# Progress in the Implementation of Subsidiarity

## Research Paper 95/36

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This paper looks at progress made in the application of subsidiarity, the principle enshrined in the Treaty on European Union which established a presumption that decisions would be taken at the lowest appropriate level. The concept and interpretation of subsidiarity were the subjects of earlier Library papers which also looked at its philosophical origins. This paper considers the practical steps that have been taken so far in the implementation of this sometimes elusive principle in the realm of EC legislation.

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# Introduction

The principle of subsidiarity is set out in Article 3(b) of the Maastricht Treaty on European Union, as follows:

> The community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.
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> In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of scale or effects of the proposed action, be better achieved by the Community.
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> Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.

Subsidiarity has been the subject of three previous Library papers. The earlier ones, Research Notes 92/70 and 92/90 (1992), looked at the various attempts to define and clarify subsidiarity in the context of Article 3(b). Research Paper 93/26, *The Maastricht Debate: Further Developments on Subsidiarity*, looked at the practical proposals for adapting subsidiarity to the Community decision-making process and how these would be applied. It included a consideration of the agreements on subsidiarity at the European Council in Edinburgh in December 1992. This paper looks at some of the subsequent developments in the adaptation of Community legislation to the subsidiarity principle.

# I The First Commission Report

At the Edinburgh European Council in December 1992 the Commission agreed to carry out three tasks with regard to the fulfilment of the Maastricht Treaty provisions on subsidiarity. These were i) to justify legislative proposals according to the subsidiarity principle; ii) to withdraw or revise pending proposals if they did not pass the subsidiarity test; and iii) to review existing legislation with a view to withdrawal or amendment. The subsequent Lisbon European Council asked the Commission to present its first report at the December 1993 European Council in Brussels.

The resulting Commission report, COM (93) 545 final, was divided into two main parts, a preamble which explains its scope and basis, and a main section which lists those aspects of legislation that the Commission has identified as not complying with the subsidiarity principle.

## A. The Preamble

This was divided into three sections, the first two of which deal with the background to the report in the light of provisions in the Treaty on European Union and undertakings given at earlier European Councils. Section two also suggests "Precautions to be taken", namely the need to avoid challenging the principle of the *acquis communautaire*, the need to give priority to earlier rather than recent legislation and to limit the review to legislative rules and regulations rather than areas in which major changes are already under consideration.

The third section of the Preamble describes how the legislation ear-marked for revision is to be divided into three groups:

i) **legislation for recasting**: this involves the modernising and reordering of existing legislation with a view to amalgamating some laws and eliminating others.

ii) **legislation to be simplified**: this applies to legislation which contains unnecessary detail.

iii) **legislation to be repealed**: this applies to laws which are to be included in recast legislation or which have been superseded.

## B. Proposals for Change

The main body of the document considers how legislation in these three groups will be affected by application of the subsidiarity principle according to the Commission report. The existing measures that will be or are in the process of being changed are summarised in a Commission Background Report entitled *Adapting Community Legislation to Subsidiarity*, 25 January 1994:[1]

### 1. Rules and Regulations to be Recast

**Community Customs Code** : around 25 Council regulations and directives, 75 Commission regulations and directives and several hundred amending regulations and directives to be brought into two regulations.

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[1] ISEC/B3/94; see also Agence Europe Nos 6148 and 6149, 14 and 15 January 1994.

**Right of Residence** : 10 Council directives and regulations and one Commission regulation on the right of residence for Community nationals.

**Pharmaceutical products** : 20 Council regulations and directives, 8 Commission regulations and directives, 2 communications and around 50 explanatory notes for manufacturers.

**Competition** : a number of Commission regulations on competition and state aids in the form of guidelines and communications.

**Trade Mechanisms for Agricultural Products** : currently a number of different instruments covering licences, refunds, levies and guarantees.

## 2. Rules and Regulations to be Simplified

**Technical standards** : several very detailed directives on foodstuffs to be streamlined and replaced by minimum requirements; others to be clarified or brought together in one instrument (eg electrical equipment in explosive atmospheres); measures also proposed for lifting equipment, lifts, pressure equipment and metrology, vehicles and agricultural tractors.

**Professional qualifications** : older directives to be simplified and mutual recognition ones to be improved.

**Environment** : air and water directives to take account of new knowledge and technical progress (see also below).

**Recognition of the possibility of Member States negotiating settlements with individuals**: member states to be encouraged to detect fraud and secure payment of debts.

**Animal welfare** : basic detailed legislation to stay but overlaps and inconsistencies removed.

**Social policy** : to involve examination of the "acquired rights" directive.

**Indirect taxation** : all VAT measures to be examined in 1995.

**Company law** : legislation on small and medium-sized enterprises could be simplified.

**Agricultural markets** : Commission has started consolidation exercise covering the market organisation of around ten products. Little prospect of major simplification until CAP reform complete.

