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The principle of subsidiarity

Communication of the Commission to the Council and the European Parliament

ANNEX

THE SUBSIDIARITY PRINCIPLE

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1. The subsidiarity principle as applied in the institutional context is based on a simple concept: the powers that a State or a federation of States wields in the common interest are only those which individuals, families, companies and local or regional authorities cannot exercise in isolation. This commonsense principle therefore dictates that decisions should be taken at the level closest to the ordinary citizen and that action taken by the upper echelons of the body politic should be limited.

2. The first application in law of this essentially political principle is to be found in the relationship between some of the Member States and their regions, where it takes various forms depending on their constitutional traditions.

   In the Community context, subsidiarity means that the functions handed over to the Community are those which the Member States, at the various levels of decision-making, can no longer discharge satisfactorily. Any transfer of powers must have due regard for national identity and the powers of the regions. The Member States, for their part, are required to facilitate the attainment of the Community's objectives by Article 5 of the EEC Treaty.

   The subsidiarity principle is enshrined in the preamble and in Articles B and 3b of the Treaty on European Union. It was present in embryonic form in the ECSC Treaty (Article 5), implicit in the Treaty of Rome, and spelled out in the Single European Act in relation to the environment (Article 130r).

   Subsidiarity is a dynamic concept in the Community system. Far from putting Community action in a straitjacket, it allows it to be expanded where circumstances so require and, conversely, to be restricted or abandoned where it is no longer justified.

3. For more than forty years the subsidiarity principle has satisfied two requirements: the need for Community action and the need to ensure that the means employed are commensurate with the objectives pursued, in other words, proportionality.

All the major initiatives taken by the Commission have been based on a justification of the need for action. The common policies provided for in the Treaty of Rome, the creation of a frontier-free area and the flanking policies provided for in the Single Act - all these initiatives have been fully justified by the imperatives of European integration. Everyone accepts that these tasks could only be effectively undertaken at European level. The results speak for themselves.

What is surprising is that certain other obligations to act, imposed by the authors of the Treaty, have still not been met in full. The list includes transport policy, certain aspects of commercial policy, and, indeed, some key provisions of the Euratom Treaty.

The intensity of Community action is sometimes criticized, the finger being pointed in particular at excessively detailed rules in highly sensitive areas (environment, health), regarded, rightly or wrongly, as being essential to the creation of a single market.

The fact that proposals are often requested by the Council or by Parliament, that wide-ranging consultations are held with all concerned (green papers, meetings of experts, etc.), that the initial proposals are expanded or altered beyond recognition by the Council or Parliament is of little consequence. The public perception is that the Commission is mainly to blame for any rules or regulations which seem to conflict with the subsidiarity principle. Its having to bear the brunt of such criticism is especially unfair when it is doing no more than fulfil the two prime tasks assigned to it by the Treaty: exercising its sole right of initiative and acting as the custodian of Community law.

4. Be that as it may, the enshrinement of subsidiarity in the Treaty and the importance attached to it by the Member States provide an opportunity for all the institutions, and above all the Commission with its right of initiative, to confine Community action to the essentials, to do less to achieve more.

It also provides an opportunity to stress that subsidiarity cannot be used to bring the Commission to heel by challenging its right of initiative and in this way altering the balance established by the Treaties. There is an interinstitutional dimension to subsidiarity which also has a bearing on the democratic deficit.

I. CLARIFICATION OF THE CONCEPT

1. The distinction between Community powers, shared powers and national powers

(a) Community powers and national powers

It must be made quite clear from the outset that the subsidiarity principle regulates the exercise of powers rather than the conferment of powers. The conferment of powers is a matter for the writers of our "Constitution", that is to say, of the Treaty. A consequence of this is that the powers conferred on the Community, in contrast to those reserved to the Member States, cannot be assumed.

A first consequence of the subsidiarity principle - too often ignored - is implicit in the first paragraph of Article 3b, namely that national powers are the rule and the Community's the exception. This explains why it would be pointless, at "constitutional" level, to list the powers reserved to the Member States.

However, the absence of a list of national powers creates a political problem to the extent that local authorities, and indeed the general public, in certain Member States conclude that there are no precise limits to intervention by the Community, which stands accused of being able to meddle where it pleases.

