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Medlemmerne af Folketingets
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Til underretning for Folketingets markedsudvalg fremsendes vedlagt formandskabets rapport vedrørende nærhedsprincippet.

Ejz. Munk-Jensen

9779/92

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REPORT BY THE PRESIDENCY

to : The General Affairs Council
on : 9 November 1992

Subject: Subsidiarity - implementing the BIRMINGHAM DECLARATION

I. INTRODUCTION

1. The European Council in Birmingham set the objective of reaching decisions at Edinburgh in the field of subsidiarity on the basis of reports on
 - adapting the Council's procedures and practices,
 - guidelines for applying the principle in practice.

The General Affairs Council in October had a first thorough discussion - concentrating on procedural aspects - in relation to the implementation of the principle of subsidiarity in Article 3(b) of the Maastricht Treaty.

It is suggested that the General Affairs Council on 9 November concentrate on guidelines for applying the principle in practice.

On this basis, COREPER will prepare a report on both aspects of the whole mandate for discussion at the General Affairs Council in December. This final report will also include the general perspective under which the debate on subsidiarity is taking place (i.e. the existence of the principle in implicit or explicit form in the present treaties, the fact that it is one of the basic principles of the Treaty on European Union as reflected in its provisions of a general nature, as well as in the drafting of many of the new E.C. Treaty's specific articles). The report to the December Council will also deal with the question of how best to achieve the objective of an agreement with the European Parliament on making the principle work, in the light of the inter-institutional dialogue, which will take place with the European Parliament and the Commission on 10 November 1992.

2. Following the lead taken by the German delegation (doc 8918/92), the Benelux countries, the Greek and Spanish delegations have presented national memoranda on the subsidiarity principle (docs 9213/92, 9245/92 and SN 4600/92).⁽¹⁾

The Commission, in line with the commitment taken in Birmingham on further analysis of, and reflexion on, the principle of subsidiarity, has submitted a Communication which provides important material for its further work in this area (doc 9649/92).

(1) The Sutherland report on "The internal market after 1992 - meeting the challenge" provides important comments on the approach to the subsidiarity principle in the single market field.

II.**GENERAL APPROACH TO ESTABLISHING GUIDELINES****a) Basic principles**

The debate in COREPER has led to broad agreement on the following basic principles:

- Making the principle of subsidiarity work should be a priority for all the Community institutions, without affecting the balance between them.
- The principle of subsidiarity cannot call into question the powers conferred on the European Community by the Treaty and as interpreted by the Court. But the principle provides a guide as to how those powers are to be exercised at the Community level, including in the implementation of Article 235. The application of the principle shall respect the general provisions of Article B of the Maastricht Treaty, including the "maintaining in full of the *acquis communautaire*".
- Where the application of the subsidiarity test excludes Community action, Member States would still be required in their action to comply with the general rules laid down in Article 5 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 jeopardize the attainment of the objectives of the Treaty.

- The principle of subsidiarity applies only to the extent that the Treaty gives to the institution concerned the choice whether to act and/or a choice as to the nature and extent of the action. The more specific the nature of a Treaty requirement, the less scope exists for applying subsidiarity. The Treaty imposes a number of specific obligations upon the Community institutions, but also upon the Member States themselves, for example concerning the protection of Community funds, competition policy and the implementation and enforcement of Community law. These obligations are not affected by Article 3 (b): in particular the principle of subsidiarity cannot reduce the need for Community measures to contain adequate provision for the Commission and the Member States to fulfil their obligations to safeguard Community expenditures and to ensure that Community law is properly enforced, as provided for in the Treaty.

- The principle of subsidiarity cannot be regarded as having direct effect; however, interpretation of this principle and review of compliance with it by the Community legislator come within the jurisdiction of the Court of Justice.

b) The possibility of establishing lists:

The discussions in COREPER have led to broad agreement on the following conclusions:

- The new Article 3(b), first paragraph, clearly implies that national powers are the rule and the Community's are the exception. This explains why it would be pointless to list the powers reserved to Member States.

- Nor is it deemed appropriate to establish an agreed list of subject matters where the Community has exclusive powers.

- The great majority of delegations are of the opinion that it would not be appropriate to establish a classification of types of measures to apply on the various subject matters falling under shared powers. Decisions have to be taken case by case based on the provisions of the Treaty.⁽¹⁾

(1) Work in COREPER has established that both the Council and the Commission, with regard to education, vocational training and youth, culture and public health, consider that the explicit ruling out of harmonising the law and regulations of Member States cannot be circumvented by use of any other treaty article, such as Article 235. They also agree that the expression "incentive measures" refers to measures designed to encourage or support co-operation between Member States on relevant policies and programmes on a voluntary basis; these measures may include financial incentives offered through Community or national programmes where this is essential to achieve the objective.

III.

