European University Institute
Department of Law

THE PRINCIPLE OF SUBSIDIARITY

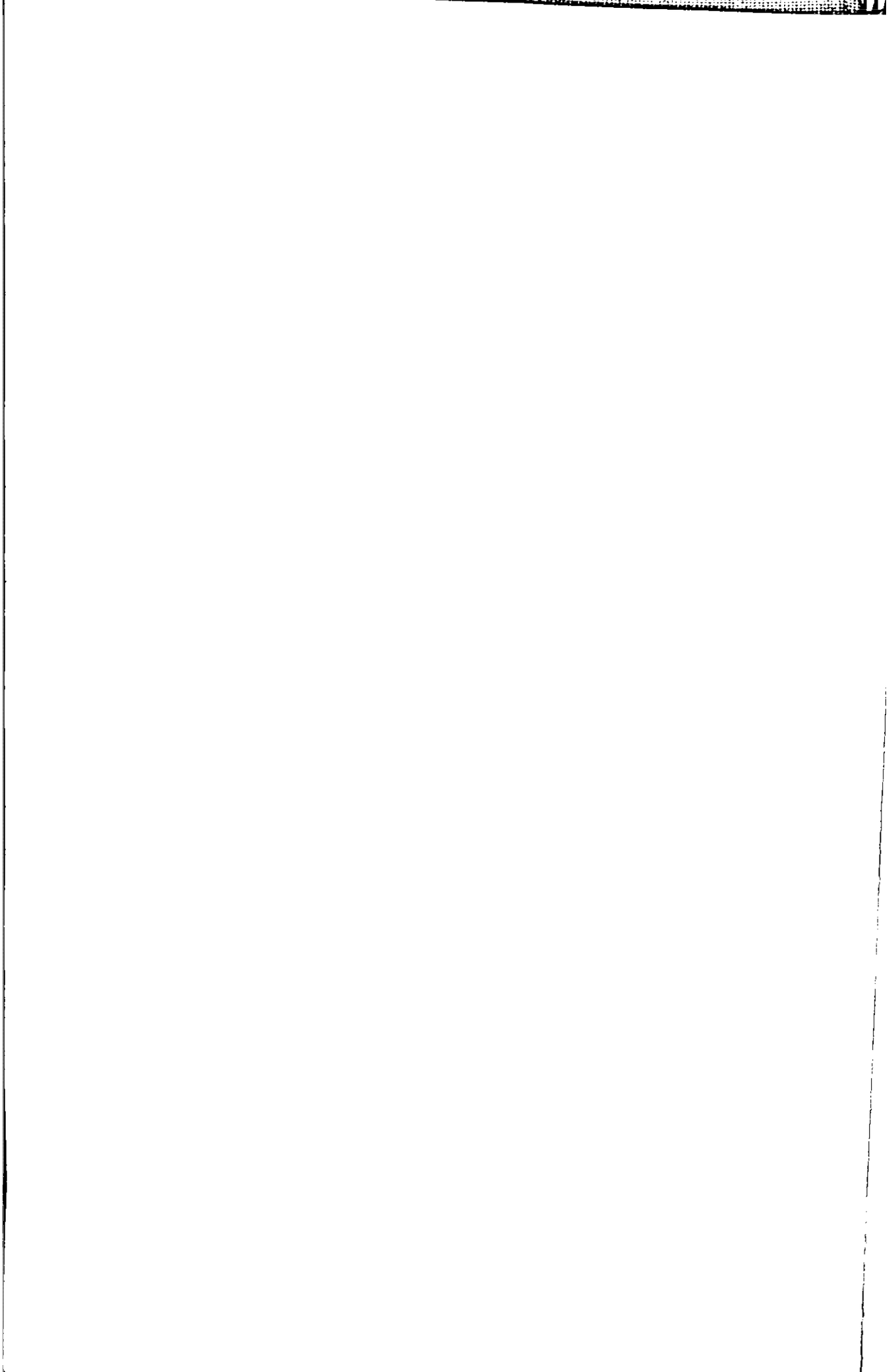
AND ITS CRITIQUE

A "Contextual" Analysis of the Principle of Subsidiarity

Antonio Estella De Noriega

Thesis submitted with a view to obtaining the Doctor of Laws
of the European University Institute

EUI, Florence, 1997



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CONTENTS.

FOREWORD.

This thesis is the result of research done in the period comprising October 1992 to August 1996. This period was mainly spent in the European University Institute of Florence (from October 1992 to February 1995; and then from September 1995 to August 1996). However, part of the research was also developed in the European Commission in Brussels (February 1995 - September 1995). Funding was provided by the Spanish government, the European University Institute and the European Commission. My thanks go first and foremost to my supervisor, Renaud Dehousse, whose constant encouragement (particularly regarding all concerned with the contextual approach adopted in this work) was essential for its development and finalisation. They go in second place to all the people who supported me throughout these years, and in particular, to my family and friends. This thesis could not have been written without the unflinching personal support of María F. Mellizo-Soto.

"Hay que correr las ideas como las liebres; no para cogerlas, sino para verlas correr. Y no seguirlas -perseguirlas- demasiado, para no acabarlas".

José Bergamín.

GENERAL INTRODUCTION.

Theorising again about a topic that has already received a great deal of scientific attention may be viewed, to use some well known words of Camus, as "the ultimately absurd act" (Camus, 1975). Precisely in order to avoid, when dealing with a classic topic, falling into the absurd, or what is only slightly better, into the banal, it is necessary to use afresh methodological and conceptual tools. This should allow one to pose new questions and, finally, open up new intellectual perspectives. Conversely, the distance that one is to cover needs to be not too far removed from current paradigms. Otherwise one may fall into a different kind of trap -that of offering a contribution which is interesting but totally useless, as it were, for the purpose of shedding new light on the ongoing debate[1].

In fact the main trigger for embarking on this project was a reaction to what were current legal critiques of the principle of subsidiarity at a given moment. Though I conceded that a critical outlook should be taken as regards subsidiarity, and no mere review of the principle in legal-technical terms, the standard critique left me with the bitter taste of scientific dissatisfaction. In my view it seemed, at best, to entirely miss the point as regards the issues that were raised by the introduction of subsidiarity into the constitutional order of the Community, which, in turn, implied that the answers that were given were also clearly unsuitable. I therefore underwent the effort of giving an alternative critical reading of the principle of subsidiarity, the result of which constitutes the thrust of this thesis. Yet before entering into the following critique, it is important to make, by way of introduction, a number of remarks concerning (i) the genealogy of this thesis; (ii) the method; (iii) conceptual issues; (iv) the exposition of the main research hypothesis according to which this work shall be

[1] I am indebted to the reflections contained in Dehousse (1988) for this point.

conducted; and (v) the structure of this thesis.

I-. Genealogy.

Chronology and a glance at history may be a good starting point for the purpose of showing the genealogy of this thesis. I started this project at the end of 1992. Before that time, the Member States' governments had already approved a new reform of the Treaties constituting the Community[2]. The new reform was perceived by many to be a brilliant corollary to the successful SEA period and a promising way to start a new epoch which announced plenty of optimism for the integration venture. The Maastricht Treaty was, as was argued then, a step further -maybe a definitive one- in the dynamic process towards "an ever closer union" among the peoples of Europe. However, around the middle of the year 1992, the European scenario would radically change. In June 1992 the Danish people would refuse to adopt the Maastricht Treaty. This was followed by a close "yes" in the french referendum on Maastricht that took place in October of the same year. To further complicate things, the monetary crisis of September 1992 put into question what was considered until that moment a hard won Maastricht achievement, the prospect of monetary union. Unpredictably, the aftermath of Maastricht witnessed one of the worst crises in the history of European integration.

As a way to face that critical situation, the academic community brought to the fore what had been until that moment a relatively unregarded reform introduced by Maastricht: the principle of subsidiarity. At the end of 1992 and in the forthcoming year a literal flood of

[2]The Treaty of Maastricht was signed by the representatives of the Member States' governments on 7 February 1992.

works were published on subsidiarity. Though variate in character, in general, political science commentary on subsidiarity viewed the principle as a suitable remedy for the Community (European Union) malaise. Conversely, and in apparent contrast with the view adopted by political scientists, legal commentary on subsidiarity had a markedly negative overtone. I remember reading at that time an article of Toth on subsidiarity which mirrored the mainstream legal critique of the principle at the time. In particular, the last sentence of Toth's 1992 article can be reproduced here for the purpose of showing the general view taken by lawyers as regards subsidiarity at that moment. According to Toth,

"(...) the incorporation of the principle of subsidiarity in the Maastricht Treaty has been a retrograde step. Without providing a cure for any of the Community's ills, it threatens to destroy hard-won achievements. It will weaken the Community and slow down the integration process. It will suit those who would like to see the Community move not towards but away from a truly federal structure" (Toth, 1992:1105).

These words perfectly capture, as I have suggested, the approach adopted by an overwhelming majority of lawyers towards subsidiarity. In fact for lawyers subsidiarity was seen at best as an exception and at worst an anomaly in the context of the Community's (European Union's) constitutional system. First of all, as was argued by Toth's article, subsidiarity had an ambiguous nature. It was a middle way between, at least, the political, sociological and legal universes. Thus the primary task of the lawyer was to translate the ambiguities of subsidiarity into a set of reliable legal criteria. Such a task proved to be so difficult (and I would add: so sterile) that the conclusion of most legal analysis was that subsidiarity did not provide "any cure for the Community's ills", as the words of Toth established. In short, subsidiarity disappointed lawyers due to the loose legal profile it bore.

To continue, subsidiarity did not only disappoint lawyers, but, more critically, it confused them. For lawyers, the introduction of the principle into the Community Treaties was in many senses counter-intuitive. It implied the elevation to the rank of a constitutional Community principle a concept which had notorious disintegrative potential. As such, this was clearly contrary to the integrative logic which the Treaties -and the law of the Communities- had traditionally relied on. As Toth remarked in his article of 1992, subsidiarity would only "weaken the Community and slow down the integration process". It is not surprising then that, disturbed by the disintegrative characteristics of the new Community principle, a strand of legal commentary on subsidiarity made an effort to highlight the integrative potential that, it was argued, the principle was supposed to have. This proves, perhaps better than any other element, the intellectual discomfort that subsidiarity provoked in the majority of Community lawyers[3].

In short, it may be said that lawyers' critiques of the principle were two-fold: 1) the principle was, from a functional-legal perspective, clearly bound to fail, due to its meta-juridical essence; and 2) the principle should be subject to criticism for its disintegrative potential. It may be adduced that implicit to the first charge there was the assumption that subsidiarity should be treated only as a mere technical device; and that implicit to the second charge, there was the assumption that law and integration are co-terminus. In other words, current legal critiques of the principle were, at least in some ways, the result of particular methodological and conceptual choices. In the following I shall show the limits of both, and

[3]Maybe the clearest example of the kind is Lenaerts (Lenaerts et Ypersele 1994:83). Lenaerts celebrates the wisdom of the Treaty's authors who "sont parvenus [avec la subsidiarité] à resoudre la quadrature du cercle: trouver un juste équilibre entre, d'une part, leur volonté de voir les décisions prises le plus près possibles des citoyens (...) et d'autre part, celle de poursuivre le processus créant une union sans cesse plus étroite entre les peuples d'Europe". Therefore, his conclusion is that one should not be afraid of the principle since "conçu de cette manière, le principe de subsidiarité devrait permettre à l'avenir de nouveaux élargissements des compétences de la Communauté ...". Note, for an example of how subsidiarity fosters integration in a particular area (environment), Lenaerts (1994:895).

how methodology and the conceptual apparatus of lawyers are streamlined in this thesis for the purpose of providing a more sustained critique of the principle.

II-. Method: Moving to "Context".

Classical legal analysis of Community integration has, until recently, mainly moved within a methodological framework which could be categorised, without malevolence, as formalist. Therefore Community lawyers have been, traditionally, more inclined to concentrate on the technical subtleties of the legal rule without giving much consideration to extra-legal developments. As Shapiro once wrote, what we have in many legal analyses of Community law is a picture in which

> *"The Community [is represented] as a juristic idea; the written constitution, as a sacred text; the professional commentary as a legal truth; the case law as the inevitable working out of the correct implications of the constitutional text; and the constitutional court as the disembodied voice of right reason and constitutional theology"* (Shapiro, 1980:538).

Of course such criticisms of legal approaches are hardly new. Kant (1798/1971), for instance, in his description of the "peculiarities of the Law Faculty", noted already that "the learned jurist seeks to find an understanding of the law not in terms of its reason, but in the published statute book, sanctioned by the highest authority. One cannot expect him to examine the latter's truth and justice, or its defence against objections of reason"[4]. However, if not new, such criticisms, at least with respect to EC Law studies, are not totally unfounded, even

[4]These words have been recently recalled by Joerges (1996:1).

today. Therefore at present, for most Community lawyers, the norm is most of the time seen as no more than a technical device, which explains our basic instinct for "ultra-sophisticated analysis and quasi scolasticism" (Dehousse, 1994c:4).

The charge is most relevant as regards analysis of the principle of subsidiarity. Formal legal analysis has proved almost irrelevant in accounting for a complex, ambiguous and in many ways uncertain concept such as subsidiarity. Instead, I propose that the analysis of subsidiarity should be placed in a wider methodological framework in which the law is understood in its broader "social, political, and economic" context[5]. *Law in Context* is therefore a shorthand way to refer to the methodological approach that is adopted in this thesis.

However, though still in a minority, contextual analysis of Community law has demonstrated itself to be particularly productive in recent years[6]. Such dynamism makes it difficult to speak, today, about a single *Law in Context* approach. In other words, though in general, *Law in Context* advocates interdisciplinarity, the general idea may be implemented in a number of different ways. It is important to show, within this general framework of analysis, which kind of approach in particular one has chosen.

In this thesis, I have tried to constantly build a bridge between law and political science[7]. The relevance of this choice is explained since, to my mind, to analyze constitutional law without the aid of political science would be, as Shapiro (1980) remarks, to repeat once again the mistake of making constitutional law without politics. However, the

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[5]F. Snyder can be considered as the founding father of this approach. Note Snyder (1990) and more recently Snyder (1994b).

[6]Note Shaw (1995a and 1995b).

[7]And within political science, I have largely used the analytical tools and terminology of the "policy analysis" approach (Meny et Thoening, 1989), as applied to European Community developments (Majone, 1989b).

contrary is also true: political analysis of a constitutional principle without law would also be flawed, as neo-institutional analysis have recently had the merit to recall (Shaw, 1995b). The result of this approach is that political science will be used at many points of this thesis to give a better understanding of legal developments; in turn, due regard will also be given to the role that is often played by law in shaping political phenomena.

III-. Moving from Context to Concepts.

Any analysis rests, ultimately, in a set of conceptual premises or substantive views. In the last section I have shown how the approach used most frequently by Community lawyers relies heavily upon a particular view of law as an instrument or technical device. The particular self-understanding of the Community's legal academia also has an important role to play in explaining why approaches to Community law have until recently remained extremely formal in character. However, I wish to make here a rather different point, one that has been rarely noticed until now. This is that implicit in many legal analyses of Community phenomena there is the strong assumption that law and integration are simply co-terminus. As Shaw has recently stated,

"In conventional wisdom it is the process of integration which gave the EC legal order an impetus and a purpose, and EC law, conversely, which structures, disciplines and pushes forward the process of integration. Law and integration -structural and socio-economic- exist in a cosy, intimate and entirely positive relation. Law is a useful form of glue for the supranational enterprise, as it brings with it an ideology of obedience which substitutes for the absence of force and violence within the EU legal order. Member States adhere to the rule of law within the EU legal sphere, the dominant narrative runs, because they adhere to it to a large extent within the domestic sphere. They are, simply put, liberal democratic states, whose basic instinct in relation to legal

authority is one of compliance and obedience. When they do so, Member States also implicitly sign up for more integration because -in EC rhetoric- law (and obedience to law) has traditionally meant integration. In this way, two circles are squared through integration and through the rule of law. Integration is what is natural for the EU and equally what is natural for the law" (Shaw, 1995a:7).

This underlying assumption explains, in many respects, why lawyers have resented subsidiarity, and also why some of them have tried to force its analysis by giving an "integrationist" reading of the principle, which is even worse. To really understand the consequences of the introduction of subsidiarity in the Community context, it is submitted that lawyers should leave behind the classical simplicity of making law and integration equivalent concepts. In fact, what we have after Maastricht -but maybe also before it- is a new constitutional context which is constituted, of course, by many integrationist trends, but also by at least as many disintegrationist elements. Subsidiarity is but one example of these elements, but many others could be cited, such as, the current three pillar institutional structure, or even the new reading that the ECJ seems to be giving to Article 30 of the TEU. Subsidiarity may not, therefore, be criticized on the simple ground that it goes against integration, only because the values of integration do not constitute, as it were, the "highest moral ground" against which new and old Community developments must be valued. In accord with these remarks, the conceptual framework of analysis that is used in this thesis has as its starting point the idea that both the integrationist and disintegrationist trends that exist in the TEU are the manifestation of equally legitimate claims to unity and diversity values in the current constitutional Community context. This has important consequences for the formulation of the main working hypotheses that will be used to conduct the thrust of this work, as shall be seen below.