If subsidiarity is to be translated into concrete terms for the benefit of the general public, the first question to be answered is whether it might not be better to indicate the main areas reserved to the Member States rather than simply affirm that national powers are the rule.

(b) Exclusive powers and shared powers

A second difficulty posed by the Treaty on European Union is that, while the authors did enumerate and at times carefully circumscribe the Community's powers, they also drew a distinction in Article 3b between exclusive Community competence and competence shared with the Member States without defining or specifying the content of each of these "blocks of competence."

This means that there is no clear line of demarcation between exclusive and shared powers. The fact is, however, that the distinction between the two is extremely important because the need for action is assessed quite differently depending on the type of powers.

2. The two dimensions of the subsidiarity principle

Under the terms of Article 3b of the Maastricht Treaty, the notion of subsidiarity covers two distinct legal concepts which are often confused:

- the need for action (second paragraph)
- the intensity (proportionality) of the action taken (third paragraph).

(a) As far as need is concerned, subsidiarity governs the very principle of Community intervention and it is for the Community to demonstrate the justification for Community action in preference to action taken, or action which could be taken, by the Member States to achieve the objectives of the Treaty.

However, the second paragraph of Article 3b does not require the Community to demonstrate the need for action except "in areas which do not fall within its exclusive competence", that is to say, in areas of shared competence.

In other words, the authors of the Treaty assumed that, in certain areas, the Community was the only appropriate level for taking the action needed to achieve the objectives of the Treaty.

Since the Treaty does not define the notion of exclusive competence or list the areas covered, it is for the institutions, and in the first place the Commission, to agree on a common approach to avoid endless demarcation disputes between exclusive competence and shared competence with the attendant dangers of watering down the "need" element of subsidiarity.

Furthermore, the subsidiarity principle - as a test of whether a given shared power qualifies for Community action - does not apply in the same way to all the objectives set by the Treaty. The constraints under which the institutions operate, and the instruments available to them, differ according to the responsibilities assigned to the Community (as between cohesion policy and civil protection, for example).

(b) As far as intensity is concerned, subsidiarity provides a guarantee that the extent of the action taken will not be out of proportion to the objective pursued, irrespective of whether the powers exercised are exclusive or shared, as stipulated in the third paragraph of Article 3b.

We need to give substance to a well-known problem, the problem of proportionality, and translate political will into practice; if action is needed to achieve the objectives of the Treaty, it must not be disproportionate; this implies that recourse to the most binding instruments should be used as a last resort and that, wherever possible, priority should be given to support measures rather than regulations, to mutual recognition rather than harmonization, to framework directives rather than detailed rules and regulations, etc.

II. THE CIRCUMSCRIPTION OF EXCLUSIVE POWERS

1. The characteristics of exclusive powers

Legally speaking, the notion of exclusive powers is characterized by two elements:

(a) A functional element: an obligation on the Community to act because it is regarded as having sole responsibility for the performance of certain tasks.

The obligation to act should be clearly and precisely imposed by the Treaty itself - for example, Article 8a: "The Community shall adopt measures with the aim of progressively establishing the internal market over a period expiring on 31 December 1992 ..."; or Article 40: "... a common organization of agricultural markets shall be established" ...

The Treaty also provides for sanctions in the event of failure to comply with the obligation to act. The Court of Justice has already found against the Council for failure to act in the transport sector.

(b) A material element: the Member States lose the right to act unilaterally.

This does not mean that the Member States can no longer legislate. They can still do so if the Community agrees - on certain aspects of commercial policy, for example - or provides an umbrella for national action. But the Community could decide that this loss should be complete.

But we cannot conclude that, because the Community has exclusive competence for an area defined in the Treaty (for example, common organizations of agricultural markets with a view to achieving the objectives of Article 39), all responsibility for the activity in question (agriculture, say) is covered by exclusive competence. The text of the Treaty cannot be interpreted so broadly as to leave common sense out of account.

In some cases, too, an obligation to act does not reflect any wish to deprive the Member States of the right to act.