**Common fisheries policy** : like CAP, this is under the exclusive competence of the EU, but simplification and decentralisation within the common policy are planned.

**Transport policy** : some old rules on weights and dimensions of road vehicles and roadworthiness testing can be simplified.

**Energy policy** : plans to simplify existing rules.

**Consumer protection** : simplification of 3 directives on the pricing of food and non-food products.

### 3. Rules and Regulations to be Repealed

These will include instruments in the following areas as a result of recasting, simplification, the extension of mutual recognition, new scientific knowledge or the case law of the Court of Justice:

> customs, right of residence, pharmaceutical products, agriculture, foodstuffs, chocolate products, jam, coffee and chicory extracts, preserved milk, fruit juice, honey, electrical equipment, lifts, pressure equipment, metrology, recognition of professional qualifications, water quality, freedom of establishment and the freedom to supply services.

## C. The Anglo-French Submission

The Annex to the Commission document contains comments on a list submitted by Britain and France in June 1993 of 24 instruments or proposals for withdrawal or amendment (including two proposals not yet adopted by the Commission). The Anglo-French list identified the need for amendment or repeal in the following areas:

foodstuffs
professional qualifications
drinking water and bathing water
quality of water for shellfish and freshwater fish
notification of projects of interest to the EC in the petroleum, natural gas and electricity sectors
acquired rights
minimum stocks in thermal power stations
marketing of vegetable seeds
air quality
MIRIAM - European network of agricultural information centres
liability of suppliers of services
taxes on transactions in shares and securities
taxes on raising of capital
community system of monitoring and control of fisheries regulations
corporate taxation
zoos
Community participation in the International Whaling Commission
used machinery
pharmaceutical pricing transparency

The Commission agreed that 16 of the 24 items should be withdrawn or amended[2] and the draft Fisheries Directive was in fact adopted in an amended form which satisfied the subsidiarity criteria.

## D. The Retroactive Application of Subsidiarity

Article 3(b) does not refer to or even imply retroactive application, so from a strictly legal point of view, the Commission's proposals to repeal or revise earlier legislation go beyond what is stipulated in the Treaty. Whilst this has been welcomed in some quarters, doubt has been expressed in others that this might undermine the achievements of the Community. As Akos Toth comments in an article entitled "A Legal Analysis of Subsidiarity":

> From a practical point of view, repealing or amending existing legislation under the pretext of subsidiarity would lead to highly undesirable results. It would mean relegating matters already brought within the scope of Community legislation - often as a result of very long and hard negotiations - as well as the power of supervision and enforcement relating to those matters, from Community to national competence. This could undermine the *acquis communautaire*, which according to the European Council's document should be preserved. It would enable Member States to use

[2] see Annex to COM(93)545 final.

> subsidiarity to obtain repeal of (for them) inconvenient legislation on a *pick-and-choose* basis[3].

Toth also suggests that retroactive repeal of environmental legislation, for example, could give rise to actions for damages under Article 215(2) of the Treaty of Rome for expenses incurred by member states in complying with the environmental standards required "which expenses would be rendered without legal basis". Since the justiciability of the subsidiarity principle has yet to be put to the test, the question of compensation in this context has not yet arisen at the Court of Justice.

In April 1994 the EP adopted a report by Spanish Socialist MEP Medina Ortega on the adaptation of Community legislation according to the principle of subsidiarity and reaffirmed its view that the application of the principle should not be used as "an excuse for bringing into question areas in which the Community has an obligation to act, and that this notion could not apply to Community law in force, with the exception of efforts to simplify and codify EC law".[4] The EP acknowledged the fact that in 1993 the Commission withdrew about 150 proposals and could still withdraw more. It also agreed with the Commission that to deal with the complexity of regulations a "hierarchy of standards" would need to be discussed at the 1996 review conference in accordance with the Maastricht provisions.

# II The Second Commission Report

The Commission presented its annual report on the application of the subsidiarity principle to the European Council at Essen on 9-10 December 1994.

The report[5] looks first at how subsidiarity has been taken into account in the legislative process, and then concentrates on a review of existing legislation.

## A. New Commission Initiatives

In the first area, where new EC legislation was considered necessary, the report shows how subsidiarity or proportionality was taken into account in various initiatives:

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[3] *Legal Issues of the Maastricht Treaty*, edited by David O'Keefe and Patrick Twomey, 1993, Chapter 3, "A Legal Analysis of Subsidiarity".

[4] *Agence Europe*, No 6216, 22 April 1994.

[5] CONS DOC 11467/94, 28 November 1994

1. Free movement of goods: in a proposal for a Directive on cableway installations designed to carry passengers, the draft laid down member states' obligations in general terms but left them a free choice as to the measures actually taken.