IV-. The subject.

It must be clear from the outset that this thesis does not aim to construe a general concept of subsidiarity from which one could deduce legal (or other) criteria that the Community Courts and the rest of the Community institutions would be bound to implement. Nor does it attempt to clarify the set of Community areas which fall within the notion of "exclusive" or "concurrent" competences in order that the implementation of Article 3b2° of the Maastricht Treaty is made more operative. As it may have transpired from my preceding remarks, I find that, although these are interesting questions, their relevance for understanding the place that subsidiarity will occupy in the present and future constitutional Community architecture is only secondary. Instead I propose to approach the matter from a functional perspective, which involves asking the following set of questions: Why was subsidiarity introduced in the EC Treaties? What is the role it is called to play as regards centre-periphery relations in the Community? Is it an adequate instrument to perform the functions for which it was introduced or is it, rather, largely irrelevant?

The answers to such compelling questions must be grounded, as was pointed out in a section above, on the premise that both the Community's claims to unity and integration and the Member States' claims to diversity are equally legitimate. As the contextualist I am, I may merely assume that the fixing and pursuit of policy objectives by the Community is as such legitimate. However, as a Community lawyer, I cannot merely assume that Member States' claims to diversity are legitimate. I have to show, rather than simply state, that this is the case, because this is an important innovation that contextual methods of analysis are attempting to introduce into current legal debates regarding constitutional Community issues. The questions that will guide my work in this regard will be therefore the following: Are the Member

States' claims to diversity legitimate? If they are, why are they legitimate? Further, if these claims to diversity are legitimate, what are the problems, if any, that the development of Community integration has produced for Member States?

To respond to this second set of questions I need to rely, above all, on an analysis of the process of Community integration and of its main causes. Once I have the basic data in this regard, the second step will be to construct a concept of legitimacy which can explain the extent to which Member States' claims to diversity are legitimate, and thus the reasons why and the extent to which Community integration has been problematic for Member States.

Analysis of the Community's legitimacy, as seen from the perspective of the Member States' claims to diversity, shall allow one therefore to understand the rationale underlying the introduction of subsidiarity in the Community context. For the Member States, or at least for a majority of them, subsidiarity was a response to creeping Community centralisation. In this connection, the main question to be answered by this thesis is whether, and the extent to which, subsidiarity is well suited to the purposes for which it was introduced in the Community context. The issue that underlies this question is not only of a functional character, but is mainly normative. Fundamentally, what is being asked is whether subsidiarity, conceived as an instrument regulating centre-periphery relations, constitutes an adequate synthesis of both unity and diversity claims or whether, on the contrary, subsidiarity is an instrument that in its implementation makes largely incompatible the accommodation of such claims at the same time.

If the answer to this question is, as I believe, the second, then subsidiarity may be judged to be ill-adapted. I shall therefore attempt to search for ways to escape from the subsidiarity principle in a later Chapter of this thesis. This search shall be guided by two main premises: first, solutions to the problem of which level of governance should do what may

be better found in the political, rather than in the technical or legal, arena; and second, mechanisms addressed to the regulation of centre-periphery Community problems should be oriented to accommodate both the Community's and the Member States' different legitimate concerns, rather than oriented to exclude one in favour of the other, as is the case, I believe, with the principle of subsidiarity.

V-. Structure.

To conclude these introductory remarks, I shall give a brief summary of the structure of this thesis. The thesis is divided into three parts. The first part, "Growth", contains Chapters I and II. Chapter I is devoted to analysis of the process of growth of the Community's powers, both from a competential and an institutional perspective, whereas Chapter II deals with the causes, or the explanatory variables, of the process of growth of the Community's powers. Though mainly descriptive -but not only: note above all Chapter II- in their purpose, both Chapters are a necessary starting point to understand what is the nucleus of this thesis, its second part, "Legitimacy". This part is formed by a single Chapter, Chapter III. Therein I analyze the impact that the process of growth of the Community's powers has produced on Member State sovereignty, with particular reference to what I believe to be the most problematic aspects of the constitutional Community setting, at least from the perspective of Member States: the majority principle and the implementation by supranational Community actors of policy-making powers granting them the final say. The aim of this Chapter is not only to describe the impact that Community integration has had on the Member States' sovereignty, but rather, to analyze this impact from the perspective of the normative concept of social legitimacy. In the third part of this thesis, "Remedies", I introduce the discussion and

my critique of subsidiarity (Chapter IV) and the alternatives to the principle (Chapter V). It shall be noted that the aim of the final Chapter of this thesis will not be that of providing a complete description of mechanisms oriented to alleviate the current legitimacy problem of the Community as far as centre-periphery relations are concerned, but only to make suggestions as regards the avenues that could be taken in this respect. In the Final Conclusions I summarize and restate the findings of this thesis.

FIRST PART: "GROWTH".

CHAPTER I: THE PROCESS OF GROWTH OF THE COMMUNITY'S POWERS: FROM ROME TO MAASTRICHT.

Du reste, toute parole étant idée, le temps d'un langage universel viendra...! Cette langue sera de l'âme pour l'âme, résument tout, parfums, sons, couleurs...

Rimbaud, lettre à Paul Demeny, 15 Mai 1871.

I-. INTRODUCTION.

Present legitimacy problems affecting centre-periphery relations in the Community system are the result of the process of growth of the Community's powers. At the higher level of abstraction, this may be defined as the degree or level of control that Community institutions have upon their environment. Such a definition suggests, more concretely, that the process of growth involves two different but related dimensions. On the one hand, there is the competential dimension. By competential expansion we understand the process through which sets of policies (entire or partial) move from being under the control of Member States' public authorities to be under the control of Community institutions. On the other hand there is the process of institutional Community expansion. By institutional expansion it is understood the process through which Community institutions confirm and develop their powers.

Both dimensions of the Community process of growth are, as hinted before, intimately

related. However, when analyzing centre periphery relations in the Community system, there is a strong tendency to forget the dual character of Community integration. Therefore the study of the Community's vertical development takes preference, if it is not even exclusive. Instead it is submitted that there exists a strong correlation between the Community horizontal and vertical axes. This is true not only as a way to explain why Community vertical integration takes place, but also because the horizontal extension of the Community institutions' powers has directly damaging consequences as regards the Member States' spheres of sovereignty. Conversely, the contrary is also valid: the vertical evolution of the Community often implies a correlative reinforcement of the Community institutions' powers.

The analysis of the process of growth of the Community's powers, to which this chapter is devoted, raises a first methodological issue which could be encapsulated in the following question: How could this process be described in scientific terms? That is, starting from the assumption that an analysis of the "hard facts" that underlie the present legitimacy discomfort should not be taken for granted, the issue of the ways in which such a process may be described should jump to the forefront of our concerns. Whether this process can be described, or better, measured, and above all, *how* can it be measured, will be therefore the first question that shall be tackled in the following pages.

Measuring the process of growth of the Community's powers should enable to resolve the following pair of questions: firstly, whether there is a macro-trend, a general and visible trend during the period under survey, which starts from the moment of the enactment of the TEEC and extends to the period of operation of the Maastricht Treaty[1]; and secondly,

[1]It must be remarked as a preliminary note that I shall refer, in this chapter, and also all through this thesis, to the moment of the coming into force of the Treaty of Rome (1 January 1958), the Single European Act (1 July 1987), and the Maastricht Treaty (1 November 1993), and not to the date of their formal approval by the

whether, despite the general trend observed, there are more particular (micro) counter-tendencies. Finally, a further objective of this chapter will be to point to the different paradoxes resulting from the process of growth of the Community's powers.

Therefore the following Chapter is organized as follows. The second section deals with a preliminary discussion of the parameters that shall be used to measure the growth process, both as regards its competential and institutional dimensions. The third section shall include a quantitative analysis of the process of competential expansion, which shall be complemented by a fourth section containing a quantitative analysis of the process of institutional growth. In a final section some conclusions shall be restated, and an answer to the questions that have been posed in this introduction shall be attempted.

Member States. Further, it must be also remarked that I use indistinctly the expressions Treaty of Rome and TEEC to refer to the Treaty of the European Economic Community, and the expressions TEU and EC Treaty to refer to the Rome Treaty as reformed by the Maastricht Treaty, all through this thesis.

II-. MEASURING GROWTH: THE STATE OF THE QUESTION.

The first thing that strikes one when analyzing the literature on growth is the lack of coincidence with regard to the parameters which are employed to measure this process at the Community level. Parameters vary in nature from formal, such as the simple comparison between the competences that have been attributed to the Community under the different constitutional reforms of the Treaties (Tizzano, 1987; Louis, 1990; Lenaerts, 1988; Constantinesco, 1974); to quantitative, such as the counting of the Council's and Commission's legislative outputs (Pryce, 1973; Krislov et al, 1985); and to qualitative, such as the comprehensive character of a field of regulation (Majone, 1993); or are constituted by a mix of legal and institutional criteria, such as the incidence of Community law in the national legal orders and the nature of decision-making processes (Dehousse and Weiler, 1992).

Beyond this apparent diversity it is possible, nevertheless, to establish some driving lines conducting the previous literature. Two things are interesting in this regard. In the first place, there is a broader preference for quantitative methods. There are however exceptions to this rule: Majone, for example, in his more recent work, seems to give more weight to qualitative parameters (Majone, 1994a). In the second place, among quantitative methods of measurement there is a preference for the use of the "decisional" outputs of the Community organs (Council and Commission). Again there are exceptions to this mainstream, some authors employing non-decisional quantitative parameters, such as budget appropriations (Pollack, 1994). Furthermore, among the authors that employ decisional outputs, the majority use legally binding acts as a criterium for measurement, whereas there are examples of authors who include also soft-law among their analytical apparatus (Cram, 1993).

The second factor that produces some perplexity is that, even when using roughly the same parameters, the results may diverge. Here it is useful to compare the work of Krislov et al. and that of Majone. According to Krislov et al, who draw from Pryce, "in 1970, 28 directives were in force. Ten years later, it would appear that within the legal order of the Community there were no less than 700 directives in force" (Krislov et al., 1985:66). In turn, Majone states in a rather evasive way that:

"...Concerning the phenomenon of over-regulation, one can mention the almost exponential growth of the number of directives and regulations produced, on average, each year: 25 directives and 600 regulations by 1970; 50 directives and 1000 regulations by 1975; 80 directives and 1500 regulations per year since 1985". (Majone, 1994a:4).

To be sure, the parameters which are used by each of these authors are not exactly the same: while Krislov et al. use as parameter the total number of directives that were in force in two particular time-references (1970 and 1980), Majone employs as parameter the average number of directives (and regulations) that were produced per year in particular time-spans (1970, 1975, and 1985). However, it is possible to compare at least some of the data which are offered by these authors. If, as a "per year" average, 25 directives had been produced by 1970, this means that, according to Majone, around 300 directives were produced in the first 12 years of Community operation. Instead, according to Krislov et al., only 28 directives were in force by 1970. And it is less than plausible to argue that this divergence could be explained by saying that the first author is referring to the number of acts *produced*, (and not in force), and the second to the number of acts in *force*, since the difference between both results is more than exponential. Of course, this divergence only serves to illustrate, if anything, the in-built difficulties involved in the task of measuring a complex phenomenon such as the process

of growth of the Community's powers[2].

A third striking aspect is the lack of an in-depth discussion about the justification of the choices that are made as far as the selection of parameters is concerned. A good example of this general trend can be found in the work of Pollack, who reduces the previous discussion to the following lines:

"In this study, we are seeking to measure policy outputs across a range of policy types, including both regulatory or legislative policies and spending policies. In these circumstances the best option seems to be a dual measure of policy output: EC legislation for regulatory policies, and budgetary appropriations for distributive and redistributive policies". (Pollack, 1994:113).

There is no doubt that the parameters used by Pollack are innovative (above all as regards the "budgetary appropriations" parameter) and that they give a good indication of the process he intends to measure. But taking into account the strong analytical implications that he derives from this information[3], it might have been of use to include further remarks to justify the use of these -as opposed to other- parameters.

Can an explanation for these troubling findings be unearthed? From my perspective,

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[2]Notice also the lack of rigour in the way in which some of these parameters are employed. To show "an almost exponential growth" of the Community's regulatory activity, Majone (1994a) uses, as time references, 1970 and 1975, then jumping to 1985. This inconsistency in the time-references that are used makes it more difficult to compare data and, therefore, to have the most reliable information about the reality one wants to measure.

[3]Pollack (1994:95) offers an eclectic explanation of the process of growth of the Community's powers in some areas, and concludes by arguing that "...(growth as regards) regulatory policies can be explained in terms of functional spill-over from the Internal Market, while redistributive policies can be understood as side payments in larger intergovernmental bargains, and distributive policies are the result of the Commission's policy entrepreneurship and log-rolling Council bargaining" (emphasis added).

the problem seems to lay in the fact that the measurement methods are not sufficiently disentangled from the reality that wants to be measured. In other words, there exists a confusion between, on the one hand, the object that is being measured -the process of growth of the Community powers- and the infrastructure used to this end. Both aspects need, therefore, to be neatly separated in order that (i) the choices that are made are sufficiently justified (and are not merely assumed to be as logical ways to measure); (ii) results can be compared to each other; and (iii) the normative conclusions that are drawn from measuring the process of growth can be subject to scientific challenge, and not simply to valorative analysis.

In this regard, a differentiation shall here be made between, on the one hand, the process of growth of the Community's powers, which is defined, as noted in the introduction of this chapter, as the process of competential and institutional expansion of the Community, and, on the other, a set of quantitative parameters which shall be employed in order to measure the reality under examination. In turn, a two-fold quantitative parameter shall be used: firstly, "formal growth", which entails comparing the formal attribution of powers to the Community as effected by the different Treaty reforms, both as regards the competential and the institutional dimensions; and secondly, "material growth", which attempts to measure the process of growth of the Community's powers from the perspective of the *de facto* developments that have occurred. Finally, three time-references have been selected: the moment of the coming into force of the Treaty of the European Economic Community (hereinafter TEEC); the Single European Act (hereinafter SEA) reform; and the Treaty on European Union (hereinafter TEU) reform[4]. Their selection is not random: the fact that

[4]In particular, the period under survey starts in 1958 and extends to 1995, the date at which the bulk of this research was finished.

references are established in those years in which major formal constitutional events took place will facilitate the task of measurement, and, above all, the comparison between formal and material growth, as shall be examined below.

The use of other parameters, such as, notably, qualitative parameters, was also envisaged for measuring the process of competential and institutional growth. However, this was finally discarded due to the following number of reasons. The first reason is that qualitative parameters are difficult to be elaborated. Different from quantitative parameters, whose content is more visible, qualitative parameters would have lead me to engage in a difficult discussion about their exact profile. The second reason is that the benefits derived from the use of qualitative parameters were not certain, since the results they gather added little to the general argument. Third, quantitative analysis seemed to me a safer method in order to pursue one of the objectives previously stated, which is that of disentangling with sufficient clarity the process under examination and the methods of measurement. Using qualitative methods of measurement, the risk of failure with regard to this objective was simply too great. Notwithstanding this remark, it should be noticed that the categories here established are not "ideal-types"; therefore the more exact statement would be to say that, although quantitative methods dominate in the following analysis, reflections of a qualitative kind do surface in certain parts of it.

III-. COMPETENTIAL GROWTH.

A. Measuring Competential Growth Through Quantitative Parameters.

As defined in the introduction to this chapter, the first manifestation of the phenomenon that is being examined, that is, the growth of the Community's powers, is the expansion of the Community's competences from the entering into force of the Rome Treaty to the coming into force of the Treaty on European Union. Two parameters shall be used to measure the growth of the Community competences in quantitative terms: formal growth and material growth. These shall be examined in turn.

A.1. Formal Competential Growth.

From a quantitative perspective, the first way of measuring whether there has been an increase in Community competences is to take into account its formal growth. Applied to the competential dimension, I understand that there is formal growth each time the Community is expressly attributed new competences by Member States through reform of the Treaties.

The justification of the use of the parameter "formal growth" is therefore obvious. A new attribution of competences to the Community indicates, at least in theory, a correlative restriction of Member States' sovereignty (Dehousse, 1994a:103). However it shall be seen later that this method of measurement needs to be qualified by other parameters of a material character.

With regard to the attribution of competences, the Treaty of Rome gave the Community eleven subject-matters or fields of competence. These were the three common policies (transport[5], agricultural policy[6], and commercial policy[7]), competition[8] taxation[9], free movement of goods[10], persons, capital[11], services (including provisions relating to the right of establishment[12]), worker protection policy[13] and finally economic policy[14] (although limited to coordination among Member States).

In turn, the SEA extends the scope of the Community competences by, first, complementing some of the Rome Treaty fields of competence and second, by attributing new competences. Concerning the first aspect, Articles 118a and 118b complement the old provisions relating to worker protection, whereas Article 102a complements the Treaty of Rome provisions on economic policy by introducing cooperation in economic and monetary policy. Though this provision simply provides for cooperation among Member States, the inclusion of Article 102a in the Community pillar was important at a symbolic level for it indicated the political commitment not to leave any Member State outside future developments regarding, in particular, monetary union (De Ruyt, 1987:187).