SPECIFIC GUIDELINES FOR APPLYING THE PRINCIPLE OF SUBSIDIARITY

1. Based on the general approach set out above, it is suggested that the following specific guidelines be used by the Council and the Commission at all institutional levels of the decision-making process on a proposal for a Community measure. These guidelines are based on the suggestions set out in the Commission's memorandum, national contributions and the discussion which has taken place in COREPER so far. Under the terms of Article 3(b) 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).

2. The guidelines should cover all three elements in Article 3(b):

- an absolute limit on Community action (first paragraph):
- a rule (second paragraph) to answer the question "Should the Community act?". This applies to areas which do not fall within the Community's exclusive competence;
- a rule (third paragraph) to answer the question: "What should be the intensity or nature of the Community's action?". This applies whether or not the action is within the Community's exclusive competence.

Limit on Community Action (first paragraph)

3. (a) This paragraph applies to all Community action.
- (b) In order to apply this paragraph correctly the Council needs to be satisfied that the proposed action is within the limits of the powers conferred by the Treaty and is aimed at meeting one or more of its objectives. The examination of the draft measure should establish the objective to be achieved and whether it can be justified in relation to an objective of the Treaty and that the necessary legal base for its adoption exists.

Should the Community Act? (second paragraph)

4. (a) This paragraph does not apply to matters falling within the Community's exclusive competence.
- (b) For Community action to be justified in areas not falling within exclusive competence, it must be demonstrated that
- the objectives in question cannot be sufficiently achieved by Member States' action; and that
 - the objectives can be better achieved by action on the part of the Community.
- (c) The following guidelines should be used for determining whether the conditions at (b) are fulfilled;
- the issue under consideration has important transnational aspects which cannot be satisfactorily regulated by action at national level;

- actions by Member States alone or lack of Community action would conflict with the requirements of the Treaty (such as the need to correct distortion of competition or avoid disguised restrictions on trade or strengthen economic and social cohesion) or would otherwise significantly damage Member States' interests;
- action at Community level would produce demonstrable economies of scale compared with action at the level of the Member States.

These guidelines must be applied in such a way as to ensure that the requirements set out in paragraph 4(b) are met in full.

The Community must not act to harmonise national legislation, norms or standards where this is unnecessary.

The wish to present a single position of the Member States vis-à-vis third countries is not in itself a justification for internal Community action in the area concerned.

- (d) The reference to objectives being achieved "by the Member States" includes both action by individual Member States and action through collaboration between two or more Member States.
- (e) The reasons for concluding that a Community objective cannot be sufficiently achieved by the Member States but can be better achieved by the Community must be substantiated by specific qualitative or, wherever possible, quantitative indicators (including indicators of the scale or effects of the proposed action).

Nature and Extent of Community action (third paragraph)

5. (a) This paragraph applies to all Community action, whether or not within exclusive competence.
- (b) The jurisprudence of the Court on the principle of proportionality should be borne in mind in connection with this paragraph. However this jurisprudence has up to now been developed in the limited context of the protection of individuals' rights, whereas the third paragraph of Article 3(b) concerns the intensity of the Community's legislative action.
- (c) In considering whether or not a proposed action by the Community goes beyond what is necessary to achieve the objectives of the Treaty, the following guidelines should be borne in mind:
- (i) Any burdens, whether financial or administrative, falling upon national governments, local authorities, economic operators and citizens, should be minimised and should be proportionate to the objective to be achieved;
 - (ii) 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. Well-established national arrangements should not be over-ridden by Community law unless they are demonstrably incompatible with the objective or insufficient to achieve it. The organisation and working of Member States' legal systems must in particular be respected. Where appropriate, Community measures should give Member States a menu of actions from which to choose, subject to the objectives of the measure being achieved and to the actions concerned being capable of proper enforcement.

- (iii) Where it is necessary to set standards at Community level, consideration should be given to setting minimum standards, with freedom for Member States to set higher national standards, not only in the areas where the treaty so requires (118A, 130T) but also in other areas where this would not conflict with the objectives of the proposed measure or with the Treaty.
- (iv) The form of action should be as light as possible consistent with satisfactory achievement of the objective of the measure and the need for effective enforcement. Non-binding measures such as recommendations and voluntary codes of conduct should be preferred where appropriate. Other things being equal, directives should be preferred to regulations and framework directives to detailed measures.
- (v) In the areas where the Treaty so specifies, and in other appropriate cases, Community action should be limited to encouraging co-operation between Member States or to complementing, supplementing or supporting Member States' action.
- (vi) Where action is needed to address localised difficulties affecting only certain Member States, it should not normally be extended to the Community as a whole.

IV

CONCLUSIONS

The Presidency invites the Council to take note of the general approach as set out in Section II above as well as the broad framework of the specific guidelines set out in Section III, which will be the subject of further work by COREPER.