2. Financial institutions: a draft Directive on cross-border credit-transfers sets out a number of essential conditions which allow institutions wishing to provide these services almost complete freedom of contract. It was left to the institutions to decide on the detailed specifications of their services with the draft setting out fall-back rules in case essential rules were not specified. There is only one mandatory section in the draft with a limited number of opt-outs.

3. Small and medium-sized firms: proposals cover the improvement and simplification of the enterprise environment, the organisation of consultation on creation, growth and transfer of firms, and encouragement of the demand for information, training and advice from SMEs. The programme encourages "mutual consultation between member states, and coordination between them by seeking to improve the environment in which firms operate and to stimulate support measures for SMEs. The Commission seeks to complement member states' own measures by facilitating the exchange of experience and the dissemination of good practices which are potentially transferable from one member state to another or from one region to another, in the common interest".

4. Research and technological development policy: the proposal on the fourth framework programme reflects the general agreement on the type of RTD activities that could better be carried out at Community level while proposals for specific programmes define the type of activity to be carried out under these programmes in accordance with subsidiarity. It is for those involved in RTD in the member states to decide what research is to be done and in association with whom.

5. Education, training and youth: under Articles 126 and 127 of the Treaties, Community action in this area should support and supplement that of member states. Three proposals were put forward on this basis: youth for Europe III, "Leonardo da Vinci" and "Socrates".

6. Transport: there have been two proposals on trans-European networks, one laying down general rules on Community

financial aid and another a set of guidelines for its development covering the objectives, priorities and main lines of action.The guidelines broadly reflect national priorities and the detailed rules for implementation are the responsibility of the member states. One of the intentions of proposals in this area was to ensure the inter-operability of different parts of the network in the different member states.

7. Telecommunications: in a proposal on the licensing of fixed and satellite-based telecommunications services, the idea of a single licence gave way to one based on the mutual recognition of national licences to provide telecommunications services.

8. Labour law: activity in 1994 has concentrated on "proposals to inform and consult employees and to safeguard employees' rights in the event of transfers of undertakings, businesses or part of businesses"

9. Fisheries: proposals concerned the responsibility of member states to monitor activities on their territories and in their maritime waters and to communicate to the Commission data supplied by individual vessels.

10. Public health: there have been four proposals concerning cancer, AIDS, drug dependence and health information. The Community's role was identified as "underpinning the efforts of the member states in the public health field, assisting in the formulation and implementation of objectives and strategies, and contributing to the provision of health protection across the Community" Diversities in member states were observed and detailed requirements were not proposed by the Community.

The report states that "where possible, the Commission has tried to find alternative solutions to Community legislation or action, for example by promoting the decentralized application of Community law by the relevant authorities of the member states or by calling on the services of standardization bodies ...".

The Commission maintained that it has been consulting more frequently to gather the observations of all interested parties before drawing up proposals. In 1994, green or white papers had been presented in the areas of social policy, audiovisual policy, mobile and personal communications and the liberalisation of telecommunications infrastructure. Recent consultation initiatives also concerned proposals for the definitive VAT arrangements and the reduction of pollutant emissions.

## B. Withdrawal or Revision of Proposals Outstanding

Based on the list presented to the Edinburgh European Council, the Commission formally withdrew nine proposals in December 1993, and more were withdrawn or revised in 1994. These included proposals on the keeping of animals in zoos, the liability of suppliers of services, the protection of personal data in the telecommunications field, comparative advertising and the labelling of footwear. Although not on the Edinburgh list, the Commission has also simplified proposals relating to time-share property, recreational craft and the internal market in gas and electricity. In 1995, revision is expected on proposals on take-over bids, the common definition of a Community shipowner, speed limits for certain categories of motor vehicles, the maximum permitted blood-alcohol concentrations for drivers and the advertising of tobacco products.

## C. Modification of Existing Legislation

1. The Commission's report to the Brussels European Council in December 1993 had set out a programme of revision and simplification (see above), on which the second report expanded. Modifications are underway in proposals on the right of residence in member states, on pharmaceutical products (medicinal products, and veterinary medicines during 1995), foodstuffs (those intended for particular nutritional uses[6]; mineral waters; directives on chocolates, jams, fruit juice, honey, coffee and milk) and technical legislation (the CEN/CENELEC mandate; weights and dimensions of road vehicles and roadworthiness testing[7]; metrology; the ranges of nominal quantities and nominal capacities for certain pre-packaged products).

2. In accordance with the earlier report, directives on the mutual recognition of qualifications (doctors, dentists, veterinarians, nurses, midwives and pharmacists) are to be simplified to keep up with changes in training.

3. In the area of indirect taxation, there are to be amendments to simplify VAT which are intended to solve the problems encountered by businesses and national administrations[8].