2. The block of exclusive powers[1]

So that the Community can attain its objectives, certain obligations to act have been imposed on it. These include, in particular, the creation of an area without internal frontiers, the strengthening of economic and social cohesion, and the establishment of economic and monetary union (Article B of the Maastricht Treaty).

(a) At the present stage in the Community's development it is impossible, legally speaking, to determine whether all these obligations to act entail exclusive powers for the Community and in particular whether they deprive the Member States of the right to act.

1 Areas of exclusive powers covered by the ECSC and Euratom Treaties have been disregarded.

Under the terms of the Maastricht Treaty itself "exclusive competence" and "common policy" - whatever the scale of that policy - are concepts as different as "objective" and "obligation to act".

Historically the concept of exclusive competence originally grew out of the obligation to establish the "common market", which was spelled out in very firmly binding terms, including the fixing of a deadline under the Single Act.

In this sense it is possible to speak of a genuine obligation to act leading, in the course of time and through the rulings of the Court of Justice, to the formation of a block of exclusive powers centred around the four fundamental freedoms and certain common policies essential to, or a corollary of, the establishment of an internal market.

What is involved here is:

- the removal of barriers to the free movement of goods, persons, services and capital (Article 8a);

- the common commercial policy (Article 113), which guarantees the unity of the internal market;

- the general rules on competition, which guarantee a level playing field in the internal market;

- the common organization of agricultural markets, a precondition for the free movement of agricultural products; it was decided as long ago as 1957 that this would be governed by specific rules reflecting the wider objectives of Article 39 of the EEC Treaty;

- the conservation of fisheries resources (Article 102 of the 1972 Act of Accession) and the common organization of the fishery markets by analogy with agriculture;

- the essential elements of transport policy; as long ago as 1957, the authors of the Treaty imposed precise obligations to act (such as Article 75(1)(a) and (b)).

(b) The demarcation lines of this block of exclusive powers will have to change as European integration progresses. They cannot remain frozen. For one thing, the Maastricht Treaty provides for future single monetary and exchange rate policies which should ultimately lead to exclusive Community competence in the final stage of EMU.

Furthermore it is clearly not easy to draw a line between implementing the four freedoms and what some people refer to as the smooth operation of the single market. The dynamics of the four freedoms generate - and will continue to generate - an impetus towards flanking measures which in turn call for the introduction of genuine policies (environment and cohesion, for example), albeit ones that do not at present involve exclusive Community competence - that is, the possibility of depriving the Member States of the power to act.

3. The exercise of exclusive powers

One consequence of the existence of a block of exclusive powers, joined by the common thread of an internal market, is that the Community does not have to demonstrate the need for action on each occasion where free movement is involved. It is true that there is some latitude here, but the subsidiarity principle cannot be invoked to question the advisability of Community action.

In the exercise of exclusive powers, the Community has an entire armoury at its disposal (notably the weapon of harmonization), but this does not mean that it has to legislate systematically and cover the sector concerned in its entirety.

It has to be admitted that "area" of exclusive powers is an unfortunate expression. It must be assumed that the exclusive powers flowing from an obligation to act are strictly construed, because they represent an exception to Community powers as a whole. The exclusiveness of powers is not determined by the matter covered (cars, capital), but by the imperatives of free movement. This is why not all the measures associated with the smooth operation of the internal market fall under exclusive

Community competence. For example, while harmonization of the VAT base (deciding whether a given type of product is subject to tax) does fall within the area of exclusive powers, it is doubtful whether uniform VAT rates are essential to free movement.

In practical terms, this means that the circumscription of powers to a block of policy measures linked to free movement must not be confused with occupation of the terrain by the legislator. This raises another problem, the issue of primacy. There is nothing to prevent the Community legislator allowing Member States to legislate on measures which are not, or are no longer, essential to free movement, provided that they respect the primacy of the Community's legal order.

III. INTERPRETING THE NEED FOR ACTION WHEN POWERS ARE SHARED

Although the subsidiarity principle is not a determining factor when the Community is under the obligation to produce results, the situation is different in areas where it shares powers with the Member States.

Article 3b provides that the Community takes action only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States.