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[5]Articles 74 to 84.

[6]Articles 38 to 47.

[7]Articles 110 to 116.

[8]Articles 85 to 94.

[9]Articles 95 to 99.

[10]Articles 9 to 37.

[11]Articles 67 to 73.

[12]Articles 52 to 66.

[13]Articles 48 to 51.

[14]Articles 103 to 109.

Concerning the second aspect, the SEA attributed three new fields of competence to the Community. These are the following: economic and social cohesion[15]; research and development[16]; and environmental policy[17]. With regard to the latter, it is important to note that the introduction of this subject matter constitutes the formalization of a policy that had been well developed in the Community since 1970, as shall be seen in the analysis of the Community's material growth.

The Treaty on European Union confirms the trend of growth of the Community's competences from a formal perspective. First, the Maastricht Treaty enlarges the scope of some of the old Community competences (monetary union[18], economic and social cohesion[19] -i.e. cohesion funds-, research and development[20], environmental policy[21], social policy[22]). Second, it attributes new fields of competence to the Community (listed in descending order, according to the economic character of the new competence: industrial policy[23], transeuropean networks[24], development cooperation[25], consumer policy[26],

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[15]Articles 130a to 130e.

[16]Articles 130f to 130q.

[17]Articles 130r to 130t.

[18]Articles 105 to 109.

[19]Articles 130a to 130e.

[20]Articles 130f to 130p.

[21]Articles 130r to 130t.

[22]Articles 118a, 123 and 125.

[23]Article 130.

[24]Articles 129b to 129d.

[25]Articles 130u to 130y.

[26]Article 129a. Note however a first formal reference to a consumer policy in article 100a3° of the Rome Treaty, as introduced by the SEA reform.

education[27], culture[28], visa policy[29] and citizenship[30]).

However, Maastricht is not exempt from contradictory trends at a formal level. As has been pointed out (Dehousse, 1994a:106), some of the new provisions are as much limiting as they are enabling. For instance, provisions concerning education, vocational training, culture, and public health, grant the Community the power to simply encourage or promote cooperation among Member States, explicitly excluding any possibility of harmonization[31]. Table I summarizes the process of formal growth in the three periods which have been examined.

[27]Articles 126 and 127.

[28]Article 128.

[29]Articles 100c and 100d of the Maastricht Treaty.

[30]Articles 8 to 8e of the Maastricht Treaty.

[31]Note, for instance, the wording of Article 128 of the TEU, which concerns the field of culture: "1°. The Community shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore. 2°. Action by the Community shall be aimed at encouraging cooperation between Member States and, if necessary, supporting and supplementing their action in the following areas:... .3°. The Community and the Member States shall foster cooperation with third countries and the competent international organizations in the sphere of culture, in particular the Council of Europe. 4°. The Community shall take cultural aspects into account in its action under other provisions of this Treaty. 5°. In order to contribute to the achievement of the objectives referred to in this article, the Council:

- acting in accordance with the procedure referred to in article 189B and after consulting the Committee of the Regions, shall adopt incentive measures, excluding any harmonisation of the laws and regulations of the Member States (emphasis added). The Council shall act unanimously throughout the procedures referred to in Article 189b;
- acting unanimously on a proposal from the Commission, shall adopt recommendations.

Table I: Attribution of competences to the Community.

Competences in TEEC (1958-1987)	**Competences in SEA (1987-1992)**	**Competences in TEU (1993)**
1-Transport 2-C.A.P. 3-Competition 4-Commercial Policy 5-Taxation 6-Free movement of goods (customs+elimination barriers among M.States) 7-Free movement of persons 8-Worker protection 9-Free movement of persons and right of establishment 10-Free movement of capital 11-Economic policy (only coordination)	1-Social Policy 2-Regional Policy 3-R+D 4-Environment 5-Consumers 6-Cooperation in economic and monetary policy.	1-Industrial Policy 2-TransEuropean networks 3-Development cooperation 4-Education 5-Culture 6-Visa Policy 7-Citizenship.

A.2. Material Competential Growth.

Formal growth gives a first indication of the increase of the Community's competences. Nevertheless, this parameter is limited in that it is essentially static. It does not give any information concerning real developments in Community competences. Therefore it has to be complemented with a more dynamic parameter. This provides a natural transition to introduce the discussion on the material growth of the Community's competences. The analysis of material growth aims at complementing the analysis regarding formal growth, by providing information about the actual development of Community policies during the periods

of operation of the European Economic Community Treaty, the SEA and the TEU. Two parameters shall be used. In the first place, I will count the number of legally binding acts (regulatory output) that were produced in these three periods. This will show how policies were developed and what the rhythm of the process of growth has been in the three periods (acceleration). In the second place, I will examine budget expenditure.

The rationale that underlies the choice of the above parameters is the following: the Community may intervene through two means, regulation and financial spending. These two basic ways of intervention give rise, subsequently, to two different policy types: regulatory policies and spending policies. Therefore it has been considered appropriate to use the Community's legislative output as a marker of the growth of regulatory polices. To complement the previous information, budget appropriations for measuring the growth of Community spending policies have been included[32].

A.2.1. Regulatory Output.

Concerning the first parameter, Community regulatory output, it is necessary to start by considering several factors to interpret the data obtained. First, as mentioned above, only legally binding acts have been taken into account. The rationale that underlies this choice is that the adoption of legally binding acts and the ECJ doctrines of direct effect and, above all, supremacy, produce a visible and direct impact on Member States sovereignty. I have

[32]It is preferred here to characterise regulatory and spending polices by function of the instrument, not the objective. An opposing view is that of Majone. This author orders his typology according to the objective that is pursued (Majone, 1994a:10). Therefore, according to this author, spending policies are those that pursue redistributive and distributive objectives. However, this differentiation according to objective is fuzzy, since both regulatory and spending policies may pursue redistributive and distributive objectives.

therefore excluded soft-law. Although soft-law does affect in some ways on Member State sovereignty, these effects are, in general, less direct and less visible than that of legally binding acts (Snyder, 1993[33]).

Second, concerning legally binding acts, I have taken into account the following: Council and Commission regulations; directives; decisions; and also international agreements signed by the Community. Legally binding acts affecting the functioning of the Community institutions (such as, for example, regulations regarding the Community's civil servants) have not been taken into account, since they do not have an impact on Member States. Financial and budgetary provisions have been also disregarded to avoid duplications, since all concerning Community spending policies has been measured with the parameter "budget appropriations".

Third, concerning sources, I have used the *Directory of Community Legislation in Force* as at 1 June 1995[34]. It is necessary to note that this source is in some ways problematic, since it does not reflect the number of acts that have been adopted each year, but only those that, having been adopted in a particular year, are still in force in 1995. To have a complete picture of the number of acts produced each year, the *Directory* should be cross-checked with another source, say, the *General Report of the Activities of the European Union*[35], which is published on an annual basis. However, this task would go beyond the scope of this work. Therefore the data concerning the number of acts produced by year should be interpreted with this qualification in mind.

Fourth, I have followed the categorization of acts that is established in the *Directory*.

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[33]According to Snyder (1993:2), soft-law is defined as "those rules of conduct which, in principle, have no legally binding force but which nevertheless may have practical effects".

[34]Luxembourg: Office for Official Publications of the EC, 1995.

[35]Luxembourg: Office for Official Publications of the EC (Annual).

Again, this classification is not ideal, being in some cases somewhat arbitrary. For example, as far as state aids are concerned, some Commission decisions are placed under the corresponding sectoral heading (for example, transport) whereas others, that could be placed under such particular heading, are situated under the general one of "state aids". Nevertheless the *Directory* categorization has been respected. This means that, to continue with the previous example, I have counted a Commission decision on state aids affecting transport as belonging to "transport policy" and not to "state aids policy"[36].

Fifth, and this applies also to the "budget appropriations" parameter, only acts produced in the framework of the European Community have been taken into account. Therefore, those acts enacted in the framework of EURATOM or the European Coal and Steel Community have been excluded, for the sake of simplifying the task of measurement.

Sixth, I have also excluded those acts adopted within the framework of the intergovernmental pillars (in the SEA, the European Cooperation Policy) for they have a different regime than acts adopted in the Community framework.

The results of the survey are summarized in Tables II and III. Table II shows the number of legally binding acts that were adopted in each of the periods under survey, by year (note also Figure I enclosed in the end of this Chapter). These data are complemented by Table III, which lists the number of acts that were adopted by policy.

[36]Despite the shortcomings that have been noted, the *Directory of Community Legislation in Force* has been retained as major source of information since it remains, at present, the most reliable public source of information concerning the regulatory expansion of the Community.

Table II: Legal binding acts, by year.

TEEC (1958-1987)	SEA (1987-1992)	TEU (1993-1995)
-1958: 3	-1987: 345	-1993: 795
-1959: 2	-1988: 270	-1994: 1464
-1960: 7	-1989: 423	-1995: 303
-1961: 4	-1990: 490	
-1962: 19	-1991: 531	
-1963: 13	-1992: 752.	
-1964: 35		
-1965: 14		
-1966: 27		
-1967: 49		
-1968: 76		
-1969: 69		
-1970: 91		
-1971: 79		
-1972: 121		
-1973: 112		
-1974: 112		
-1975: 157		
-1976: 200		
-1977: 213		
-1978: 210		
-1979: 247		
-1980: 252		
-1981: 261		
-1982: 255		
-1983: 231		
-1984: 254		
-1985: 309		
-1986: 311		
3734	**2809**	**2562**

Source: Directory of Community Legislation in Force as at 1 June 1995.

Table III: Legally binding acts, by policy.

Subject Matters	**TEEC (1958-1987)**	**SEA (1987-1992)**	**TEU (1993-1995)**
-Transport	111	89	61
-Competition	216	123	63
-State Aids	94	91	53
-C.A.P.	1672	1138	936
-Fisheries	111	106	147
-External Relations	455	543	578
-Taxation	37	24	7
-Free movement of persons+social policy(1)	61	53	20
-Free movement of goods+customs union	411	273	134
-Free movement of services+right of establishment	93	43	21
-Free movement of capital+economic/monetary policy	34	10	7
-Energy	31	10	12
-Environment	97	60	72
-Protection of animals	2	14	1
-Protection of consumers+health	15	53	42
-Science and Information	9	19	21
-Education and vocational training	24	16	13
-Industrial policy(2)	57	46	56
-Regional policy	24	17	246
-Internal market	180	81	69
-Citizenship			2
-Culture			1

Source: Directory of Community Legislation in Force as at 1 June 1995.

(1): The *Directory* includes worker protection within the heading free movement of persons.

(2): Law relating to undertakings has been included under "industrial policy".

In global terms, the first aspect of interest is the important development of Community regulatory activities that took place during the SEA period. This is all the more striking if the "policy of Community regulatory restriction" introduced by the Commission *White Paper* of 1985 is taken into account. The tendency towards over-regulation is illustrated by the fact that in the SEA period, the total number of legally binding acts that were adopted (2809) amounted to approximately 2/3 of the total number of acts that were adopted under the preceding period (3734). Furthermore, under the SEA the Community experienced an important acceleration of its regulatory activities. Whereas the Community's rhythm of growth was of 270 legally binding acts per year in the six years before the SEA[37], this grew to the considerable figure of 468 legally binding acts per year under the SEA.

Yet the more interesting global finding for our more direct purposes is that in the TEU period the total number of acts (2562) that were adopted in the years under consideration (1993, 1994, 1995) amounts practically to the number of acts that were adopted during the six years of operation of the SEA. The data regarding the TEU are therefore of interest if the introduction and implementation of the subsidiarity principle in this period is taken into account. One could have expected an important reduction in the Community's regulatory activity as a consequence of the implementation of the subsidiarity principle in the Community constitutional order. Yet the data reflect, as hinted before, not only no reduction, but on the contrary, a significant increase, in Community regulatory intervention. Here we shall simply note this apparent contradiction between both aspects. A full appraisal of it shall be made later in this thesis[38].

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[37]These were the years of the period under the Treaty of Rome that experienced the major growth. Note Table II.

[38]Note in particular Chapter IV, *infra*.

Further, the data in Table II allow us to make a set of more specific points.

Firstly, Table II helps to establish three different phases of evolution in the Treaty of Rome period. The first phase runs from 1958 to 1971. In this phase the Community was able to enact only around 600 measures, and it navigated at a speed of 42 acts per year. The first 4 years of Community history were particularly bad, with an outcome of only 16 acts. This might be explained by the "the Commission build-up" in the formative years (Krislov et al., 1985:36); however, the fact is that the situation did not get much better in the subsequent years of this period (1967 being the most prolific year, with 49 measures). The second phase begins in 1972 (in which the barrier of 100 acts is passed) and ends in 1985 (excluding this year). In this second phase the Community experienced a significant regulatory growth, the majority of the measures under the Treaty of Rome being enacted in this lapse of time (2625 measures). In terms of rhythm of growth, the Community grew at a speed of 219 acts per year. These achievements are somehow paradoxical, if we take into account that they are made under the shadow of the Luxembourg compromise. One could have expected that unanimity, instead of fostering Community regulatory growth, would have stifled it or, at least, kept the rhythm of growth going at the same pace. The latter figure puts also into question, at least during the second phase of the Rome Treaty's life, the classical contention that unanimity brought about (or increased) the lack of effectiveness (*lourdeur*) in Community decision-making[39] (Winscott, 1995:304). The third wave of evolution of the TEEC period

[39]This finding corroborates the preliminary conclusions that were obtained by the seminal study on quantitative growth of the Community competences undertaken by Krislov et al. (1985:57). Note the following passage: "Given the preliminary nature of this Pilot Project any conclusions may be drawn with caution (...). However, at the level of management of existing Community policies, despite the fact that this activity engages the full Community apparatus, burdened by the well known Member State controls, the emerging picture is not what one would have expected at the commencement of the study. In quantitative terms, the Commission proposal rate has been steady and the capacity of the Council and the COREPER to deal with the Commission output does not seem to be overly handicapped".

is configured by the years 1985 and 1986. Though this phase is constituted only by two years, and therefore could have been assimilated to the second TEEC period, it has been decided to distinguish it since it is a transition span between the end of the TEEC and beginning of the SEA periods. In 1985 the Community would adopt more than 300 acts per year, a figure that would even be bettered in the subsequent year (311 acts). This development may be considered as heralding the impressive development in the Community's regulatory activity that would take place during the SEA period.

Secondly, Table II allows also the general finding as regards regulatory growth in the SEA period to be qualified. As remarked above, Table II shows that the Community experienced an exponential growth during these years. However in 1988 this impressive rhythm of regulatory growth would decrease by 75 measures with respect to the previous year. It is also interesting to note the grand regulatory effort made in 1992, in which the number of measures that were enacted (752) was double the number of those that were enacted at the beginning of the SEA period, in 1986 (345), and exceeded by approximately 200 those enacted in 1991 (531).

Thirdly, during the TEU period, Table II shows that the Community has navigated at a speed of 854 acts per year, which is the highest average of the three periods under survey. Notice also the striking development which occurred during 1993 and above all during 1994. The number of acts that were adopted during the latter year (1464) is significantly superior to the number of acts that were adopted in 1992 (752), which was the year in which more acts were adopted than in any other single year during both the SEA and the TEEC periods. All in all, TEU data should be interpreted with great caution since first, we are considering a period that is still in operation, and second, the number of years that have elapsed is low. To make an in-depth analysis of this period we should wait, if not for its end, at least for the

results of 1996 and 1997, in order that comparison among the three periods is more systematic. The significant decrease in the rhythm of regulatory growth suffered by the Community in 1995 (only 303 acts were adopted in 1995) may be but the first indication that the above-mentioned trend could be inverted in the years to come.

Contrasting formal growth (Table I) and material growth (Table III) shows that the Community had difficulty in developing some of the policies which it was formally entitled to pursue both during the TEEC and SEA periods. Table III is somewhat misleading in this respect. In the case of transport, for example, Table III seems to indicate an acceptable record (111 measures), although compared to the rest of the common policies, performance is somewhat poor during the TEEC period. Yet, as is known, the common transport policy was almost stagnant at least the first 16 years of Community history (21 measures adopted before 1974). In the rest of the years up to the SEA the average improved, but no important measure regarding the liberalisation of the sector was enacted until the entering into force of the SEA[40]. Even if improvements were made during the SEA period (above all in the field of air transport liberalisation), some sectors, such as, in particular, railway transport, have experienced only limited development (Megret, 1990:214). Another case that is of particular interest in this regard is the field of state aids. Again, Table III is misleading in this respect. The latter one seems to imply that the Community (Council and Commission) was active in the field of state aids. Instead, all the decisions that were taken were adopted by the Commission, the Council being unable to enact any single measure under the Treaty of Rome. This situation did not improve under the SEA. Only one directive taken by the Council during

[40]This was acknowledged by the ECJ in Case 13/83 *European Parliament v Council* [1985] ECR 1513.

this period has been traced[41].