4. In the area of competition, the Commission has merged two Regulations into one applying to "certain categories of technology transfer agreements". There is to be wide consultation with interested parties and member states before adoption planned in

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[6] see also European Legislation Select Committee twenty-third report, HC 48-xxiii, 1993/94, 29 June 1994.

[7] see also House of Lords European Communities Select Committee seventeenth report on maximum weights and dimensions of road vehicles, HL 84 1993/94, 26 July 1994.

[8] VAT is discussed in Library Research paper 93/22, 2 March 1993.

1995. On state aids the Commission adopted communications on the application of Regulations on environmental protection and the rescuing and restructuring of firms in difficulty. Details of aid are left to the member states. regulations on regional aid are also to be revised, with the Commission taking a "flexible approach", and taking into account national policies on regional development.

5. In areas not announced in the Brussels report, the Commission has initiated revision of legislation concerning the block exemption for agreements in the motor vehicle distribution sector, cooperation between businesses, particularly small ones and merger controls.

6. In the area of energy, the Commission intends to simplify existing legislation on investment projects of interest to the Community to lighten the burden on industry and national administrations by reducing the amount of data collected, extending deadlines and leaving the means of data collection to the member states. There is also to be a "complete reappraisal of legislation in the energy field", involving revision of energy efficiency legislation and legislation arising from the oil crisis of the 1970s[9].

7. In the environmental field, legislation on air and water quality is to be revised to take account of proportionality and a cost-benefit assessment, while not allowing a drop in standards[10]. There is also to be a revision of the Seveso Directive to allow member states to choose how they will achieve a high safety level at major industrial plants. The Commission is also preparing to amend legislation on the contained use of genetically-modified micro-organisms and on the deliberate release into the environment of genetically-modified organisms[11]. The performance of the LIFE Regulation on financing environmental projects has also been evaluated.

8. In the area of social policy, the Commission proposed a revision of the so-called Acquired Rights Directive[12].

9. In agriculture the Commission is to revise rules on export refunds for agricultural products by incorporating several Regulations into one basic Regulation. The Council Regulation on the advance payment of export refunds for agricultural products is to be amended during 1995 "so as to exclude all possibilities of abuse". Other amendments involve the wine sector and the zootechnical veterinary field in the context of the completion of the internal market. The requisite controls will be the responsibility of the member states, subject to Commission inspection.

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[9] EC energy policy and UK Energy Conservation Bills are discussed in Library Research Paper 94/14, 25 January 1994 and 95/5, 16 January 1995; see also Environment Select Committee fourth report, HC 648 i-xii, 1992/93.

[10] see also European Legislation Select Committee twenty-fourth report, HC 48-xxiv 1993/94, on the Bathing Water proposal and European Communities Select Committee (HL), first report, "Bathing Water", HL 6 1994/95.

[11] These issues are discussed in Library Research Paper 93/55, "Genetically Modified Organisms, Transgenic Animals and Animal Patenting", 27 April 1993.

[12] see European Legislation Select Committee twenty-seventh report, HC 48-xxvii 1993/94, and Commission Background Report, "The Acquired Rights Directive", ISEC/B2/95, February 1995.

10. In fisheries, a new legal framework for structural intervention has been operating since January 1994 and provides "a proper division of responsibility between the Community and the member states".

11. In consumer protection matters, the Commission intends to propose simplifications to legislation on the indication of the price of products offered to consumers to be in place in 1999, allowing the member states greater discretion in deciding how to ensure that consumers are properly informed.

# III Subsidiarity in Practice? The Water Directives

The environment is one area in which Community action has been strengthened in the last few years, first by the Single European Act (Article 130 r-t of the Treaty as amended by the SEA) and subsequently by the Maastricht Treaty. Following the SEA provisions to improve the environment across the Community, there has been a number of directives in areas such as waste disposal, water and air quality, noise, nature protection, dangerous chemicals, radiation protection and environmental impact assessment. However, while it has been accepted generally that environmental legislation is an area where common action at European level is more effective, there have been implementation problems in a number of member states (above all in the new Länder in Germany, but also elsewhere) because of the cost implications of some of the measures required. There have been calls for certain environmental measures to be dealt with at national level according to the subsidiarity principle, particularly in cases where there are no cross-border implications which would justify Community action. Water quality has been one area of contention as to competence.

## A. Government and Opposition Views on Proposals to Amend Legislation

The British Government has maintained that water quality is largely a matter for national legislatures rather than for the Community. Britain's failure to implement the Bathing Water Directive 76/610/EEC in Blackpool and neighbouring areas of Southport resulted in a judgement against Britain at the European Court of Justice in July 1993 in an action initiated by Friends of the Earth: [13]

The European Council on 10-11 December 1993 endorsed the Anglo-French proposal that the quality of drinking and bathing water should be consistent with subsidiarity and modern science. This was welcomed by the then Environment Minister Tim Yeo in a DOE press notice on 14 December 1993, in which the Minister stated:

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[13] C-56/90, judgement of 14 July 1993.

