part in the application of European law?

The answer to this is that improvements could easily be made to the provisions concerning subsidiarity laid down in the Amsterdam Protocol (Protocol no. 30 of the European Community Treaty). At present these consider only the conditions that justify resorting to Community measures, but they do not seem adequately to address the need for a degree of continuing discretion at the relevant level of government within a member state. The critical provisions are in paragraphs seven and eight of the Protocol, as follows:

7. Regarding the nature and the extent of Community action, Community measures should leave as much scope for national decision as possible, consistent with securing the aim of the measure and observing the requirements of the Treaty. While respecting Community law, care should be taken to respect well established national arrangements and the organisation and working of Member States' legal systems. Where appropriate and subject to the need for proper enforcement, Community measures should provide Member States with alternative ways to achieve the objectives of the measures.

8. Where the application of the principle of subsidiarity leads to no action being taken by the Community, Member States are required in their action to comply with the general rules laid down in Article 10 of the Treaty, by taking all appropriate measures to ensure fulfilment of their obligations under the Treaty and by abstaining from any measure which could jeopardise the attainment of the objectives of the Treaty.

I would propose that the following new paragraph might be added as "7 A"

The authorities of the member states responsible for implementing a Community measure shall be entitled to exercise a sufficient margin of appreciation in order to implement it in a way which takes due account of specific local circumstances. They shall act so as to secure that the stated reasons on which the measure is based are satisfied in accordance with the principle of proportionality in the light of prevailing local circumstances. This margin of appreciation applies except where a Community measure expressly excludes it, the exclusion being justified in the stated reasons for the measure.

Finally, I would suggest that the provisions of the Protocol should be rescued from their present obscurity, and included in the proposed constitution treaty by way of an expanded definition of the principle of subsidiarity as understood in the European Union. If citizens are to connect effectively to the Union, it must be easy for them to discover and read the principles by which it is governed.

It could perhaps be argued that the proposed reference to local knowledge and margin of appreciation is unnecessary since it is already implicit. The advantage, however, of making it explicit would be to deprive state agencies of the “European law” excuse. It would force them to acknowledge that they are responsible for the sensitive and locally appropriate implementation of European law. A local failure to act with sensitivity and common sense would be less likely than at present to contribute to undermining confidence in the usefulness and value of European laws that are justified under any or all of the criteria of justification stated in the Protocol.

Neil MacCormick

Edinburgh, July 14th 2002