Conversely, in the SEA period, all new competences were significantly developed, above all if taking into account the short period of time elapsed (six years). The measures adopted as regards the new competences were: social policy 53 measures; regional policy 17 measures; research and development 19 measures; economic and monetary policy 10 measures; and environmental policy plus animal protection policy 74 measures. The important development experienced in the field of social regulation, understood as regulation against risks (consumer protection, worker health and safety protection, environmental protection) during the SEA period is to be noted. This development has prompted one author to state that, in general terms, Community regulation is experiencing a shift in its focus towards social regulation (Dehousse, 1993:29[42]).

Some of these policies had already been significantly developed under the Rome Treaty, which illustrates again the important contrast between formal and material growth that arose during this period (though in the opposite direction to what was examined above). In fact, there is, during the period before the SEA, a wide phenomenon of policy development under the shadow of catch-all provisions, such as, notably, Articles 100 and 235 of the EEC Treaty (Megret et Teitgen, 1985). Therefore fields such as regional policy (24 measures), education (24 measures), industrial policy (57 measures), R&D (9 measures), consumer protection (15 measures) and above all environmental and animal protection (96 measures), experienced already a significant growth without a clear legal base in the EEC Treaty. This phenomenon has been reproduced, although to a lesser extent, under the SEA. Examples of

[41]Council directive 90/684 EEC of 21 December 1990 on aid to shipbuilding, OJEC L 380/27 of 31 December 1990.

[42]At footnote n° 55.

this trend are, notably, education policy (16 measures) and industrial policy[43] (46 measures).

Some of the trends experienced in the first two periods of Community evolution are also present in the TEU period. Thus, for instance, the number of acts that have been adopted as regards the common transport policy has been particularly low in the first three years of the TEU's operation (61 acts). Similarly, the CAP is the policy that experiences the most significant regulatory growth during the TEU (936 acts), as occurred for both the preceding periods (1672 acts under the TEEC period; 1138 acts under the SEA period).

Further, two policies have experienced an important boom during the TEU period: external relations and regional policy. Though external relations had a substantial development during the first two periods, the regulatory effort that has been made under the TEU is especially notable: with 578 acts adopted, this constitutes the highest number for all the three periods under consideration. Regional policy, in contrast with external relations, in which one could speak of a sort of "sustained development" along the three periods, has experienced a development under the TEU (246 acts) which clearly breaks with a previous trend of more than moderate growth (24 acts in the pre-SEA period and 17 acts in the SEA period).

To conclude the analysis of the TEU period, one notes the scarce development that citizenship and culture, two new fields of action for the Community, have experienced: in the field of citizenship only two acts have been adopted, whereas in the field of culture the Community has adopted only one. As regards culture, the explanation of this result may be in the fact that Article 128 of the TEU is drafted in very restrictive terms, as has been noticed previously[44]. In fact the only act that has been adopted, which is a decision concerning the "youth for Europe" programme, falls more in the domain of the free movement of persons

[43]Within this field, think for instance about Telecommunications policy.

[44]Note in particular point A.1., *supra*.

than in the field of culture[45]. Regarding citizenship, the only acts adopted have been the "right to vote" directives 93/109[46] and 94/80[47]. The scant development of this new competence may be owed to the nature of citizenship, which does not allow for great regulatory developments.

A.2.2. Budget Expenditure.

The second parameter that is used to measure material growth is Community budget expenditure. As has been hinted earlier[48], this parameter was chosen because the Community, as well as national states, makes use of financial instruments to intervene. Furthermore, Community financial intervention has a direct impact on Member States' "financial sovereignty", be it positive (Member States that are net recipients) or negative (Member States that are net contributors). Therefore the increase in the Community's budget expenditure gives an additional indication of the general process of Community material growth.

Yet before entering into the analysis of the growth of the Community's budget it is necessary to give some preliminary explanations in order to correctly interpret the data obtained. I shall make three points in this regard.

First, the sources that have been used to construe the data are the 1995 *Vade-Mecum budgetaire des Communautées* for the data concerning budget expenditure by year, and the Official Journal of the European Communities for the data concerning budget expenditure by

[45]Decision n° 818/95 OJEC L 87/1 of 2 April 1995. Note, in particular, Article 3 of the decision, in which its general aim is stated (exchange activities among youth).

[46]OJEC L 329/34 of 30 December 1993.

[47]OJEC L 368/38 of 31 December 1994.

[48]Note, in particular, section II, *supra.*

policy.

Second, I have taken into account only budget expenditure or outturn and not budget appropriations. The reason justifying this choice is that budget expenditure or outturn constitutes a better indication of the Community's real growth, for these variables reflect what the Community has actually spent in a certain period and as regards a particular policy[49].

Third, I have excluded, as I did in the regulatory growth parameter, budget expenditure in the framework of the ECSC and EURATOM. However the *Vade-Mecum* specifies that the EURATOM budget was integrated into the EEC budget from 1969. Therefore, data concerning the evolution of Community expenditure by year have to be interpreted with this qualification in mind. Data obtained are summarized in Tables IV and V (note also Figure II enclosed in the end of this Chapter as regards budget growth by year).

[49]A further reason is that the first Community budgets are expressed in terms of "appropriations" and also in terms of "expenditure/outturn", whereas the following ones are expressed simply in terms of "expenditure/outturn". The selection of the latter variables allows therefore for comparison among all years.

Table IV : Budget growth in millions of ECUs, by year.

TEEC	SEA	TEU
-1958: 7,3	-1987: 35088,0	-1993: 64204
-1959: 18,1	-1988: 41021,7	-1994: 59343
-1960: 21,2	-1989: 40757,1	-1995: 75438
-1961: 34,0	-1990: 44062,9	
-1962: 41,5	-1991: 53650,2	
-1963: 39,8	-1992: 57946	
-1964: 46,8		
-1965: 76,6		
-1966: 125,2		
-1967: 476,1		
-1968: 1487,9		
-1969: 1904,8		
-1970: 3385,2		
-1971: 2207,1		
-1972: 3122,3		
-1973: 4505,2		
-1974: 4826,4		
-1975: 5816,9		
-1976: 7562,8		
-1977: 8735,9		
-1978: 12041,8		
-1979: 14220,7		
-1980: 15857,3		
-1981: 17726,0		
-1982: 20469,6		
-1983: 24506,0		
-1984: 27081,4		
-1985: 27867,3		
-1986: 34675,4		

ource: Vade-Mecum Budgetaire des Communautés (1995).

It may be derived from Table IV that the general tendency is of steady growth during the TEEC, SEA and TEU periods. In the Treaty of Rome period we can, however, differentiate three different phases of budget growth. These phases are marked by different "budgetary booms". The first phase is from 1958 to 1967. Budget growth was relatively small, the rhythm of growth being 47 million ECU's per year. The first budgetary boom was in 1968 in which 476 million ECU's in 1967 grew to 1487 million in the following year, that is, a growth of approximately 1000 million of ECU's. The second phase of Community budgetary growth starts therefore in 1968, and ends in 1977. The rhythm of growth during this phase was 725 million ECU's per year, roughly speaking. The third phase that can be differentiated is from 1978 to 1986. At both the beginning and the end of this phase the Community experienced impressive booms. In 1978, the Community budget grew by 4000 million ECU's with respect to 1977 and reached to 12041 (8735 million ECU's in 1977). Subsequently, before the entering into force of the SEA, the Community budget grew from 27867 million ECU's in 1985 to 34675 million ECU's in 1986, (plus 7000 million ECU's). The rhythm of growth during the third phase was 2.265 million ECU's per year, that is, an acceleration of approximately 1500 million ECU's per year with respect to the previous period.

It is also interesting to note that, within this general trend of growth in Community expenditure under the TEEC, there are some concrete periods in which an inflexion point occurs. The clearest occurred within the second phase (1968-1977). The Community's expenditure increased in 1970 by 3385 million ECU's, only to diminish to 2207 and 3122 million ECU's in the two following years.

It is also worth comparing budget booms and legislative booms. In general, budget booms preceded legislative ones. Thus, for example, during the TEEC period, regulatory growth passed the psychological frontier of 100 legally binding acts per year in 1972, whereas

the first budget boom would take place some years in advance, in 1968. In 1985, the Community would exceed the barrier of 300 legally binding measures per year, whereas the Community budget would experience another significant boom some 7 years before, in 1978.

Again, as in the case of regulatory growth, the effects of the political convulsions occurred under the TEEC, such as the shift to unanimity from 1966 onwards, do not seem to have had a negative impact on the development of Community growth. On the contrary, two years after of the signing of the Luxembourg compromise, the Community experienced the first significant boom (1968, a growth of 1000 million ECU's).

Regarding to data of the SEA period, it is interesting to note, first, that the entering into force of the new Treaty was not immediately translated into a strong growth in Community expenditure. From 1986 to 1987, the Community budget experienced a growth of only 300 million ECU's. It would be in 1988 that the Community budget would grow considerably (by 6000 million ECU's with respect to 1987). This may be understood as an apparent consequence of the implementation of the *First Delors Package*[50]. From 1990 to 1991 the Community would experience another boom of approximately 8000 million ECU's. Growth was also significant in 1992, but not as important as in previous years (3000 million ECU's more, compared with 1991 figures). Second, in general terms, the rhythm of growth in the SEA period was of 3833 million per year, which implies an acceleration of 1000

[50]The *First Delors Package* was proposed by the Commission in February 1987 (COM(87) 376 final, note EC Bull 7/8-1987 at 9) and approved by the European Council one year later, in February 1988 (European Council of Brussels; 11, 12, 13 February 1988, note EC Bull 2-1988 at 8) for the period 1988-1992. The *First Delors Package* was intended to be the financial complement of the achievement of the single market objective. Its general features were the following: 1) reform of the C.A.P., in order to control and rationalize expenditure in this sector; 2) establish the main basis of regional policy; 3) Increase the resources for the development of the Common Policies; 4) reinforce the principle of budgetary discipline. Its most important action regarded financial support for the development of a regional policy aiming at the social and economic cohesion of the regions of Europe. The *First Delors Package* reformed, at this respect, the structural intervention of the Community in favour of regions on the basis of four principles: 1) concentration on the less favoured regions; 2) programming; 3) complementarity; 4) partenariat.

million ECU's per year with respect to the six last years of the pre-SEA period (2800 million growth per year from 1981 to 1986).

Under the TEU period, the trend towards growth in the Community's financial intervention is confirmed in general terms. Thus in 1993 the Community budget expanded by approximately 7000 million ECU's. However, it is interesting to note that in 1994 (thus immediately after the TEU came into force), Community budgetary intervention suffered a considerable reduction with respect to the previous year (in particular, a reduction of 5000 million ECU's). This trend has been counterbalanced by the important boom of 1995 (an increase of 26000 million ECU's), a tendency towards growth that seems to be confirmed by the budget predictions for 1996[51].

This general trend towards growth during the TEU (only qualified by the data of 1994) constitutes the result of the implementation of the so-called *Second Delors Package*[52]. This package establishes a new financial framework for the period 1993-1997[53]. The main objectives of the *Second Delors Package* are the following: 1) to promote competitiveness of European economies; 2) to upgrade economic and social cohesion amongst European regions and amongst Member States; 3) to foster the Community's external activity. The most important feature of the financial framework established by this document is the creation of the so-called "cohesion funds", which has widened the Community's structural intervention

[51]The prediction for 1996 is of 81927 million ECU's (in outturn).

[52]Presented by the Commission 11 February 1992 (note" *Second Delors Package*: From the SEA to Maastricht. The means to match our ambitions" COM.2000) and approved by the European Council in Edinburgh at the end of 1992 (note European Council at Edinburgh, 11-12 December 1992, Conclusions of the Presidency, Bull.EC 12-1992).

[53]Though in the European Council at Edinburgh, Member States decided to enlarge the Commission proposal to 1999. Note page 61 of the Conclusions of the Presidency, noted above.

in favour of the economically weaker Member States (Ireland, Greece, Portugal and Spain).

Table V complements the previous analysis by offering an overview of the budget expenditure in the pursuit of particular Community policies in concrete years (1980, 1986, 1987, 1992 and 1995). It is important to mention that the time references have not been randomly selected. On the contrary, they have been selected in order to illustrate general tendencies with regard to the evolution of each of the policies that are examined[54]. Neither is the selection of policies to be examined random. Thus regional policy, R&D and the C.A.P. have been selected because, firstly, they are the most important Community spending policies, and secondly, because they are clear examples of distributive (R&D and C.A.P. to a certain extent) and redistributive (regional policy and C.A.P.) Community budgetary interventions[55]. The choice of environment and consumer protection is explained by the fact that they are good examples of Community "social regulation" policies[56]. Transport has been selected in order to complement the data on regulatory growth in this policy which showed a case of policy failure irrespective of its status as a common policy. Finally, education and culture have been chosen since they are examples of the budgetary development of policies not formally enshrined in the Treaties up to the TEU.

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[54]A complete table with the evolution, year by year, of the set of policies that are analyzed has not been included here for technical reasons. For further information, see the *Vade-Mecum Budgétaire*, cited *supra*, as well as the budgets for each year, in which the reader shall find a confirmation of the tendencies which are illustrated here by the data on budgetary growth in particular years.

[55]Majone's (1994a:10) definition of redistributive and distributive policies is followed here. Majone argues that redistributive policies are those in which a transfer of resources is made from one group of individuals, regions or countries, to another group. Distributive policies are those in which a transfer of resources is made in favour of different economic activities.

[56]Joerges (1994:44) definition of "social regulation" is followed here. According to this author, "social regulation" is understood as regulation on risks produced against the environment, workers at the workplace, and consumers.

The first point to be noticed is the dominance of the expenditure of the common agricultural policy with relation to the other policies, in all the time references that are established. However, it is interesting to note that C.A.P. budgetary intervention has decreased through the years. Whereas in 1980 C.A.P. expenditure represented as much as 73.2% of the total Community budget, in 1995 it constituted about a half (53%). This may be explained as the result of the reform of the C.A.P., which was initiated in the SEA period and continued in the TEU period, and which pursues the objective of downsizing the overall importance of this policy as regards the total Community budget.

In general, all policies experienced a trend towards growth, including even transport policy. Therefore the findings regarding the difficulties encountered in the implementation of this policy at a regulatory level are counterbalanced, to a certain extent, by these data on its financial aspect. Notwithstanding this remark, it must be noticed that Community financial intervention in this field is scarce both in relative and absolute terms[57].

Regional policy budget expenditure is of significance as a general trend. This also applies as regards the Treaty of Rome period, in which regional policy was not, formally speaking, a Community field of interest (9.4% of the total budget in 1980, which reflects the trend of the years before the SEA was enacted[58]).

The same trend of growth before formal enshrinement is also visible in the history of the financial development of R&D. Though less significant than regional policy, R&D expenditure had already experienced some growth before its formal introduction as a Community policy under the SEA (by 1.6% in 1980 and 2% in 1986). Interestingly enough,

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[57]Note 1995 *Vade-Mecum budgétaire*, cited *supra*, at p. 28.

[58]For instance, the 1975 regional Policy budget was already of significance as regards the total budget (5.1%) (Note 1995 *Vade-Mecum budgétaire*, cit. *supra*). In 1986 (therefore just before the SEA was enacted) it amounted to 14% of the total budget (see, *infra*, Table V).

its introduction in the SEA was not directly supported by a major budgetary expansion. Instead, one can notice, as a general trend, a very gradual process of budgetary growth from the SEA onwards.

Although the preferred instrument of Community intervention in the field of consumer and environmental protection has been regulation, there has been some intervention through financial means. Again, the patterns of budgetary growth of some of the policies examined above (notably, in R&D and regional policy) are also visible in consumer protection and environmental policy, though expenditure is much more limited in scope in this latter case due to its marked regulatory profile. The general tendency is therefore of steady but gradual growth as regards both fields of action.

Finally, the case of education and culture is of particular interest. Both policies have grown steadily in the Treaty of Rome and SEA periods. This is significant since neither were formally enshrined in the Treaties until the TEU. Although growth *ratios* are roughly similar, education seems to have expanded more than culture. The general findings are summarized in Table V.

Table V: Budget growth, by policy.

Policies	1980	1986	1987	1992	1995
-C.A.P.(1)	73,2%	66%	67,6%	58,8%	53.3%
-Regional policy(2)	9,4%	14%	14,4%	22,1%	23,2%
-Transports	0,006%	0,1%	0,07%	0,015%	0.023%
-Education	0,05%	0,09%	0,16%	0,42%	0.23%
-Consumers/ environmental policy	0,02%	0,04%	0,07%	0,12%	0.16%
-R&D	1,6%	2%	2,12%	3,7%	3.6%
-Culture	0,003%	0,05%	0,06%	0,15%	0.17%

Sources: Community budgets (OJEC, 1979, 1985, 1986, 1991, 1994)

(1): Includes both sections of the European Agricultural Funds, (guarantee and guidance).

(2): Includes the European Regional Development Fund and the European Social Fund. 1995 data include also the Cohesion Funds and IFOP (included in the Community budget since 1993 for Cohesion Funds and 1994 for IFOP).

The preceding survey on material growth may be summarized as follows. First, measured both from its regulatory and budgetary perspectives, there has been an increase in Community intervention from the enactment of the Treaty of Rome up to the coming into force of the Maastricht Treaty. Leaving aside particular years in which an inflexion point occurs, and also the fact that the data regarding the TEU period are still in flux, in none of the three periods here examined does the Community reduce substantially and in a sustained way its regulatory or financial intervention.