The Commission's approach as endorsed by the European Council is a major step forward and offers a clear framework within which to achieve improvements in Community water legislation which could allow better targeting of resources, and reduce costs and charges, without weakening environmental protection.

It will of course be vitally important that the Commission and the Council should, in giving effect to this decision, ensure that the details of the new and revised directives really are consistent with subsidiarity, so that they are confined to essential quality and health parameters, leaving details to be tailored to the varying circumstances of member states.

The existing directives will remain in place until the Commission has brought forward proposals, and substitute directives have been agreed by the Council after consultation with the European Parliament. It will inevitably take some time to implement the changes.

The scope for, and timing of, better targeting of resources and reduced costs will depend on the exact terms of what is agreed by the Council for each of the new directives.

The Government believes that the new approach to water legislation outlined in the Commission's report offers a basis for improving the cost-effectiveness of water measures, taking into account varying geographical conditions in different parts of the Community, but without weakening environmental protection. Our open and thorough system of monitoring drinking water and the water environment is a vital safeguard which we want to see fully matched in other member states.

The cost of the urban waste water treatment directive remains a problem virtually throughout the Community. The United Kingdom continues to believe that its provisions will result in an unsustainably rapid increase in water charges in the period up to 2000. Its costs for most member states are much higher than was expected when it was agreed in 1991. The UK is continuing to discuss with the Commission and other member states the scope for modifying deadlines so as to spread the cost burden over a longer period without weakening the improvements in environmental protection which the directive will achieve.

## B. The New Commission Proposals on Water

The Commission's plans for a revision of the drinking and bathing water directives were based on two new sets of directives:

First, a set of framework directives on drinking water quality; ecological quality of water; quality of bathing water; and freshwater management and groundwater protection. The first and the third of these directives would replace the existing directives on drinking water and bathing waters; the set

as a whole would replace at least parts of a number of other existing directives.

Secondly, the urban waste water treatment directive and the nitrates directive would remain in place as directives which "comply with the subsidiarity principle in that they simply define an objective leaving Member States free to achieve it in their own way".

The Commission also raised the possibility that at a later stage the consistency of Community water legislation could be boosted through "a genuine Community code for water"[14].

## C. Differences in Interpretation

Not long after the Government and media had announced a British victory in its handling of the water issue, there were contradictory reports that the Commission was insisting there would be no change in water standards. *Europe Environment*, 16 December 1993, expressed concern over the "very subsidiary" new proposal, which it thought would simply grant a "right to pollute" clean water. Fears from environmental groups and opposition parliamentarians in Britain that the proposed flexibility of water directives would result in a lowering of British standards were countered by the argument that applying subsidiarity in this area would not affect the aims, objectives and above all the standards set in policies, which would continue to be determined by the Council of Ministers.

On 12 December 1993, Commission officials said that they were examining the legal form of some environmental and social legislation, but that this had nothing to do with changing established standards. Furthermore, legislation on urban waste water, to which the Government had objected strongly on grounds of cost, had not been included in the Commission's list of water proposals to be amended. The need for additional improvements to the British sewage system to comply with this directive would be the main reason for a future rise in water bills in the UK and the most that British Ministers could do was to ask for implementation of the law to be delayed until the year 2000 at the earliest.

The Commission's insistence that standards would not be compromised by changes made to the water directives conflicted with the Government's claims a few days earlier that Britain had scored a victory in securing agreement in the EC to relax the high environmental standards for water quality and so slow the rise in water charges. However, the proposed framework directives would allow more scope for member states to implement measures. This

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[14] DOE Press Notice, 14 December 1993, ibid.

would perhaps mean less pressure on governments and consequently water bills would rise less quickly than they would otherwise. Giving evidence to the Select Committee on European Legislation, the Foreign Office Minister David Heathcoat-Amory commented on the water legislation as follows:

> I think we signed those Directives perhaps when a different political culture prevailed. Firstly, the whole environmental debate was running extremely strongly and we tended to look at the environmental benefits without assessing in all cases the costs. I think there is a better appreciation of the need to balance the one against the other now, in the interest of European competitiveness if no other. Secondly, the concept of subsidiarity was not properly working. That is why the growing realisation that some of these directives and regulations were too prescriptive, and were not in all cases founded on proper scientific evidence, has now added to the subsidiarity concept and has led to a realisation that these directives need to be looked at again. They were on the original Anglo-French list which we submitted to the Commission and they have now been agreed not just by the Commission but by the European Council. It does not mean we are going to relinquish our environmental standards, what it does mean is that they are going to be looked at again in the light of up-to-date scientific evidence because some of the original requirements were simply not achievable. Others, which really had very little basis in health and safety requirements, were going to be extremely expensive and would, if implemented in full, lead to a misallocation of resources. The same sum of money spent on different aspects of the environment would bring a much greater environmental gain for lower cost. So I think that re-think in the context of subsidiarity has borne fruit, and although it may be a British initiative, it has now been agreed throughout the Community[15].