Each case must therefore be considered individually in the light of two tests laid down in Article 3b - the scale and the effects of the proposed action. This would involve:

- checking that the Member States have at their disposal the means - including the financial means - to the end (national, regional or local legislation, codes of conduct, agreements between employers and trade unions, etc.) - the comparative efficiency test;
- assessing the effectiveness of Community action (its scale, cross-border problems, consequences of failure to act, critical mass, etc.) - the value added test.

However, it is obvious that in the vast range of areas in which powers are shared, the need for Community action cannot always be assessed in the same manner.

Neither the objectives assigned to the Community nor the instruments available to the institutions for achieving them are uniform. This derives from the Treaty itself, which prescribes certain forms of action in one area and rules out other forms of action in other areas.

Bearing this in mind, and allowing for the inevitable lack of precision in an exercise of this kind, it is possible to propose a guide to the various ways of exercising shared powers which under no circumstances should be treated as a kind of ranking order.

1. Legislative measures: smooth operation of the internal market and the common policies (agriculture, transport, fisheries), certain social, environmental and consumer protection measures, in particular when they are related to the internal market.

There is a very strong political resolve to take action because of the development of the internal market. The aim is not just to remove barriers but to facilitate freedom of movement through common legislation, flanking measures and the completion of the single market.

The instruments are, for the most part, harmonization and mutual recognition. Qualified majority voting is given precedence.

2. Joint measures: economic and social cohesion, research.

The political resolve is again very strong in matters of cohesion ("The Community shall ... pursue its actions leading to the strengthening of its economic and social cohesion"), while it is strong for research ("... the objective of strengthening the scientific and technological bases of Community industry").

The instruments are programmes based on the principle of partnership with the Member States, firms or regions.

Development cooperation, too, should already come under this head, as will the common foreign and security policy as and when joint measures are identified ("gradually implementing ... joint action in the areas in which the Member States have important interests in common").

3. Supportive measures: certain social and environmental measures, trans-European networks, industrial policy, consumer protection and vocational training.

The Treaty gives the institutions a great deal of latitude for deciding whether to take action.

A variety of instruments are used, the most common being support programmes.

4. Complementary measures: education, culture, health.

There is little political resolve. The Treaty specifically rules out harmonization. The aim is merely to complement and support national measures.

In some fields the Community has only potential powers (tourism, civil protection) and their implementation is strictly limited by the requirements of Article 235.

IV. SUBSIDIARITY AND INTENSITY OF ACTION

The purpose of the subsidiarity principle is to give general application to the rule that the means should be proportional to the ends.

In practical terms, subsidiarity means that, when exercising its powers, the Community must, where various equally effective options are available, choose the form of action or measure which leaves the Member States, individuals or businesses concerned the greatest degree of freedom.

Beyond this general rule, though, is the implication that if a binding measure proves necessary, the actual degree of regulation should be kept to a minimum.

1. Choosing the appropriate form of action

The Community has a wide range of options available to it. It can:

- enact legislation in a variety of forms:
  - the simple provision of a common instrument to supplement national legislation (e.g. the European company);
  - approximation of laws;
  - harmonization - either total or optional - or harmonization by means of general rules or of detailed specifications;
- impose mutual recognition;
- adopt recommendations;
- provide financial support via regional development programmes (structural Funds) or joint projects (networks) based on interoperability;
- promote cooperation between Member States (e.g. Erasmus);
- encourage desirable forms of behaviour (e.g. agreements between the two sides of industry, undertakings from businesses to respect certain standards of conduct in their dealings with each other) or direct or coordinate private or public initiatives;
- become a party to international agreements.

With the exception of legislation, most of the options listed above are based, in accordance with the subsidiarity principle, on a partnership with bodies which are closer to the individual than the Community institutions, e.g. regional authorities, businesses, associations and trade unions.

The main choice where subsidiarity is concerned is between binding and non-binding measures. The decision whether or not to legislate should be based on an assessment of:

- the importance of uniformity in the field in question and, in particular, the need for non-discrimination and certainty as to the law; and,
- where appropriate, the degree of technical complexity of the area in question (e.g. harmonization of technical standards using the old approach).