Second, as regards regulatory intervention, growth was especially spectacular during the last years of the SEA period and the first years of the TEU. Both developments are neatly

paradoxical, due to the fact that regulatory growth during the SEA was presided by the philosophy of regulatory contention of the Commission *White Paper* of 1985 (Commission, 1985) and that the TEU witnessed the introduction of the subsidiarity principle.

Third and last, the process of growth of the Community's competences has been by no means sequential, that is to say, one in which Member States have attributed competences to the Community -> which then implements them. This is shown by a comparison between formal growth, on the one hand, and material growth (both regulatory and budgetary) on the other. Thus there are cases in which even if the Community lacks formal competence for action, regulatory (i.e., environment under the TEEC) or spending (i.e., regional policy and R&D during the TEEC period) intervention is developed to a considerable extent. The converse trend is also present. Thus there are a number of examples that illustrate how the Community fails to act even when formally entitled to by the Treaties (i.e., in the field of transport under the TEEC).

With these conclusions in mind, we may turn to the analysis of the process of growth of the Community's powers, which shall be approached now from its institutional dimension.

IV-. INSTITUTIONAL GROWTH.

A. Measuring Institutional Growth Through Quantitative Parameters.

As stated at the beginning of this chapter, the second dimension of the process of growth of the Community's powers is the institutional. Taking a quantitative perspective, institutional growth, like competential growth, shall be measured through both formal and material parameters. I shall examine them below.

A.1. Formal Institutional Growth.

In order to measure institutional growth from a formal perspective, I shall employ two different parameters: firstly, the extension of majority voting; and secondly, the increase of the powers of the Community supranational institutions that intervene more decisively in the Community regulatory process, such as the Commission, the European Parliament, and the European Court of Justice.

The relevance of both parameters is the following. Concerning the first, the Member States' sovereignty is curtailed whenever the Treaties make an extension of majority voting, since it is at least theoretically possible that one or more Member States could be outvoted when adopting a legally binding decision. Further, the principles of supremacy and direct effect will do the rest: at the end of the day, outvoted Member State(s) may be obliged to implement the Community measure in question as a result of the constitutionalisation of the Community legal order.

Concerning the second, it is obvious that an increase in the powers of the European

Parliament, the Commission and also the ECJ may result in a parallel limitation of the Council's or Member States' autonomy to regulate matters in which these institutions have an input (Dehousse, 1994a:103). This shows in itself the strong correlation that exists between the vertical and the horizontal Community axis. Both aspects shall be examined in the following pages.

A.1.1. Majority Voting.

The Treaty of Rome established at least 25 cases in which the resort to voting was foreseen[59]. Yet in 1966, Member States would sign the so-called "Luxembourg Compromise"[60], which overruled in practice the possibility to resort to voting in those cases provided by the Treaty of Rome.

In turn, the SEA established 13 more cases in which resort to a vote was foreseen[61]. Finally, the TEU has provided for majority voting in at least four more cases, all of which constitute fields of relevance from a qualitative perspective[62]. The findings as regards this parameter are summarized in Table VI.

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[59]The list is the following: Art. 7; Art. 8; Art 20; Art. 21.1°; Art. 22.2°; Art. 25; Art. 43.2° (third paragraph); Art. 43.3°; Art. 44.4°; Art 44.5°; Art. 55; Art. 63.2°; Art. 69; Art. 70.2° (second paragraph); Art. 75; Art. 79.3°; Art. 87; Art. 94; Art. 111.3°; Art 112; Art. 113; Art. 114; Art. 116.

Further, in 1977, the Treaty amending certain financial provisions of the European Economic Community Treaty (OJEC L 359 of 31 December 1977) established two more cases in which resort to a majority vote was foreseen: these were Arts. 203 and 204 of the Treaty of Rome.

[60]Note the remarks *infra*, in section A.2.1., in which the process of material growth as regards majority voting is analyzed.

[61]The list is the following: Art. 49; Art. 56.2°; Art. 57.1; Art. 57.2°; Art. 86; Art. 28; Art. 59 (second paragraph); Art. 70.1°; Art. 84.2°; Art 100 a; Art 118 a 2°; Art. 130 e; Art. 130 q.

[62]Note the following list: Art. 109 j 3° and 4°, which regards the decision on the transition to monetary union; Art. 100 c 3°, which regards visa policy (though only from January 1996); Art. 130 s 1°, which regards environmental policy (though Art. 130 s 2° imposes unanimity for the adoption of a certain number of decisions).

A.1.2. Supranational Institutions.

With regard to the European Parliament, its legislative powers were restricted to consultation under the Treaty of Rome[63]. Nevertheless, it is important to note the significance of the role of the European Parliament in the adoption of the Community budget. When the Treaty of Rome was enacted, the role of the European Parliament concerning the adoption of the Community budget was basically limited to consultation. Yet the Member States made two important modifications to the Treaty of Rome regarding this point. The first was made in 1971[64] and granted the European Parliament the power to amend unilaterally the so-called "non-obligatory" expenditure (although restricted to a certain threshold imposed by the Council). The second was established in 1977[65], and granted the European Parliament the power to veto the ensemble of the Council's budget proposal. These two modifications gave an important say to the European Parliament as far as spending policies are concerned. Moreover, these powers were sometimes used as a weapon in the hands of the E.P. to force the Council to change its view in political matters that went well beyond the scope of spending policies[66].

Further, the SEA introduced important modifications regarding the powers of the European Parliament. First, the SEA set six more cases in which consultation of the European

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[63]Besides "facultative" consultation by the Council, the TEEC established 22 cases of "compulsory" -though not binding- consultation of the European Parliament (Alonso García, 1994:80).

[64]Note the Treaty amending certain financial provisions of the Treaties establishing the European Communities and of the Treaty establishing a Single Council and a Single Commission of the European Communities, of 22 April 1970 OJEC L n° 2 of 2 January 1971.

[65]Treaty amending certain financial provisions of the Treaties establishing the European Communities and of the Treaty establishing a Single Council and a Single Commission of the European Communities of 22 July 1975 OJEC L n° 359 of 31 December 1977.

[66]The E.P. has used its powers to exert political pressure on at least two occasions, in 1979 and 1984 (De Ruyt, 1987:21).

Parliament was made compulsory. And second, it established two innovations: the cooperation procedure and the assent procedure. The cooperation procedure was provided for ten cases[67]. Although not granting a final power of decision to the European Parliament, this innovation had the merit of inserting this institution in the core of the Community decision-making process[68]. The assent procedure[69] was provided for two cases, accession to the Community of new members[70], and association agreements[71]. It is important to note that, as opposed to the cooperation procedure, the assent procedure granted a real power of decision to the European Parliament (though this power was subject to the condition that the E.P. should act "by an absolute majority of its component members" in both cases).

Finally, the Maastricht Treaty further enlarged the formal powers of the European Parliament by, first, expanding the cases of compulsory consultation to 32[72]; second, by extending the assent procedure to 6 more cases[73]; third, by enlarging the number of cases

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[67]The list is the following: Art. 7; Art. 49; Art. 56; Art. 57.1°; Art. 57.2°; Art. 66; Art. 130 i; Art. 100 a.1°; Art. 118 a 2°; Art. 130 e.

[68]The main feature of the cooperation procedure is that it establishes what Alonso García (1994:113) calls a "conditional veto" in favour of the E.P.: the European Parliament may veto (by a majority of its members) a Council common position. In this case the only alternative that is left to the Council is to adopt the measure unanimously.

[69]The main feature of this procedure is that it gives the European Parliament the power to confirm or reject the measure in question.

[70]Article 237 of the EC Treaty.

[71]Article 238 of the EC Treaty.

[72]The list is the following: Art. 8 b; Art. 8 e; Art. 43.2°; Art. 43.3°; Art. 56 (though presently obsolete); Art 66 (though obsolete in part); Art 57.2°; Art. 75.3°; Art. 87; Art. 94; Art. 99; Art. 100; Art. 100c; Art. 104 c 14°; Art. 106.6°; Art. 109.1°; Art. 109 a 2° b); Art. 109 f 1°; Art. 109 f 6°; Art. 109 j 2°; Art. 109 j 4°; Art. 109 k 2°; Art. 130 3°; Art. 130 b; Art. 130 i 4°; Art. 130 o; Art. 130 s 2°; Art. 130 s 3°; Art. 201; Art. 209; Art. 228.3°; Art N.

[73]The list is the following: Art. 8 a 2°; Art. 105.6°; Art. 106.5°; Art. 138.3°; 130 d; Art. 228.3°.

in which the cooperation procedure is envisaged from 10 cases (SEA situation) to 21 cases[74]; and fourth, and most important, by establishing the new codecision[75] procedure for 11 cases[76].

Turning now to the Commission, the Treaty of Rome had granted this institution one major power as far as decision-making was concerned: the power to initiate the Community legislative process. Two brief points shall be made in this regard.

Firstly, the right of initiative was established by the Rome Treaty as an exclusive Commission power[77] (Temple Lang and Gallagher, 1995). The Commission's monopoly on making proposals therefore provided this institution with an important weapon[78] that has worked as one of the motors for integration[79]. However, as Noël remarks (1194:22), the TEU has slightly curtailed the Commission monopoly of initiative. Thus as regards some sensitive

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[74]The list is the following: Art 75.1°; Art. 103.5°; Art. 104 a; Art. 104 b 2°; Art. 105 a 2°; Art 125; Art. 127; Art. 129; Art. 130 o; Art. 130 s. 1°; Art. 130 w.

[75]Its main feature is, following again the line settled by Alonso García (1994:121), to grant the European Parliament a power of "definitive veto". In the framework of the third reading established by article 189 B of the TEU, the EP may exercise this definitive veto in two cases: 1) the first possibility is that the Conciliation Committee (established by article 189 B 4°) adopts a joint Council-EP text, in which case the EP's plenary may reject the text by an absolute majority of the votes cast (189 B 5°); 2) the second possibility is that the C.C. reaches no agreement. In this latter case there are several variants: a) nothing happens, and therefore the act is not adopted; b) the Council adopts, by a qualified majority, the act in question, integrating the amendments which were proposed by the EP. In this second case, the EP's plenary may still reject the adoption of the act if a majority of its members decides to do so.

[76]The list is the following: Art. 49; Art. 56; Art 57.1°; Art. 57.2°; Art. 66; Art. 110 a 1°; Art. 126 4°; Art. 129 4°; Art. 129 d; Art. 130 i; Art. 130 s 3°.

[77]Nevertheless, the Treaty of Rome established cases in which the Commission had merely a role of recommendation. See, for instance, Articles 108.1° and 113.2°.

[78]Note for example the case of state aids, in which the Commission has refused in certain periods to make proposals to the Council, in order to put pressure on Member States.

[79]Note however Art. 152 of the TEEC (now Art. 152 of the TEU), which established the Council power to request the Commission to make proposals. Nevertheless, the Commission remains free not to accept the Council request (though in practice the Commission follows very often if not always the Council suggestions at this regard). Further, the TEU has granted a similar right to the EP in Article 138 B.

decisions, the Council will no longer have to decide on a Commission proposal, but on a simple recommendation[80]. Further, the Commission will have to share in some cases its right of proposal with other institutions, such as for example, the future European Central Bank[81].

A second note regarding the Commission powers of initiative relates to article 149, which has survived all Treaty amendments[82]. This article has considerably enhanced the Commission's powers for it requires Council unanimity in order that a Commission proposal might be modified. However the Maastricht Treaty has qualified to a certain extent this Commission right, notably in regard to the third reading of the codecision procedure[83].

Briefly stated, the formal powers of the European Court of Justice, as established in the Rome Treaty, were the following[84]. In the first place, the ECJ was attributed powers to control the legality of Community institutions' acts as regards Community law[85]. This was achieved through the creation of four mechanisms: first, an action for the annulment of illegal Community acts[86]; second, a remedy invoking the inapplicability of illegal Community acts (the so called *exception d'illégalité*[87]); and a third action by which the Community

[80]Note, for example, Article 100 c. 2°, in the area of visa policy.

[81]Note, for instance, Articles 106.5° and 106.6° of the TEU.

[82]Now established in article 189 A of the TEU.

[83]Note Article 189 a which forwards to Article 189 b 4° and 5°.

[84]The typology of actions before the ECJ that are described in the following were maintained by the SEA and the Maastricht reforms, although slight modifications were introduced. Here I shall just describe the actions as they were originally established in the TEEC.

[85]Rideau's (1994:583-741) categorisation of Community legal actions in front of the ECJ is followed here.

[86]Arts. 173, 174 and 176 of the TEEC.

[87]Art. 184 of the TEEC.

institutions' failure of their obligation to act may be declared[88]. The corollary of these mechanisms was a fourth, the action for non-contractual Community liability[89]. In the second place, the ECJ was granted powers to control the legality of Member States' acts as regards Community law. Belonging to this second category are the following mechanisms: first, an action for a declaration of Member States' violations of Community law[90]; and second, a very specific action aiming at the ECJ's control of the application of Community law made by national jurisdictions, which was the so-called "preliminary reference" regarding interpretation and validity[91].

I shall shortly move on to the explanation of the latter kind of action (preliminary reference), due to its peculiarities (no other system of integration based on public international law provides it) and to the fact that the ECJ has above all employed this mechanism in order to reinforce its jurisdictional powers and to promote Community integration through the constitutionalisation of the Community legal order, by way of the establishment of some of the most important principles in which the latter one rests[92][93].

Article 177 of the Rome Treaty established a distinctive system of judicial cooperation between the national and the Community judiciaries, whose main feature was (and still is) the

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[88]Arts. 175 and 176 of the TEEC.

[89]Arts. 178 and 215.2° of the TEEC.

[90]Arts. 169, 170 and 171 of the TEEC.

[91]Art. 177 of the TEEC.

[92]The establishment of the principles of supremacy, direct effect and, more recently, Member States' responsibility derived from the violation of Community law, has been settled by the ECJ in the framework of preliminary rulings. Note in this sense the following much celebrated set of cases: Case 26/62, *Van Gend en Loos*, [1963] ECR 1, for direct effect; Case 6/64, *Costa v ENEL*, of 15 July 1964 [1964] ECR 585, for supremacy; and *Francovich* (note source *infra*) for Member States' responsibility as a consequence of violation of Community law.

[93]This is not to suggest that other jurisdictional mechanisms have been irrelevant in the constitutionalisation of the Treaties, but only to underline the significant role that Art. 177 references have had in this respect.

granting to the national judge of a power to ask questions to the ECJ regarding a norm of Community law, the validity and/or interpretation of which a doubt had arisen in the course of a case being examined before the national jurisdiction. This faculty, which belongs to the national judge, becomes, according to article 177, an obligation in the case in which the matter is pending before a national court of last appeal. Further, the ECJ must give a ruling in which, on the one hand, the national judge is given sufficient guidance as to make possible for him or her to solve the case, without, on the other hand, encroaching on the national court's competences. Accordingly, the ECJ must leave a certain margin of manoeuvre in order that it is the national court who decides at the last resort the correlation between the national and the Community norm (or norms) which were in apparent conflict.

In turn, the SEA reform introduced the possibility of adding to the ECJ another court "with jurisdiction to hear and determine at first instance"[94]. The Member States made use of this possibility in a Council decision of 1988[95], by creating a Court of First Instance. Further, Article 168 a of the TEU has formalized in the Treaties the existence of this new judicial institution.

The powers of the Court of First Instance are specified in the Council decision adopted in 1988. To summarize, the CFI has jurisdiction to hear the following: first, staff cases[96]; second, actions brought by private individuals and companies against Community institutions' acts (both actions for annulment and actions for failure to act); third, actions for non-contractual liability brought by private individuals or companies; fourth, actions in contract brought by private individuals or companies. Thus in general terms, actions brought by private

[94]Note Article 168 a of the TEEC as modified by the SEA.

[95]Council Decision of 24 October 1988, OJEC L 319/1 of 25 November 1988.

[96]Art. 179 TEU

individuals or companies are heard by the Court of First Instance, whereas all other cases will go to the ECJ. Therefore the setting up of the Court of First Instance has not been translated into an increase of the powers of the Community judiciary, at least from a formal standpoint. The rationale underlying its creation has been, as Hartley remarks, the reduction of the ECJ backlog[97] (Hartley, 1994:63).

To put an end to our survey of the process of formal growth of the EC judiciary, it is important to remark that the TEU has introduced new restrictions on the capacity of the ECJ and the Court of First Instance to extend their powers beyond what is formally established in the Treaties. Thus article L of the TEU explicitly excludes the jurisdiction of the ECJ from matters regarding the second and third (intergovernmental) pillars[98]. This implies an apparent retreat as regards the formal powers of the Community's judicial institutions with respect to the past, which gives another illustration of the counter-tendencies that, in terms of formal growth, abound in the Maastricht reform of the Treaties. The findings regarding the formal growth of the Community supranational institutions are summarized in Table VI.

[97]Note however Hartley's (1994:63) sceptical view as regards the achievement of this objective.

[98]With one exception, foreseen by article L b) of the TEU: international agreements negotiated between the European Union and third states may give the ECJ jurisdiction to interpret and decide on the application of their provisions. Note also Art. K.3.2°.c) of the TEU.