In a motion on an Opposition Day debate on "Europe and the Environment" on 11 May 1994, the opposition environment spokesman Chris Smith moved:

> That this House recognises that the environment cannot be properly protected by national endeavour alone; acknowledges the importance of Europe-wide action to prevent pollution and environmental standards; applauds the work of the European Union and especially of the European Parliament in helping to safeguard the environment here in Britain; notes the lamentable record of Her Majesty's Government in failing to ensure that agreed standards for drinking water, bathing water and air quality are achieved; deplores the Government's consequent attempts to diminish those standards; deprecates the inadequate implementation of provisions for access to environmental information ... recognises the need for further radical improvement in Europe's environmental work, especially in relation to the Common Agricultural Policy; and believes that Britain should be in the forefront of environmental progress in Europe, rather than lagging constantly behind its European partners[16].

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[15] HC 184-i, 1993-94, *Current Events in the European Union*, 25 January 1994.

[16] HC Deb, 11 May 1994, c.332.

This was supported by the Liberal Democrat spokesman Simon Hughes, who said that Britain "must honour the commitments", adding that "of course, a politically acceptable formula must be found"[17].

## D. EC Action and UK Government Response

The Commission's revised proposal on the quality of bathing water was submitted to the Council on 7 April 1994[18] in accordance with the Edinburgh agreement. It contained a detailed assessment of the Community dimension versus the national one, proportionality and costs. On the question of proportionality, the relation between the means used to the objective, the Commission concluded:

> The revision to Directive 76/160/EEC has a double goal: leaving the ambition of the Directive unchanged and facilitating its implementation by way of simplifying its text and by reducing the routine costs of analyses.
>
> The proposed changes concentrate on the essential requirements, leaving Member States free to set higher standards and to react to specific local and regional problems. The number of parameters have been reduced and the criteria for compliance have been simplified without reducing the level of protection ensured by the Directive.
>
> Concerning the remedial measures to be taken when pollution affects a bathing area, the proposal leaves the Member States the choice and the extent of the actions to be taken to fulfil the obligations defined in the present proposal.
>
> It has been made clear that bathing does not necessarily have to be prohibited in the case of non-compliance and that it is up to Member States to assess whether such a measure is necessary because the pollution represents a danger to public health.

The Council is to adopt a common position by March 1995, taking into account the opinions of the EP, the Economic and Social Committee and the Committee of the Regions.

In the Government's Explanatory Memorandum of 12 May 1994 on the Commission's revised proposal, the Under Secretary of State at the Department of the Environment, the Earl of Arran, stated that "The Government will examine carefully whether all elements of this proposal are consistent with both the Commission's own commitment and Article 3(b) of the Treaty". In his consideration of the policy implications of the proposal, the Minister doubted whether the two-year time limit for completion of any remedial work would be sufficient and expressed reservations about some aspects of the standards proposed. He also questions the

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[17] ibid, c.364.

[18] EC Draft 6177/94

justification for Community level action rather than national or regional arrangements for the prohibition of bathing in places where pollution constitutes a risk to public health. On the financial implications of improvements to water standards, the EM states: "The Government considers that any additional costs to be incurred as a result of revised standards should be justified by, and proportionality, the benefits to be gained". Regarding risk assessment and scientific justification, the EM cites research in the UK into the alleged link between certain illnesses and water quality which has concluded that "more stringent standards are not justified". The EM concludes:

> Some elements of the proposal can be justified to the extent that they correct shortcomings in the existing Directive. The Government will be working to ensure that the Directive has clear and comparable methods for assessing water quality reflecting better the current scientific understanding of the health risks of bathing.

What is not clear from the Government's response is whether or not it considers that the new proposal is a simplification of the earlier one in accordance with the Edinburgh agreement and the Commission report, or whether the new proposal satisfies two of the subsidiarity tests: the need for action at EC level and the proportionality requirement.

## E. The Question of Competence

In a publication entitled *Making Sense of Subsidiarity: How much centralization for Europe*, by David Begg et al, 1993, an attempt is made to resolve the question of whether or not the Community is justified in assuming competence for drinking water regulations. One argument is "The quality of water drunk by a Dane does not change the welfare of a Spaniard, and there is *prima-facie* evidence that this directive flies in the face of the principle of subsidiarity. National governments should be responsible for activities that affect only the welfare of their citizens"[19]. The answer to the question as to how the Community can defend its decision to take this role is that the Council seeks to prevent "ecological dumping":

> It is concerned that member states may try to give their own firms a competitive advantage by lowering the environmental standards that they impose, and that this non-cooperative behaviour will result in a general under-protection of the environment.