If legislation is not imperative on the basis of these tests, subsidiarity requires that:

- preference should be given to support programmes or programmes to coordinate national measures, as opposed to harmonization of laws;
- the Community should make greater use of the recommendation, while reserving the right to resort to legislation if this proves necessary, particularly if the recommendation does not have the desired effect; in this connection, the provisions of Articles 101 and 102 of the EEC Treaty need to be developed further (these articles call for recommendations as a first step, followed by harmonization of laws if required); and
- particular attention should be paid to the possibility in certain cases of achieving the objectives set out in the Treaty through international agreements rather than via an internal instrument, for subsidiarity surely also means not legislating at Community level when action is already being taken at international level and proving just as effective as Community action.

2. The intensity of legislative action

If legislative action is necessary, the subsidiarity principle dictates that Community legislation and national measures each be given its own respective role: Community legislation forms the framework into which national action must be fitted.

For this purpose, the Treaty of Rome devised an original instrument which typifies subsidiarity: the directive sets the result to be achieved but leaves it to the Member States to choose the most appropriate means of doing so. It differs from the regulation, which applies directly and in its entirety to States, firms and individuals and, where necessary, supersedes national legislation. When the Single Act was adopted, the Intergovernmental Conference again stressed the need to give pride of place to the directive as the instrument for establishing the frontier-free area.

In practice, of course, the distinction between directive and regulation has become blurred, in some cases for good reasons (need for uniform rules), but in others for less honourable ones (to avoid the detour via a national parliamentary procedure). Be that as it may, the directive no longer enjoys any preference over the regulation and, when it is used, it is generally as detailed as a regulation and leaves hardly any margin of manoeuvre for transposal.

If the subsidiarity exercise is to produce any overall tangible results, then it must unquestionably be by systematically reverting to the original concept of the directive as a framework of general rules, or even simply of objectives, for the attainment of which the Member States have sole responsibility.

Similarly, preference must be given to the techniques of minimum standards and mutual recognition.

Regulations should remain the exception, to be resorted to only where there is an overriding need for uniform rules, in particular to guarantee the rights and obligations of individuals and firms.

3. The need for a hierarchy of norms

There are unfortunately no miracle cures that will prevent instruments being overburdened with a surfeit of detail, as is borne out by the incapacity of most Member States to contain the plethora of highly detailed rules and regulations produced by their own government departments.

There can be no escaping the fact that the solution, as the Commission proposed to the Intergovernmental Conference (which accepted only the principle), will involve writing into the constitution a genuine hierarchy of norms. A declaration annexed to the Maastricht Treaty states that "the Intergovernmental Conference to be convened in 1996 will examine to what extent it might be possible to review the classification of Community acts with a view to establishing an appropriate hierarchy between the different categories of acts".

There is much to be said for inserting in the legislative process a new type of instrument above the regulation - the framework law - which would lay down the basic principles and essential rules for an operation, in keeping with the idea of a directive. First of all, from the point of view of democracy, this would strengthen Parliament in its natural function as legislator but would also involve it in enforcing the subsidiarity principle by generally transferring responsibility for implementing a law to the national authorities. National parliaments would thus acquire an active role in the Community process instead of being relegated, as all too often at present, to a rubber-stamp function for the transposal of an instrument. On the other hand, such laws would be implemented by Community regulations in respect of those aspects which, for reasons of certainty as to the law and non-discrimination, require uniform rules.

Without awaiting the outcome of a new intergovernmental conference, better use could be made of existing instruments to reduce Community legislation to the essential and leave a greater margin of manoeuvre for implementation to the Member States and to the Commission when uniform rules are required.

4. Transparency of instruments

Finally, in view of the importance of the public debate on subsidiarity and the need for instruments to be made more comprehensible, not only for economic operators but also for ordinary citizens who to an increasing extent are directly concerned by Community legislation, special care and attention should be paid to clarity and conciseness right from the proposal stage. Moreover, consolidation should be systematic - if necessary in the form of publication solely for information purposes in the Official Journal - as soon as an instrument has been amended a number of times. It is not acceptable, in a Community governed by law, that individuals and firms should be forced, if they wish to know their rights in the jungle of Community legislation, to produce their own consolidated versions of the enactments in force.