Table VI: Majority voting; E. Parliament and Commission formal growth of powers.

Parameters	TEEC	SEA	TEU
Majority voting	25	25+13	38+4
E.Parliament	- Compulsory Consultation: 22 - Budget Proced.	- C. Consultation: 22+6 - Cooperation: 10 - Assent Proced:2 - Budget Proced.	-C. Consultation: 28+4 -Cooperation Proc: 10+11 -Assent Proc: 2+6 -Codec. Proced: 11 - Budget Proc.
Commission	-Proposal -Council unanimity for modification of Commission proposals	-Idem	-Idem (but recomm. of Com. for some sensitive issues; share recomm. with other Cty. insts.)
ECJ	-Control Community Institutions actions -Control Member States actions	-Idem + possibility of creation C. of F. Instance	-Idem + Court of First Instance -Article L

A.2. Material Institutional Growth.

The same remarks that were made when measuring the process of competential expansion of the Community from a material perspective also apply here. Material methods of measurement of the process under examination, in this case, the process of Community institutional evolution, are intended to complement the data regarding formal institutional

growth by giving information about the real developments in the Community's institutional dimension during the periods under survey. Community institutional evolution shall be therefore examined from this angle in the following pages.

A.2.1. Majority Voting.

The question that a material analysis regarding majority voting is called upon to answer is whether or not in the different periods of Community evolution this rule applied *de facto* in those cases for which it was formally provided by the Treaties.

Firstly, as regards the Treaty of Rome period, the answer must be negative. As is widely known, the adoption by Member States of the "legally dubious" (Weiler, 1991a; Hartley, 1994:21) "Luxembourg compromise"[99] meant that, in practice, all decisions were

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[99]The Luxembourg compromise was adopted in an extraordinary session of the European Council held in Luxembourg on the 28 and 29 January 1966. This was the Member States' reaction to the so called "chaise vide" crisis, that, from 30 June 1965, set France against its Community partners in relation to several decisions to be adopted in the framework of the Common Agricultural Policy. The final text of the Luxembourg compromise is reprinted in EEC Bull. 3-1966, at page 9, and reads as follows:

"I-. Where, in the case of decisions which may be taken by majority vote on a proposal of the Commission, very important interests of one or more partners are at stake, the Members of the Council will endeavour, within a reasonable time, to reach solutions which can be adopted by all Members of the Council while respecting their mutual interests and those of the Community, in accordance with article 2 of the Treaty.

II-. With regard to the preceding paragraph, the French delegation considers that where very important interests are at stake the discussion must be continued until unanimous agreement is reached.

III-. The six delegations note that there is a divergence of views on what should be done in the event of a failure to reach a complete agreement.

IV-. The six delegations nevertheless consider that this divergence does not prevent the Community's work being resumed in accordance with the normal procedure".

Further, the text of the Luxembourg agreement incorporated a set of decisions that should be adopted by a unanimous vote:

"The Members of the Council agreed that decisions on the following should be adopted by common consent:

a) The financial regulation for agriculture;
b) Extensions to the market organization for fruit and vegetables;

adopted unanimously during the whole TEEC period. Notwithstanding this institutional shift, there is some evidence to show that the majority principle did not totally disappear from the Community institutional map. Thus for instance, De Ruyt remarks that from the period that goes from 1966 to 1974, at least "6 to 10 decisions were adopted by resorting to a vote". Further, he states, "from 1974 to 1979 at least 30 decisions" were adopted by majority vote (De Ruyt, 1987:116). De Ruyt also notes that in the years before the adoption of the SEA there was already an increasing tendency to adopt decisions by resorting to a vote. From 1980 to 1984, majority voting was used in around 90 cases. More importantly, some of the decisions taken by majority were of great importance, such as the budgets after 1982 and the agricultural prices for 1982-1983. This latter decision was adopted by majority despite the fact that the United Kingdom invoked the application of the Luxembourg compromise. This case was by no means unique. There were other examples in which there was a vote in spite of the explicit invocation of the Luxembourg compromise by some Member States. Thus for instance, in December 1982 Denmark opposed several Council regulations for fisheries by invoking the Luxembourg compromise, and further in June 1983, it invoked the Luxembourg compromise to oppose a Council decision regarding the "Hareng" issue. Denmark's demands were rejected by the other Member States, and decisions were adopted by majority in both cases (De Ruyt, 1987:117; Hartley, 1994:21-23).

Secondly, as regards the SEA, this reform formally introduced, as remarked in a previous section, majority voting for the adoption of important decisions regarding, notably, the completion of the internal market[100]. From a material perspective, it was more

c) The regulation on the organization of sugar markets;
d) The fixing of common prices for milk, beef and veal, rice, sugar, olive and oil and oil seeds".

[100]Art. 100 a TEEC.

significant that Member States expressed their commitment to implement majority voting once the SEA came into force. This compromise was illustrated by, notably, the reform of the Rules of Procedure of the Council that took place in October 1987[101]. The new Article 5 of the Council Rules of Procedure established that a majority of the Member States was sufficient to proceed to a vote, on the request of a Member State or the Commission. This reform greatly fostered the resort to voting in Community decision-making during the SEA period (Dehousse, 1994a:103).

Finally, as regards the TEU period, Table VII gives evidence that illustrates that the majority principle is regularly applied at present, and that, in general terms, Member States (even the stronger ones) have ceased to invoke the Luxembourg compromise in order to protect vital interests. It can be therefore concluded that majority voting constitutes today a common practice in Community decision-making.

[101]Council Rules of Procedure, OJEC L 291 of 15 October 1987.

Table VII: Member States outvoted 1993-1995.

Member State	**N° times outvoted 6/12/93-1/9/95.**
U.K.	16
Germany	14
Netherlands	15
Denmark	15
Spain	4
Portugal	6
Italy	5
France	2
Greece	6
Luxembourg	5
Ireland	3
Belgium	2

Source: European Voice 2-8 November 1995 (Vol. 1 n° 5), pag 2.

A.2.2. Supranational Institutions.

A material analysis of the growth of Community supranational institutions must address two sets of questions. Firstly, there is the question of whether or not the powers that the Treaties had formally granted to the Community supranational institutions have been *de facto* used, and the extent to which they have been used. And secondly, there is the question of whether the Community supranational institutions have gone beyond the powers that the Treaties had given them. The analysis that follows will try to answer both questions as regards the E.P., the Commission and, finally, the ECJ.

The first question to be answered is, therefore, whether the Community supranational

institutions have made use of their formal powers or not, and the extent to which they have done so. As regards the European Parliament, my reflections shall be limited to the two most important legislative procedures that exist at present, that is, the cooperation procedure (introduced by the SEA) and the codecision procedure (introduced by the Maastricht Treaty).

As regards the cooperation procedure, the analysis of the first five and a half years of implementation of this procedure (from July 1987 to December 1993) presented in Table VIII, gives the following picture as regards 332 procedures that had completed both readings.

Table VIII : Implementation of cooperation procedure by EP (July 1987-December 1993).

a) At the first reading:

- The Parliament amended **285** of the Commission proposals;

- The Commission accepted **2.499** of the **4.572** amendments adopted by the E.P. (that is, **55%**) and modified its proposals to the Council accordingly;

- The Council approved **1.966** of the **4.572** parliamentary amendments (i.e., **43%**).

b) At the second reading:

- The Parliament approved without amendment **129** of the Council common positions and amended **203** of them.

- The Parliament adopted a total of **1074** amendments to the Council's common positions, **475** of which (**44%**) were supported by the Commission and **253** (**24%**) by the Council

- In **4** cases, the EP rejected a common position, and, in all but **1**, the text was not adopted since the Council was unable to overrule Parliament by unanimity within the three months established.

Source: Corbett et al., (1995:199).

What may be extracted from these cold figures is a two-fold point: firstly, they show with certainty that the European Parliament actively participated in the Community legislative process (something that was basically reserved for the Commission and the Council in the TEEC period) during the SEA period; and second, above all, the high number of EP amendments that were finally retained according to the above-mentioned data, allows one to state that the EP produced a significant input into Community decision-making.

As regards the codecision procedure, a survey made from the entry into force of the Maastricht Treaty (November 1993) to July 1994 gives, of a total of 16 codecision procedures, the following picture (note Table IX):

Table IX : Implementation of the codecision procedure by the EP (November 1993-July 1994).

- In 11 cases agreement was reached between the two institutions (EP and Council) without needing to convene the conciliation committee.
- In 4 cases, the conciliation committee approved one text which was then endorsed by both institutions.
- In 1 case, the conciliation committee was unable to reach a joint text. Then the Council confirmed its common position, which was then rejected by the European Parliament.

Source: Corbett et al., (1995:203-204).

Even if it is still too early to give an overall assessment of the use by the EP of the codecision procedure, the previous evidence allows one to think, at least preliminarily, that the EP is currently implementing its codecision powers to the full, and even exerting its definitive veto if need be. This latter reflection is even more apparent if it is taken into account that the measure on which the EP decided to exert its veto was a qualitatively important one (the directive for the liberalisation of voice telephony). In short, if the figures that are presented here were confirmed by future research on the legislative activity of the E.P., it could be concluded that from a material perspective this institution has made a wide use of its formal powers.

The second question to be answered from a material angle is whether the Community supranational institutions have gone beyond the formal powers arrogated to them by the Treaties. In this regard, the history of the European Parliament shows that this institution has constantly tried, at times successfully, to obtain through informal means powers beyond those explicitly attributed by the Treaties. Two examples will be enough to illustrate this trend. The

first is taken from the Community's external relations policy. As has been previously suggested in the formal analysis of the E.P.'s powers, the European Parliament only enjoyed a power of consultation as regards the negotiation and conclusion of association agreements[102]. Thus, in 1964, and at the demand of the EP, the Council adopted the so-called *Luns I* procedure, which granted the European Parliament the faculty to ask the Council that a debate on the mandate given to the Commission to negotiate the agreement would be held in the plenary before negotiations started, thus giving the European Parliament the possibility to oppose the initiation of negotiations. Further, the *Luns I* procedure established that both the Commission and the Council should keep the EP informed throughout all the Treaty negotiations. Finding inspiration in the *Luns I* procedure, the Council would adopt the *Luns II* procedure (or *Westerterp* procedure) for commercial agreements[103] in 1973. This procedure allowed for the possibility that debates could be organised in the plenary before negotiations were started, besides the establishment of other information obligations upon the Commission and the Council in favour of the EP. Though their legally binding character was dubious, both procedures were *de facto* applied once the Council adopted them, and were finally established in the European Parliament Rules of Procedure (Rideau, 1994:459).

The second example that illustrates the trend of going beyond the formal powers that the Treaties have attributed to the European Parliament is the recently adopted interinstitutional agreement between the Commission, the Council and the European Parliament (the so called "modus vivendi[104]") as regards the comitology procedures. After

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[102]Article 238 TEEC.

[103]Note Articles 110 to 115 TEEC.

[104]Modus Vivendi of 20 December 1994 between the European Parliament, the Council and the Commission, concerning the implementation measures for acts adopted in accordance with the procedure laid down in Article 9B of the EC Treaty, OJEC C 102/1 of 4 April 1996.

the Maastricht reform of the Treaties, the European Parliament was concerned that in those cases in which the Council delegated implementation powers to the Commission, the EP codecision powers would be circumvented, since the 1987 comitology procedure had not been updated to the new institutional situation. The interinstitutional agreement therefore satisfied the EP's demands, by putting the comitology procedures in line with the new EP codecision powers.

Moving to the material analysis of the Commission's powers of initiative, the following data may give a general impression of the extent to what the Commission has employed them.

Table X: Number of Commission proposals in SEA and TEU.

YEAR	N° OF PROPOSALS
1990	185
1991	111
1992	89
1993	75
1994	51
1995	52*

(1): Source: Report on the Operation of the Treaty on European Union[105], Annex n° 9.

* Forecast from the Commission work programme for 1995[106].

In a few words, (and lacking more complete data, at least to my mind) what can be

[105]SEC(95) 731 final of 10 May 1995.

[106]COM(95)26 final.

extracted from the previous figures is that the Commission's use of its powers of initiative has been significant, above all in the last years of the SEA period. However, one may observe a reduction of proposals in the first years of operation of the Maastricht Treaty, a diminution that shall be subject to analysis in another part of this thesis[107]. Here it shall simply be pointed that the sample offered above gives the impression that the Commission has apparently implemented its powers of initiative[108].

Further, it may be submitted that the Commission has developed, as has the European Parliament, a trend towards the extension of its powers beyond the formal limits established by the Treaties. A good example of this leaning may be found, again, in the field of external relations, in which the Commission has been particularly dynamic in pushing for the extension of its powers. Thus the Commission attributed to itself, almost from the inception of the process of Community integration, the power to exercise the rights of passive and above all active international representation. Therefore heads of missions of third states that wanted to be accredited before the Community used to present their credentials to the President of the Commission[109]. Further, the Commission started to establish its own offices in third states, in order that Community interests were represented in the international sphere, and on the

[107]Note Chapter IV, *infra.*

[108]I think it is not necessary to insist in this point, since the material development of the Commission's power of initiative may be indirectly induced from the data of the Community's "regulatory output", presented *supra.* By definition, having the Commission the almost exclusive monopoly of legislative initiative, the extraordinary development of the Community's regulatory activity is the clearest indication that the Commission has *de facto* implemented them. The sample offered here -which is, admittedly, but a very partial view of the overall situation- may serve to further underline this aspect.

[109]Note Art. 17 of the Protocol on the Immunities and Privileges of Third States Missions Accredited before the European Communities, which established the right of passive international representation for the Community, without specifying the particular institution that should exercise this right.

basis of the powers of internal organization that were granted to it[110]. To be sure, the Member States reacted to this unilateral expansion of powers by the Commission, and at times bitterly[111]. Though today the question seems to be settled as to further respect the Council and Member States' passive and active international representation rights, the Commission has finally ensured for itself at least concurrent powers in this field[112].

In turn, the European Court of Justice has also made a wide use of the powers granted to it by the Treaties, as suggested by data established in Table XI.

Table XI: Judgements pronounced by the ECJ from 1953 to 1989.

Years	Preliminary refs.	Direct Actions	Cases involving staff	Actions brought by individuals	Total
1953-69	61	144	90	..	295
1970-79	498	157	174	..	829
1980-89	825	610	340	5	1780
Total	**1384**	**911**	**604**	**5**	**2904**

[110]Note Commission internal rules regulation 94/492, OJEC L 230 of 11 September 1993.

[111]Note, for example, the conclusions of the European Council at Luxembourg of 17 and 18 and 28 and 29 January 1966 (the same in which the Luxembourg compromise was adopted) in which Member States criticized the Commission since "...letters of credence are presented to the President of the Commission who has instituted for these occasions a ceremony modelled on that used between states, whereas the Treaty of Rome lays down that the Council alone may commit the Community vis-à-vis non-member countries. A stop must therefore be put to present practices and all the prerogatives of the Council restored". Therefore, the European Council took the following resolution: "3. The credentials of the Heads of Missions of non-member states accredited to the Community will be submitted jointly to the President of the Commission and to the President of the Council, meeting together for this purpose". Note EEC Bull. 3-1966, at pages 7 and 9.

[112]Note in this regard article J.6 of the TEU.

Source: Eurostat (1993:32).

To be sure, these data should be interpreted with care, since the implementation of the ECJ's powers is not only contingent on the ECJ's will, but also on the cooperation of other actors. In other words, for example, the success that Article 177 actions have had, as reflected in the data above, depends on the cooperation of the national judiciary as much as it depends on the ECJ's will to implement its powers (Burley and Mattli, 1996). However, with this qualification in mind, it may be noticed that the ECJ's powers have been exponentially developed through the years[113]. This is particularly the case as regard Article 177 actions. The ECJ has endeavoured to employ its powers under this provision to their full extent by, for example, giving a very loose reading of the conditions through which preliminary references may be declared admissible. Thus even in the cases in which the national court states its question wrongly, the ECJ, instead of declaring the action inadmissible, rephrases the question(s) and resumes the proceedings[114] (Hartley, 1994:296). Simply this demonstrates that the ECJ, as opposed to other international courts, has always attempted to make the most of the powers that the Treaties have attributed to it.

Further, the ECJ has extended its powers, as have the other Community supranational institutions, beyond the formal limits established by the Treaties. One of the most clear examples in this regard may be found in the *Francovich* case[115]. The case concerned a

[113]Notice also that the figures of Table XI correspond to judgements pronounced by the ECJ, and not to actions brought before it.

[114]The conditions set by the ECJ to give an Art. 177 ruling are particularly loose. They are three-fold: 1) there must be a genuine dispute (note, for instance, case 104/79, *Foglia v Novello*, [1980] ECR 745); 2) this dispute must be before a body which has the power to resolve it in a legally binding way (note, for instance, case 138/80, *Borker*, [1980] ECR 1975); 3) the questions put before the ECJ must be at issue in the national proceedings (note, for instance, case 14/86, *Pretore di Saló*, [1987] ECR 2545). Note also Hartley (1994:286).