The authors ask: "But could this really apply to drinking water?" and goes on to suggest reasons why it might apply, particularly with regard to "inefficiencies resulting from competition to attract mobile tax bases"[20]. They also go on to consider clear examples of

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[19] page 139.
[20] ibid, page 141.

cross-border pollution in the pollution of the River Rhine which would affect some fifty million people in eight countries.

The House of Lords Select Committee on the European Communities published a report on bathing water in December 1994[21] which looks *inter alia* at the question of subsidiarity and competence. It stated:

> Although in theory each Member State could take effective measures, appropriate to its national situation, to safeguard public health, in practice it may very well be that without general standards, national governments might find it convenient to ignore or obfuscate evidence of health risks and to procrastinate over remedial action. Given the movement of polluted waters, and the fundamental objective of free movement of people throughout the Community, legally binding minimum standards for bathing water seem to us highly desirable. Article 130r, however, also requires the Community to take account of available scientific and technical data, of environmental conditions in the various regions of the Community and of the potential benefits and costs of action or lack of action. Although we do not question the general justification for a revised Directive, we are not satisfied that the Commission's proposal adequately complies with these further requirements. In revising the Directive, the Council should not make changes which would increase the net public cost of compliance without proportionate increase in the level of public health protection. Given that its essential objective is the protection of human health, the Directive should be confined to requiring monitoring of biological parameters which are good indicators of public health risks.

On the matter of the subsidiarity test, the report concluded:

> Given the detailed description of Community objectives in relation to the environment under Article 130r and of the manner in which the Community must proceed when seeking to achieve these objectives, we do not find that Article 3b imposes additional requirements in this particular case. We have, however, noted the requirement in Article 3b that "Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty". This wording reinforces the doubts and the specific recommendations which we made in the previous paragraph [see above]. The Committee concludes that while the case against some aspects of the bathing water directive on subsidiarity grounds is well-founded it may be politically unrealistic to look for the repeal of the directive.

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[21] HL Paper 6, "Bathing Water", 1st report, 1994-95.

# IV The Justiciability Question

If the UK Government wanted to take the Community institutions to the European Court of Justice (ECJ) over the subsidiarity issue they feel is at the heart of, say, the water regulations, it is not clear how that could be achieved. The question of the justiciability of subsidiarity remained largely unanswered during the pre-Maastricht period, although the European Parliament had insisted that "judicial guarantees" and "respect in law" be given to subsidiarity, with the European Court of Justice (ECJ) as the constitutional body with jurisdiction over the division of competences.[22]

In the UK, legal experts were generally against incorporation of the principle into the main body of the TEU. The House of Lords Select Committee on the European Communities concluded in their 27th report, *Economic and Monetary Union and Political Union*[23] that they did "not believe that subsidiarity can be used as a precise measure against which to judge legislation". In a later Lords report, *Political Union: Law-Making Powers and Procedures*,[24] they concluded: "Subsidiarity is a political principle which should permeate all stages of the Community legislative process, but the responsibility for its application should lie with the legislators and not with the judges". Lord Mackenzie-Stuart, who had also written authoritatively on the subject, wrote in a letter to *The Times* on 11 December 1992: "It is fundamentally wrong that the Court should be put in this position", that is to say, in the position of ruling on the political issue of level of competence. These and other opinions have been discussed in earlier Library papers on subsidiarity.

Under Article 4 of the Treaty of Rome, the Court of Justice, like the other EC Institutions, "shall act within the limits of the powers conferred upon it by this Treaty". This means that the Court has jurisdiction only where the Treaty specifically grants it, and under Article L of the TEU, the jurisdiction of the ECJ extends only to Titles II, III and IV (ie Articles amending the Treaties), Article K.3(2)(c) and Articles L - S. It does not extend to the Preamble and Titles I (which contain the expression of the subsidiarity principle), V and VI (except for K.3(2)(c)). Interesting too is the fact that Titles III and IV on amending the Treaty establishing the Coal and Steel Community and the European Atomic Energy Community, do not contain similar Articles to Article 3b in Title I on subsidiarity. Toth, in an article entitled "Is Subsidiarity Justiciable?" concludes therefore that "on purely jurisdictional grounds, the principle of subsidiarity is not justiciable before the Court of Justice except in so far as it has been incorporated in the EC Treaty"[25].

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[22] EP Resolutions, 12 July 1990, OJC 231 and 21 November 1990, OJC 324.
[23] HL 88, 1989/90
[24] HL paper 80, 1990-91.
[25] *European Law Review*, June 1994.