V. MANAGEMENT AND SUPERVISION OF IMPLEMENTATION

The practical implications of the subsidiarity principle as regards the management and supervision of implementation are difficult to ascertain at this point in the process of European integration. Even if the question of the very existence of decentralized machinery for applying subsidiarity is resolved, we are still faced with a problem of mutual trust between the institutions, between some Member States and the institutions, and between the Member States themselves. What is more, the Commission cannot surrender its ultimate supervisory responsibility when public money from the Community budget is involved.

1. Subsidiarity and the management of Community activities

The application of the subsidiarity principle to the management of Community activities is connected with the familiar problem of the delegation of implementing powers. The difficulties raised by the straightforward delegation of such powers by the Council to the Commission or to agencies is well known.

It is to be hoped that the Member States will agree to the decentralized management of a number of the Commission's more burdensome activities. There is no doubt that, all things considered, the Member States often prefer direct management by the Commission, over which they exercise collective control, rather than management entrusted to national or regional agencies whose efficiency and regularity are more difficult to control on a shared basis.

The solution might be to arrive at a precise definition of the types of activity to be decentralized, the nature of the decentralized management machinery and the amount of expenditure which can be allocated for this purpose.

2. Subsidiarity and supervision of implementation

The present situation is unsatisfactory. The bulk of supervisory work is performed by the Commission either in its capacity as the custodian of Community law or by virtue of its powers to implement the budget.

The Commission has already become less involved with certain control activities in areas which do not affect freedom of movement as regards, for instance, national aid schemes of minor importance and "thresholds" for mergers. It will continue to give thought to the matter of petty infringements.

However, over and above the "de minimis" rule, it is important that more decentralized procedures be introduced for supervising the application of Community law in order to avoid "apoplexy at the centre and paralysis at the extremities". The best solution would be for the Member States to cooperate more closely in the examination of complaints for failure to comply with Community law. But first of all national examining procedures would not have to show any marked differences in terms of guarantees and costs for plaintiffs. It will be recalled that during the Intergovernmental Conference the Commission proposed that each Member State should designate an Ombudsman who would have a role to play in such matters.

Consideration might be given to the introduction of systematic decentralized controls on the lines of those which already exist in the public procurement sector, with the possibility for the national authorities to order by summary procedure the suspension of any contract-award procedures which do not comply with the transparency and equal-treatment requirements contained in Community legislation.

Another avenue worth exploring is for the Member States to be made directly responsible for supervising the application of Community law - for example, in the environment or technical harmonization fields. Each Member State would send annual statements to the Community institutions. In the event of default, the Community would be entitled to refer the matter to the Court of Justice and ultimately apply financial "sanctions" (along the lines of the clearance of the EAGGF accounts or of the penalty payments provided for in Article 171 of the Treaty).

Lastly, in those areas where an acute problem of mutual trust arises, inspiration should be drawn from experiences such as that of the steel industry during the crisis of the late seventies by developing a system of "cross-over" controls where an engineer from a firm in one Member State was sent to a firm in another Member State on the strength of a Community instruction to help check that capacity had been cut back and that prices and quotas were being enforced.

VI. THE SOLUTION - AN INTERINSTITUTIONAL AGREEMENT

1. Need to reconcile a number of imperatives

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The subsidiarity exercise has to reconcile a number of imperatives:

- on a practical level, Community action must be made more effective - "do less, but do it better";
- on a political level, the Member States and public opinion must be reassured that it is not the Commission's intention to dominate;
- on a legal level, good intentions must be translated into binding commitments;
- on an institutional level, the existing balance must be maintained - particularly the Commission's right of initiative.

An interinstitutional agreement, by providing clear definitions and a precise demarcation of powers, would permit these objectives to be reconciled while allowing the present institutional balance to be preserved intact.

If the Commission must be prepared to demonstrate in every case that the subsidiarity principle has been observed, it must be made clear, in return, that when its proposals are being examined there must be no question of separating the issue of subsidiarity from the substance of the matter in hand and in this way obstructing by degrees the decision-making process.