[115]Cases C-6, 9/90, *Francovich v Italy*, [1991] ECR I-5357.

directive which Italy had not implemented after its deadline had expired, and which imposed on Member States the obligation to establish a series of financial guarantees for employees in case of employers' insolvency. Asked by an Italian court through a preliminary reference whether Member States incurred liability for not having implemented in their national legal order the directive at hand, the ECJ held that "there is a general principle inherent in the Treaty that a Member State is liable to compensate individuals for damages caused to them as a result of a violation of Community law for which the Member State is responsible" (my emphasis). In this way the ECJ did not only move forward a step further its doctrine on the effectiveness of Community law (Hartley, 1994:225), but created (at least indirectly) a new action for Member States' liability as a result of the violation of a Community legally binding obligation, which did not formally exist when the TEEC and the SEA were enacted.

Some conclusions may now be drawn from our previous analysis of the material growth of the Community institutional dimension. First, it is apparent from the data that have been examined that all the Community institutions made every effort in order to implement their formal powers to their full extent. In this connection, there are no apparent contradictory trends, at least they have not surfaced from the data. All the Community institutions were therefore extremely active as regards the materialization of their powers. A second conclusion is that all the Community supranational institutions have attempted to go beyond the powers that the Treaties attributed to them. The ways in which this was tried, and the results achieved, diverge depending on the institution that is analyzed. But in all cases it was easy to find examples in which, as a matter of fact, the Community institutions had gone beyond their formal powers.

Therefore the overall conclusion is that during the three periods under survey one may

speak of a striking "institutional activism" on the part of the Community supranational actors. As such this major finding poses a number of questions, such as the rationale underlying this trend and the role played by the Community supranational institutions in the development of the process of growth of the Community powers. Both aspects, and also others, will be analyzed further in this thesis[116].

[116]Note, in particular, Chapter II, *infra*.

V-. CONCLUSIONS.

The questions that were posed at the beginning of this chapter may be now answered. Firstly, in aggregated terms, the data reveal a general tendency towards growth both as regards the competential and institutional dimensions of the process under survey, and both from a formal and a material perspective. Therefore it may be stated that, leaving aside particular moments in Community evolution, both the institutions' powers and the Community's competences experienced an enduring growth during the three periods that were examined. In none of these periods did a significant retrenchment of the Community's powers surfaced in the data.

Secondly, in particular, it should be noted that the patterns of competential and institutional growth diverge. Whereas institutional growth, both formally and materially speaking, could be accommodated within the pattern of gradual and sustained development, the process of competential growth is more anarchic, less systematic. Notice in this regard the extraordinary regulatory and budgetary growths that occurred in particular moments of Community evolution.

Thirdly, both institutional and competential growth present particular counter-tendencies. That is, there are concrete cases in which the Community's powers and competences stagnate or even retrench. However, whereas retrenchment of Community competences occurs both at a formal and material level (note, for instance, some of the new TEU provisions and the case of the Common Transport Policy during the TEEC), in the case of institutional evolution, retrenchment or stagnation occurs mainly at a formal level (note, for instance, the limitation of Commission and ECJ powers made by the TEU). In general the TEU is the first time that there is a clear attempt to limit, at a formal level, both Community

competences and the institutions' powers.

Fourthly, both competential and institutional evolution present a similar trend: material development breaks, in many occasions, the formal borders imposed on Community development. The conclusion that may be drawn from the third and fourth points is that the process of growth of Community powers is not linear, in which Member States attribute competences/powers to the Community -> which then goes onto develop them. On the contrary, the evolution of the Community gives plenty of examples in which there is a lack of correlation between formal and material growth.

The previous aspect introduces a fifth and final point, which is the paradoxical character of the process of growth of the Community's powers. Some of the most relevant have been already hinted (i.e., why this lack of correlation between formal and material growth?), but there are still others. For example, it is paradoxical that Member States accepted a move to majority voting during the SEA period, knowing the -at least potentially- harmful effects that this institutional shift could produce on their sphere of sovereignty. Further, it is also paradoxical that the most spectacular regulatory developments have occurred in those epochs in which, precisely, a discourse on the limitation of Community regulation was fashionable (note in this respect competential evolution in the final years of the SEA and in the first years of the TEU periods). All these paradoxes pose difficult challenges to any attempt to account for the causes underlying the process of evolution of Community powers. At the least, any explanation of such a process should take them into account. But this shall be discussed in the following chapter, when I shall deal with the question of why Community integrates.

Figure I: Legal Binding Acts, by Years

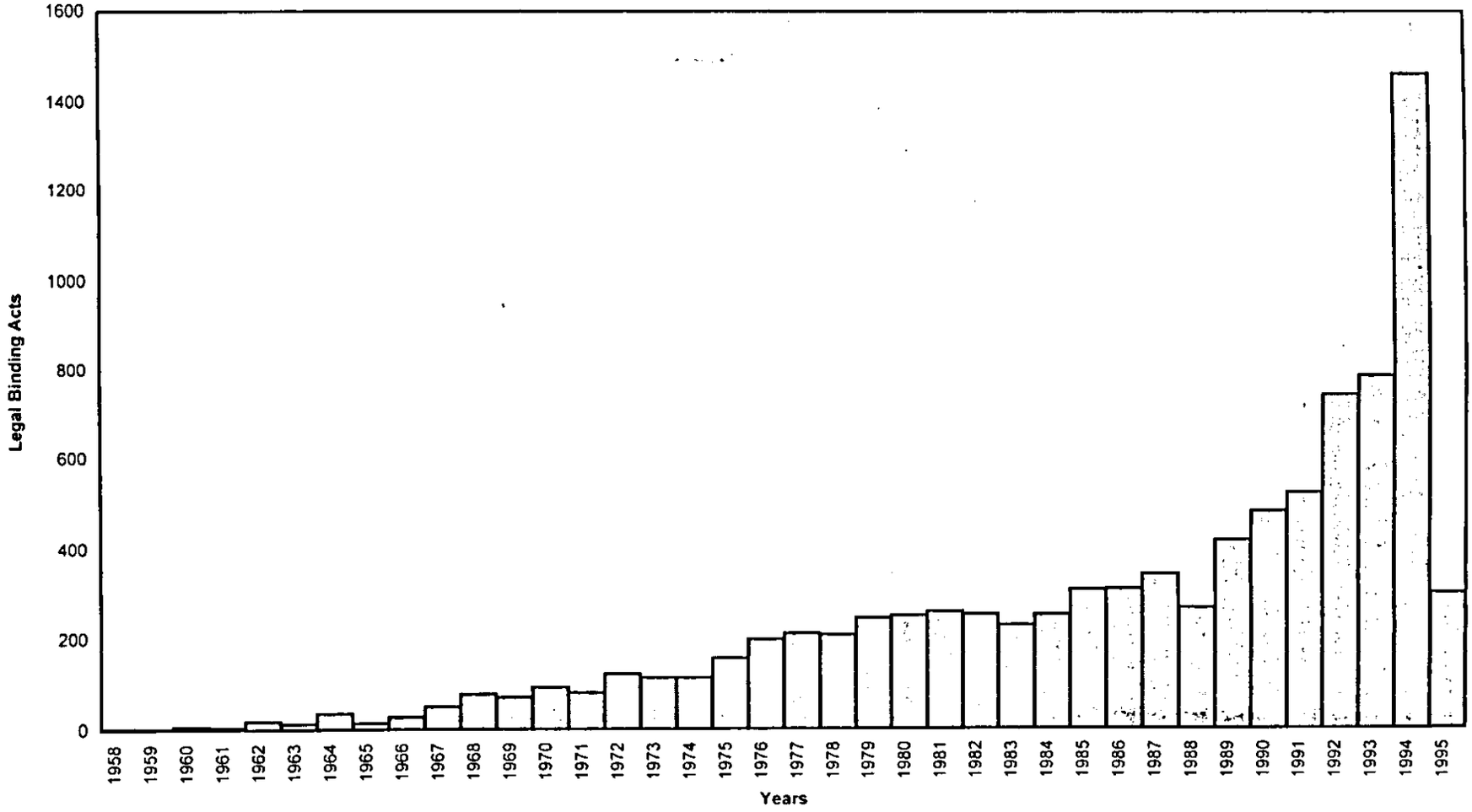
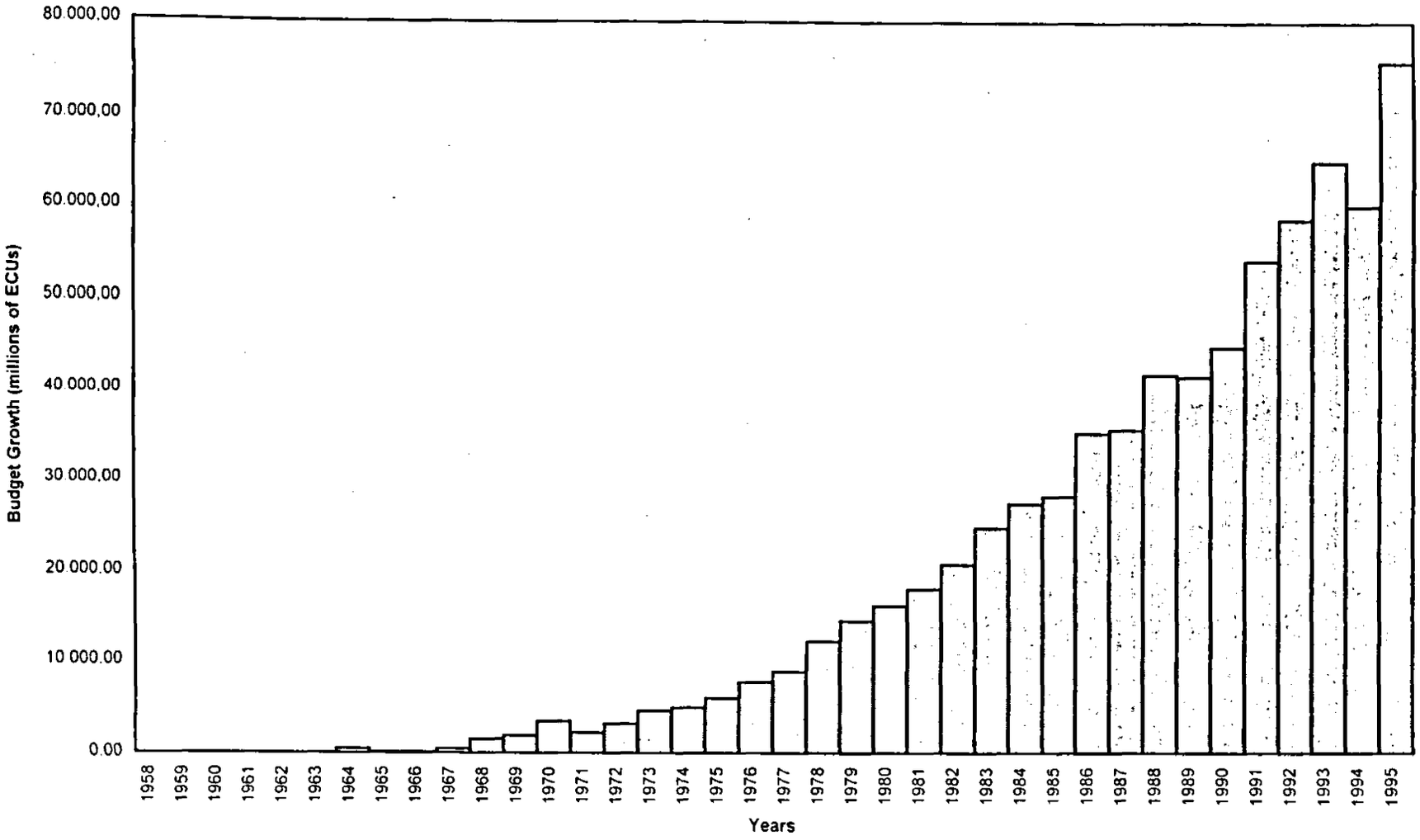


Figure II: Budget Growth (millions of ECUs), by Years



CHAPTER II: EXPLAINING THE PROCESS OF GROWTH OF THE COMMUNITY'S POWERS: FACTS, MODELS AND VARIABLES.

"Quand on veut reprendre avec utilité et montrer à un autre qu'il se trompe, il faut observer par quel côté il envisage la chose, car elle est vrai ordinairement de ce côté-là, et lui avouer cette verité, mais lui decouvrir le côté par où elle est fausse. Il se contente de cela, car il voit qu'il ne se trompait pas, et qu'il manquait seulement à voir tous les côtés; or on ne se fâche pas de ne pas tout voir, mais on ne veut pas s'être trompé; et peut-être que cela vient de ce que naturellement l'homme ne peut tout voir, et de ce que naturellement il ne se peut tromper dans le côté qu'il envisage; comment les appréhensions des sens sont toujours vraies".

Pascal, *Pensées*, 9-701.

I-. INTRODUCTION.

Positive analysis of Community integration involves not only description of this process but also explanation of it. Whereas the first Chapter of this thesis was devoted to the systematic exposition of the main trends of the process of Community growth, in this chapter I shall focus on the analysis and explanation of a selection of the facts that have emerged from this earlier description effort. For the purposes of explaining Community growth, I shall use as frameworks of reference a number of different theories of Community integration that have recently emerged. However, it must be noted at the outset that these theories are only used instrumentally in order that the explanatory variables of the process of Community growth which I wish to emphasise may emerge and be understood more easily. In other

words, the aim of this chapter is not to construct a model of Community integration, not even to develop some of the existing ones, but simply to focus on the elements that, in my view, constitute a necessary explanatory reference of the process of growth of the Community's powers. In this connection, it is necessary to start by stating that my explanation of the process of growth of the Community's powers is strongly influenced by the view that Community integration is "a complex, dynamic, and in many respects, unique process" (Dehousse and Majone, 1994:91). The direct implication of this view at an analytical level is that "[such a] process is driven by several engines operating according to different principles and sometimes out of sync" (Dehousse and Majone, 1994:92). Therefore, following Pascal's wise advice, it seems to me that all the integration models contain important explanatory elements, the potential combined analytic value of which could not completely emerge if only one of them were adopted.

Before entering into the following analysis, it is important to raise a methodological point. This is that explanations of the process of growth of the Community's powers are directly contingent on the facts one wishes to explain. In this Chapter, the primary aim will be to explain the general Community trend towards growth that has been examined in the preceding Chapter, but also to account for some of the more concrete Community developments. I shall attempt therefore to move continuously from the macro to the micro level, as a way to further refine my explanations.

Chapter II is therefore organised as follows. Section II includes, in line with what has been said before, a brief reminder of the facts upon which my explanations are grounded. In turn, section III attempts to give explanations to the previous facts, whose exposition is

structured along the lines of a number of integration models. The last section wraps up the different explanatory variables and states some broad conclusions.

II-. FACTS.

The discussion in section III of this chapter will be structured around a set of facts that shall be presented briefly here. It must be clarified at the onset that although most of them emerge from my analysis in Chapter I, my aim has not been to explain here every single point of fact therein presented. Therefore, the following factual reminder is only instrumentally used for the ensuing analytical discussion[1].

A. Macro-Level Trend: the Process of Community Growth.

Although Community integration may be more concretely depicted as a process of "stops and goes" (Moravscik, 1993), the general trend is, as has been shown in Chapter I, towards growth, both at the competential and institutional levels. This shall constitute the basic factual point of departure of the analytical remarks of section III.

B. Micro-Level Trends: The "Paradoxes" of Community Integration.

Chapter I gave empirical evidence, at a micro-level, of the paradoxical character of the process of Community integration. Here I include a selection of some of these paradoxes, and an explanation of why they may be categorised as such.

[1]The term "macro" is used in the following to refer to Community developments of a general kind. The term "micro" is used to refer to more particular Community developments.

B.1. Material Growth < Formal Growth: the (Non) Development of the Common Transport Policy under the TEEC period.

The (non) development of the Common Transport Policy up to the SEA is a good example of the failure of a policy which the Community had formal powers to pursue, or, as the formula appearing at the title of this point suggests, of the material growth being less important than the formal growth would suggest. Let us further analyze the main factual aspects of this case.

National preferences have, traditionally, widely diverged among Member States as regards transport policy. This was the result of three main factors. First, transport policy is heavily determined by the geographical characteristics of a country, and in particular, by space. Thus, a railway-oriented transport policy in principle makes sense from an economic perspective in countries where distances are large. Therefore France and Germany have traditionally relied heavily on this mode of transport, whereas road and inland waterway transport have dominated in Belgium, the Netherlands and Luxembourg. The U.K. has traditionally maintained a middle-way approach between both railway and road transport. Nevertheless, it has in general supported pro-liberal measures as regards this sector at the Community level (Erdmenger, 1983:1-5).

Second, different modes of transport compete with each other. Therefore to make a policy choice in favour of one particular mode of transport usually has direct consequences for the others. For instance, countries like France and Germany have traditionally adopted measures oriented to protect their railway transport industry, mainly due to the heavy losses which they had incurred. In turn, the development of their other transport industries has been considerably slow (Erdmenger, 1983).

Third, within the transport market, there has historically been a cleavage between small transport firms and large transport firms, the latter being traditionally more successful in obtaining market share. Thus the well-organized Dutch road transport industry expected to make significant gains from liberalisation of the transport sector at Community level, while the German and Italian transport industries, traditionally smaller, feared the loss of market share and have therefore traditionally put pressure on their governments to block Community liberalisation measures (Héritier, 1996:6).