Toth goes on to consider how a subsidiarity case might be brought to the ECJ. Since there is no provision in the TEU for a mechanism to bring a subsidiarity case to the Court, a complaint would have to be made under existing procedures for direct actions or preliminary rulings. Toth speculates[26]:

> Of the various direct actions, questions of subsidiarity are most likely to come before the Court in actions for annulment under Article 173 EC. In these actions, subject to certain conditions, it will be possible to challenge an act adopted by the Council on the grounds that the prerequisites for Community action, as laid down in Article 3b, were not satisfied and that, therefore, the act exceeds the limits of the Community's powers. In the terminology of Article 173, the ground of action would be lack of competence or, perhaps more correctly, infringement of the Treaty. Thus, a Member State wishing to keep the matter concerned within national field of action but outvoted in the Council may use an action for annulment to achieve its purpose. In certain limited circumstances, natural or legal persons (private parties) may also use the subsidiarity principle as a ground for challenging an act (even if they may be led by motives other than concern about the division of the exercise of competences). It is less likely that the Commission would wish to rely on subsidiarity as a ground of challenge since, in accordance with the procedural rules adopted by the Edinburgh summit, the Commission must have been satisfied that the prerequisites for Community action were met before it initiated the legislation in question.

Toth also points out that since an action for annulment can only be taken against an 'act' adopted by the Council, it is questionable whether the ECJ could be challenged over the competence claims surrounding a proposal, "in spite of the fact that there is no formal 'act' to challenge"[27]. Toth concludes that a negative answer "would reveal a serious gap in the system of judicial review since it would mean that the Court is unable fully to control the proper application of subsidiarity".

Opinion remains divided. According to Andrew Beale and Dr Roger Geary in an article entitled "Subsidiarity comes of age?" subsidiarity **is** justiciable before the ECJ, but that the Court will have to choose whether to use it as a legal or a political principle:

> Whereas subsidiarity has been successfully transformed from a social philosophical concept into a pragmatic political principle, and used to promote the further integration of post-war western European states, the most difficult stage of development will be its crystallisation into a workable legal rule.
>
> It is certainly clear that the inclusion of subsidiarity in the Maastricht Treaty renders the concept justiciable before the European Court of Justice, which, under Article 164 of the Treaty of Rome, is required to ensure that in the interpretation and application of the Treaties, the law is observed. It seems likely, then, that the court will have to

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[26] ibid, p.274.

[27] ibid, p. 275.

> choose between using the principle for the traditional purpose of judicial review or risk the politicisation of the court by taking up a substantive position in the vexed area of "State Rights",
>
> From the purely legal standpoint, both these options seem far from ideal. Indeed, it is difficult to disagree with the growing body of academic and judicial opinion which stresses the undesirability of trying to adjudicate on what is essentially a political construct[28] .

A European Parliament Written Answer of 10 March 1994 summed up the situation as follows:

> As the principle of subsidiarity is not merely a political guideline for the activities of the Community institutions, but a general principle of Community law, the Court of Justice might be required to scrutinize Community acts from the point of view of compliance with that rule of law. However, it is not yet possible to determine precisely how far the Court of Justice's scrutiny would go were it asked to rule on the question of whether the principle of subsidiarity was being complied with in the Community legislative process. With that reservation and in so far as application of that principle by the institutions calls for an essentially political appraisal, and given that the second paragraph of Article 3b leaves the institutions a wide margin for discretion, it would appear difficult to attribute to this provision the direct effect that the Court of Justice has acknowledged, through a quite specific and constant jurisprudence, in respect of certain other provisions of the Treaty. In that connection, the Edinburgh European Council felt that "the principle of subsidiarity cannot be regarded as having direct effect" ...[29]

# V Subsidiarity and the 1996 Intergovernmental Conference

Georges Berthu of the French Europe of Nations party in the European Parliament submitted a proposal on subsidiarity to the EP's Committee on Institutional Affairs. He supported a proposal from the French Senate of "an official conference of national parliaments" which would form a "Subsidiarity Chamber"[30]. This "lightly-structured Chamber" would comprise representatives of member states and would rule on all questions of subsidiarity. Its legitimacy would be "undisputable" since it would "have its roots in national parliaments" to which it could turn to settle "difficult or important cases". All new legislative proposals would automatically be referred to this Chamber "in order to avoid institutions having to rely on today's almost lack of self-discipline", and national governments and parliaments would also be able to turn to it. Such issues would therefore not be referred to the Court of Justice.

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[28] *New Law Journal*, 7 January 1994.
[29] OJC 102, 11 April 1994.
[30] *Agence Europe*, No 6398, 14 January 1995.

## European Communities

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