Subsidiarity is part of decision-making, not a precondition for it. It must be considered together with all the other aspects (legal basis, substantive provisions, etc.) in accordance with the voting conditions applying to a proposal. Only at the end of the examination of a proposal, if Parliament or the Council (general affairs) feels that it conflicts with subsidiarity, could the Commission, at their express request, reconsider it in that light.

There should also be provision for the Commission, in the context of interinstitutional cooperation, to "sound the alarm" if amendments introduced by the Council or Parliament are inconsistent with the subsidiarity principle, and the Commission's right to withdraw its proposal in such circumstances should be confirmed.

2. Content of interinstitutional agreement

After first giving a common definition of the concept of exclusive powers - or else drawing the dividing line with shared powers - this agreement could contain two types of provision relating to:

(a) The intensity of Community action, i.e. implementation of the principle of proportionality.

In all areas, whether powers are exclusive or shared:

- Priority will be given to the implementation of programmes of action to support and coordinate national action, or to recommendations, rather than to systematic harmonization of legislation.

- Particular attention will be paid to the possibility of attaining the Treaty's objectives by the Community and/or its Member States acceding to an international convention rather than by adopting Community legislation.

- Where the enactment of a binding instrument is found to be necessary, the Commission will give preference to the directive, and specifically to the framework directive, and to the techniques of the minimum standard, mutual recognition and the possibilities offered by Articles 101 and 102 of the Treaty.

- A constant effort shall be devoted to ensuring that instruments are clear and concise, and to consolidation.

(b) The principles of cooperation between the institutions:

- The Commission's work programme will be presented to Parliament, the Council and the national parliaments. The Commission will undertake to pay special attention to the remarks of the national parliaments concerning subsidiarity.

- All Commission proposals to the Council and Parliament will contain an explanatory memorandum, to be published in the Official Journal, and a recital justifying the instrument in terms of subsidiarity.

- Establishing that there is no conflict with the subsidiarity principle forms an integral part of the examination of a Commission proposal and may not be separated from it.

- If Parliament or the Council wish to make a substantial amendment to a Commission proposal, they must state their grounds with specific reference to the subsidiarity principle.

- If Parliament or the Council (general affairs) consider that the Commission proposal conflicts with the subsidiarity principle, they may, stating their grounds and under the voting conditions applying to the proposal, ask the Commission to reconsider. Once the Commission has done so, they will resume their consideration of the proposal.

- If the Commission feels that the amendments to its proposal are such as to conflict with the subsidiarity principle, it will make a specific report to the Council (general affairs) and Parliament and, if need be, withdraw its proposal.

The principle of subsidiarity

Communication of the Commission to the Council and the European Parliament

The discussions leading up to the signature of the Treaty on European Union and, in particular, its article 3B have emphasised the importance which the Community attaches to the three linked issues of greater democratic control, more transparency in Community legislation and other action and the respect of the principle of subsidiarity. The Commission considers that all three elements need to be carried through into the practices of the Community. It has made and will continue to make a positive contribution in this direction. This communication deals only with the principle of subsidiarity, its scope and its application in three areas: the preparation of Community action, the management of Community policies and the financial and other control of Community activities.

The preparation and examination of proposed Community action

The inclusion of the principle of subsidiarity in the Treaty imposes an obligation on all the institutions which participate in the process of decision but in view of its power of initiative the Commission has a particularly important role. The principle of subsidiarity does not determine which competences are attributed to the Community: this is determined by the Treaty itself. It is, however, an important principle regulating the exercise of these competences. In practical terms it implies for the Community institutions, and in particular for the Commission, the application of the simple principle of good sense that, in the exercise of its competences, the Community should do only what is best done at this level. The burden of proof is on the Community institutions to show that there is a need to legislate and take action at Community level and at the intensity proposed. The principle of course operates in both directions: if, within the field of Community competences, a decision or action at Community level meets these requirements, it should be undertaken at this level. For reasons which have to do with subsidiarity itself, the principle must be examined together with the content of a proposal or action.

Subsidiarity and its brother principle, proportionality, were not invented at Maastricht. They exist in the legislative and other practices of the Community. However, article 3B of the Treaty on European Union is more explicit. The criteria for its future application can be sketched out. They need not be complicated. They should help to assure the citizen that decisions will be taken as closely as possible to the citizen himself, without damaging the advantages which he gains from common action at the level of the whole Community and without changing the institutional balance.

The analysis of article 3B leads to the following conclusions:-

The first paragraph underlines that the competences are given by the Treaty and that the limits of these competences must be respected. Within these limits the Community has an obligation to achieve the necessary result: to attain the objectives which the Treaty assigns to it.

The second paragraph concerns the areas where the Community has not an exclusive competence and deals with the question whether the Community should act in a specific case. This article requires that the Community should only intervene if and in so far as the objectives of the proposed action cannot be realised sufficiently by the member states. This implies that we have to examine if there are other methods available for member states, for example legislation, administrative instructions or codes of conduct, in order to achieve the objectives in a sufficient manner. This is the test of comparative efficiency between Community action and that of member states.

The factors which could be examined in such cases are the effect of the scale of the operation (transfrontier problems, critical mass, etc.), the cost of inaction, the necessity to maintain a reasonable coherence, the possible limits on action at national level (including cases of potential distortion where some member states were able to act and others were not able to do so) and the necessity to ensure that competition is not distorted within the common market.

If it were concluded that a proposal passes the test of comparative efficiency, it would still be necessary to respond to the question "what should be the intensity and the nature of the Community action?". This recalls the principle of proportionality which is already an element of the case law of the Community. It is necessary to examine carefully if an intervention by legislative means is necessary or if other means which are sufficiently effective can be used. If it is necessary to legislate the Commission will as far as possible favour framework legislation, minimum norms and mutual recognition and more generally avoid a too detailed legislative prescription.

The third paragraph of article 3B applies not only to the area of shared competences but also to the area of exclusive competence. It reaffirms that the principle of proportionality, for which certain criteria are set out above, should apply, but does not alter the attribution of competence.

Management of Community action

It is important that, when legislation is being prepared, there should be careful examination of the possibilities of decentralising the management of Community action. In practice this should be often the result of the use of framework directives, since the legislation transposed at national level would normally be implemented on the ground by the national or regional authorities with due respect for the constitutional requirements of the individual member states. However, in the case of other proposed legislation, the possibility of specific decentralisation of the management of Community action should also be examined. This corresponds to the need to maintain such actions, where possible, as close to the citizen as

possible. It is also often inevitable, in view of the fact that the European public service is very small and the national and regional public services very large.

The Commission will continue to examine possible definitions of a more precise kind of the types of action which might be decentralised and of the elements of control and follow-up which might need to remain directly within the Commission's responsibility. The Community has already adopted a number of initiatives in this direction, in particular the development of the partnership in the operation of the structural policies.

Control

A useful distinction can be made between those areas where Community money is being committed and those areas where there is no financial element. In the first case the Commission must fulfil its responsibilities in relation to the Community budget. In other cases the possibility of a devolved control should always be considered, provided that the member states in the sector concerned dispose of an adequate structure for this purpose.

The Commission will in particular be examining:

- a wider use of de minimis rules;

- the possibility that in the application of Community law the member states should cooperate more closely in the examination of complaints for non-respect of Community law;

- in some sectors a possible system of direct application of controls by member states themselves, with a regular series of reports to the Community institutions, leaving open the possibility of referring issues to the Court of Justice if these reports indicated an unsatisfactory situation.

The paragraphs above indicate that the Commission has carried forward its work in the area of the application of the principle of subsidiarity, over and above the engagement which it took at the Lisbon European Council to justify in legislative proposals the need for such action at Community level. In our view the two key elements are the need for all those concerned in the Community institutions to recognise the need to justify intervention and the need to examine the intensity of the manner in which intervention at Community level is proposed. We do not think that there should be a static interpretation of these two important concepts. We should not "stop the film" of Community development. On an internal basis, the Commission has prepared a more detailed juridico-technical document intended to contribute to the definition of the principle and its better application; this document is annexed. Furthermore the Commission has already indicated that there could be advantage in an interinstitutional agreement on this point and is prepared to suggest a text, if this course seemed acceptable to the Parliament and to the Council.