It was in these circumstances that the Commission implemented its First Action program for Transport Policy on 23 May 1962. The action program was of a comprehensive character. It set out in detail a series of measures concerned with: first, the elimination of bilateral quotas and the establishment of a Community quota in the area of goods transport by road; second, the introduction of bracket tariffs for all modes of transport (as a compromise solution between total liberalisation of tariffs and state imposed ones); and third, the harmonisation of conditions of competition in the fields of taxation, state aids, protection of workers' safety, etc. The measures proposed were to be implemented by the end of the transitional period, that is, by 1970.

The outcome was rather deceptive: no more than 14 measures had been adopted by 1970 (up to 1974: 21 measures). Subsequently, the Commission changed its approach to the Common Transport Policy and, as was explained in a 1973 communication[2], implemented a "pragmatic" approach. This consisted of the development of each transport sector "on its own merits", therefore disconnected from the other sectors. The idea was to avoid the Member States' traditional approach to transport policy, in which, as the Commission communication of 1973 said, assistance for one mode of transport was achieved by imposing undue

[2]Published in *Bulletin CEE*, suppl. 16/73.

restrictions on another. Even if the Community's transport policy gained some impetus with the new approach, the results were rather few: from 1973 to 1983 no more than 50 measures were adopted. From 1983 to 1986, the period in which the Commission tried to give a new momentum to Community transport policy through another communication of 1983[3], only 40 more measures were adopted. More importantly, from a qualitative point of view, many restrictions on creation of a common transport market existed before the SEA was implemented, above all in the road and railway sectors[4] (Megret, 1990:323; Whitelegg, 1988). In conclusion, given the importance that the Member States accorded to the development of a Common Transport Policy in the TEEC, the failure to implement this policy during this period is a paradox that needs to be accounted for.

B.2. Material Growth > Formal Growth: the Development of Environmental Policy under the TEEC period.

The development of environmental policy before the SEA is a good illustration of material growth breaking through the limits of formal growth. Given that environmental policy was only formally introduced in the SEA, its significant growth before then is in need of explanation. An illustration of the important growth that this area experienced before the SEA are the around 100 legally binding environmental measures that were adopted during the TEEC period. Moreover, some of these measures were also of importance from a qualitative perspective, since they introduced an intense degree of policy innovation. Some examples of

[3]Communication of the Commission to the Council "Towards a Common Inland Transport policy" OJEC C 154/9 of 13 June 1983.

[4]This was acknowledged by the ECJ in the case 13/83 *European Parliament v Council* [1985] ECR 1513.

the kind are the following. First, directive 76/769[5], the so-called "PCB directive". This directive was concerned with the harmonization of Member State legislation relating to the marketing and use of certain dangerous substances, such as, notably, polychlorinated biphenyl (PCB) and polychlorinated terphenyl (PCT). As some authors have pointed out referring to the innovative character of this measure, directive 76/769 "had no parallel in existing Member States" (Rehbinder and Stewart, 1985:214). Second, directive 80/779[6] was concerned with the establishment at Community level of air quality standards to control the emission of sulphur dioxide and suspended particles into the atmosphere. The innovative character of this measure is shown by the fact that most of the Member States did not use quality standards as a control strategy before the directive was enacted (Majone, 1994:8). A final example is directive 79/831[7], concerned with the free movement of dangerous substances within the Community. This directive established an innovative procedure to provide for the mutual recognition of authorizations given by the Member State authority in which the dangerous substance was marketed. In particular, this directive was innovative since it established a series of procedural safeguards according to which other Member States authorities took part in the national administrative procedure leading to the authorization of the substance. To conclude, both from a quantitative and qualitative perspective, the development of the Community's environmental policy was already substantial by the time of the TEEC period. Given that the Community lacked formal powers to act in this area until the SEA reform, what accounts for the marked development of it in the preceding period?

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[5]OJEC L 262/201 of 27 September 1976.

[6]OJEC L 229/30 of 30 August 1980.

[7]OJEC n° L 259/10 of 15 October 1979.

C. Institutional Paradoxes: the Case of Majority Voting.

Majority voting was introduced by the SEA reform. Taking into account the fact that the implementation of majority voting had, at least potentially speaking, obviously harmful effects for Member States' sovereignty, its inclusion within the Treaties is also in need of explanation. Further, and more in particular, 6 months before the SEA was adopted, there was no agreement between the Member States on the need to modify the institutional structure of the Community, let alone its substance. Yet, in the Luxembourg summit of December 1985, the Member States would agree to adopt far-reaching institutional changes in the Community context. What accounts for this rapid change of views?

D. Other Micro and Macro-Level Trends.

Two more facts of a micro and macro level character shall help me to identify the explanatory variables of the process of Community growth. Although they may not be considered to be paradoxes, in the sense in which this concept has been used earlier, the following constitute relevant facts calling for explanation.

D.1. Policy Innovation.

There is empirical evidence that shows that Community regulation introduces an intense degree of regulatory innovation. Although much research still needs to be done in this area, the available evidence is already sufficiently strong to support the view that although this may not be a general trend, neither can it be considered marginal (Dehousse and Majone,

1994; Eichner, 1992; Majone, 1991; Majone, 1993). The examples that shall be discussed here refer only to the area of protection of workers in the workplace. However some other examples of the trend are also visible in other fields, such as that of environment (note my remarks above).

Thus the examples that shall be discussed in the next section are the following. Firstly, directive 89/391[8], on "health and safety at work". This is an interesting example of policy innovation in the field of social regulation. The most relevant elements of innovation that are introduced by this piece of legislation are the following: first, the notion of adaptation of work to the individual; second, the development of a coherent prevention policy (covering technology, organisation of work, social relations, and the influence of environmental factors); third, the priority given to collective protective measures over individual protective measures; fourth, the obligation to give appropriate instructions to the workers as far as health and safety measures are concerned, etc. For some authors, such elements were, when this piece of legislation was adopted, unknown even in those Member States with the most far-reaching social legislation, like for example Germany (Eichner, 1992). Secondly, other examples of the same trend are the "machinery" directive 89/392[9] and the directive 90/270[10] on "health and safety for work with display screen equipment". The innovation consists in the fact that both measures rely on the concept of "working environment" and take into account factors such as stress and fatigue as elements to be considered in a modern regulatory approach (Majone, 1993:30). It is important to note that, with such innovations, the Community adopted higher standards of protection than those that existed in the majority of even the most protective

[8]OJEC L 138 of 29 June 1989.

[9]OJEC L 393 of 30 December 1989.

[10]OJEC L 156 of 21 June 1990.

Member States. Only Denmark and the Netherlands had introduced similar approaches: Denmark in 1975 and the Netherlands in several steps between 1983 and 1990 (Eichener, 1992:6). In short, these examples seem to be evidence of policy innovation at the Community level. Such evidence shall be used in order to question some of the intergovernmentalists' main assumptions.

D.2. The Acceleration of the Community's Regulatory Activity in the SEA period.

The SEA period witnessed, as emerged from the data presented in Chapter I, an important recover in the Community's regulatory activity (to recall some evidence: measures equivalent to 2/3 of the total number of measures adopted in the previous period were adopted during the SEA). Though majority voting seems to be the main explanation of this phenomenon, it shall be argued in the following that other variables are needed to explain it in full.

III-. MODELS AND VARIABLES.

A. The paradigm: State-Centred Models.

State-centred models dominate among present analytical approaches to European integration. Since they can therefore be considered as the dominant paradigm, any attempt to offer an account of the facts described in the preceding section must have them as its starting point. Stated in simple terms, State-centred models posit the Member States (or national governments) as the independent variable around which any explanation of the process of European integration should be construed (Garrett, 1992; 1995). Even if the finest variants of this approach grant that national governments are subject to a number of different pressures in their definition of national policy preferences (thus challenging the old "black-box" paradigm), the core of their approach remains basically the same (Moravscik, 1991; 1992; 1993; 1994). The State constitutes the basic point of reference from which to understand international relations and, in particular, Community integration. The following formula correctly captures the thrust of their argument:

N->P->I->R(-)

Where **N** (national interests) determine **P** (national policy preferences), and **R** (the outcome) is ordered, in general, around the preferences of the least forthcoming Member State **(-)** in a process of intergovernmental bargaining **(I)** which has as its main actors national governments.

Therefore, State-centred models start from the premise that the relevant actors at the

Community level are the Member States (national governments) and therefore view the Community as a simple instrument, or arena, in which the problems arising from interdependence (basically, transaction costs, the problems of imperfect contracting, and the like), may be more effectively solved through cooperation among them. Supranational institutions are therefore simply instruments in the hands of Member States. Moravscick (1994) has even argued that the Community forms part of a two-level game, which consists basically of an institutional game in which national governments go from the national to the Community arena in order to reinforce their power of leverage as regards other national actors (such as, for instance, national parliaments) and, in the end, to enhance their legitimacy[11]. This implies that, for intergovernmentalist authors, Community integration does not only not pose a challenge to the State sovereignty but, quite on the contrary, Community advances "strengthen" the State[12].

No doubt, State-centred approaches to Community integration have had the merit of underlining the important place that national governments occupy as an analytical variable for the purposes of explaining some Community developments. Thus, for example, by focusing on state behaviour beyond the formal political channels in the Community, one important explanatory element has emerged. This is the fact that, as opposed to what could be thought at first sight, many Community proposals initiate as suggestions made by the Member States to the Commission. Accordingly, the Member States could be, paradoxically enough, one of the main sources of phenomena such as the Community's tendency towards overregulation.

[11]For Moravscik (1994), a paramount example of this trend is the establishment of the Monetary Union provisions in the Maastricht Treaty. According to him, the setting up of the convergence obligations upon the Member States through Community processes serves to enhance the legitimacy of decisions that, at national level, have significant political costs.

[12]The basic reference of intergovernmentalist literature is Moravscik's article of 1993. One should also read, besides the other references to Moravscik made in the text, the developments of intergovernmentalism made by Garrett (1992; 1995).

However, it may be contended that, from a more general perspective, to place Member States at both the beginning and the end of Community integration means saying either too little or too much for the purpose of understanding why the Community develops. It says, on the one hand, too little, since even a superficial reading of the EC Treaties tells that the Member States have a central role in Community integration. In this way, intergovernmentalism would not be adding much to, for example, classical formal legal analysis. It places, on the other hand, too much weight on the Member States, since other actors, and, more largely, other variables, need to be taken into consideration in order to explain such a complex phenomenon as Community integration, as shall be argued below.

Two examples, both at the "micro" and "macro" levels, may suffice to illustrate some of the shortcomings of intergovernmentalism. First, intergovernmentalism argues, as suggested above, that the majority -if not all- of Community outcomes will be ordered around the policy preferences of the least forthcoming Member State. As such, this finding is hardly new. Classical legal analysis of Community integration has traditionally contended that as a result of protracted negotiations at the Council level, Community legislation translates, in most of cases, only the "lowest common denominator" of the different national positions (Bieber et al., 1988). Yet, recent empirical analysis of the Community policy process has provided micro-foundations, that is, concrete examples, in which Community regulatory outputs do not only not align along the least forthcoming Member State's preferences but, quite on the contrary, introduce a certain degree of "policy innovation" as regards national regulatory practices. Good examples in this regard have been noticed by Eichner (1992) and Majone (1993). Among these examples, one may select directive 89/391[13] on "health and safety at

[13]OJEC L 138 of 29 June 1989.

work", the "machinery" directive 89/392[14] and the directive 90/270[15] on "health and safety for work with display screen equipment", the innovative content of which has been examined in an earlier section[16]. This evidence seems therefore to illustrate that Community regulation does not always align along the "lowest common denominator". If intergovernmentalist premises are taken into account, how can this finding be explained?

Second, as has been argued before, in the intergovernmentalist literature, the Member States are the only relevant actors at the Community level and the Community institutions are mere instruments in their hands. In macro-level terms, that is, from a general perspective, this statement means that legitimacy tensions resulting from the challenge that the growth of the Community's powers may pose for the Member States' sovereignty are simply nonsense. That is, since the Member States have command of the Community machinery, undue forays against their sovereignty may be easily avoided. Yet, from this perspective, the following question rapidly emerges: if intergovernmentalist premises are sound, how can one explain the emergence of the debate on the limits of the Community's powers? Further, how can one explain, in pure intergovernmentalist terms, the fact that some Member States have been among the main supporters of the introduction of the subsidiarity principle, employing precisely the argument that some mechanisms should be set at the Community level for the purpose of coming to grips with a process that they say no longer control?

To conclude, it may be said that intergovernmentalism seems to be challenged both

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[14]OJEC L 393 of 30 December 1989.

[15]OJEC L 156 of 21 June 1990.

[16]Note section II of this Chapter, at point D.1., *supra.*

from a micro and macro level perspectives. While acknowledging the interest of some of its insights, and above all its effort to understand the determinants of state behaviour at Community level, it is submitted that a different -richer- framework, in which national governments are not the unique explanatory variable, should be set up for the purpose of capturing the Community phenomenon in its full complexity. It is precisely to this that the following lines turn.

B. The Challenge: State-Fragmented Models.

The deficiencies of intergovernmentalist models previously set out have been noticed by a new strand of research that has developed recently (Marks, Hoogue and Blank, 1995; Hoogue and Marks, 1995; Hoogue, 1995; Dehousse, 1996). The point of departure of what could be labelled as "State-fragmented" models is a critique of the "reification" of the State into which the intergovernmentalist writers seem to fall. To quote Dehousse,

> *"L'approche intergouvernamentale classique tend à reifier, voire à personnaliser l'Etat: celui est traité comme un individu, doté d'une capacité d'entendement, d'une volonté propre, soucieux d'agir de façon cohérente".* (Dehousse, 1996:2).

Therefore, as opposed to intergovernamentalist authors, Dehousse, for example, proposes a fragmented view of the State as the main basis on which the understanding of Community integration must be construed. His reasoning is developed in three phases. First, the complex nature of modern social systems has resulted in the "fragmentation" of the State's political and, above all, administrative apparatus. Second, Community integration has

reinforced the trend towards the fragmentation of the State. And third, fragmentation of the Community's and States' machinery has fostered the growth of the Community's powers. Let us examine in more detail the thrust of this argument[17].

- First, *the State is a fragmented, rather than unitary, reality.* The high degree of complexity of current regulatory problems, has resulted in horizontal and vertical diversification of the State. *Horizontally*, national governments' departments have considerably increased in recent decades as the functions of the State have grown in size and complexity. *Vertically*, that is, within each department, the modern State has witnessed the setting up of an ever-growing myriad of specialised units and services (Poggi, 1995). From a more general perspective, modern democracies force the analyst to differentiate among the distinct actors that interact in the national political scenario (Slaughter, 1995). The interests, ambitions and functions of national governments and national parliaments, to cite an example, may not always be the same. Therefore, due to these developments, the assumption that the State is a unitary actor can no longer be maintained as a starting point for the analysis of Community integration.

- Second, *Community integration has reinforced the trend towards State fragmentation.* Community integration is the Member States' response to growing interdependence. To start with, the Community has supplied the adequate setting to provide for "sectorial cooperation", that is, for cooperation among the Member States' experts concerned by the same regulatory

[17]To correctly understand State-fragmented models it is necessary to have a previous knowledge of neo-functionalist theories, since they constitute, to my view, a point of departure for many State-fragmented authors. Furthermore, neo-functionalism could be considered as a rudimentary State-fragmented model in many regards. To construe the following lines, I have taken into account as background readings the following: Haas (1958/1968); Haas (1975); Lindberg and Scheingold (1970) Burley and Mattli (1993); Slaughter (1995); Mattli and Slaughter (1996).

issues resulting from interdependence. To continue, Community integration has also encouraged the development of an intense degree of "functional differentiation" among the different State organs (i.e., executive, judiciary, etc). Both trends are mutually reinforcing. In fact what the result of this is that policy making develops at Community level within structured "functional networks". This can be perceived both at the higher and lower institutional levels. At a higher level, the clearest example of the kind is the Council of Ministers. From a formal perspective, the Council of Ministers constitutes a single Community institution. In practice, the Council of Ministers is divided into around 20 specialised Councils each of which joins the ministries concerned to a determined policy field (Majone, 1994). Each of these sectorial Councils tends to act autonomously, with little regard for what the other sectorial Councils do. The External Affairs Council, and the European Council, which have in theory the role of coordinating each of the sectorial Councils, do not have in practice either the time or the resources to perform this in full. At a lower level, there are also networks which are organised along functional lines. These networks are normally set up by the Commission in order to "prepare" Community actions, and are mainly composed of Commission and national bureaucrats of the branch in question, but may also include other members: independent experts, sectorial interests (both private and public, represented by lobbyists in Brussels), regional governments' representatives, etc, may also take part in these functional networks (Mazey and Richardson, 1993a; Marks, Hoogue and Blank, 1995). As shall be shown below, the interaction of both lower and higher level networks constitutes an important element in explaining much of the development of the Community.

Third, *fragmentation fosters the growth of the Community's powers.* In the previous point I have noted that the Community fosters State fragmentation and, therefore, the development at Community level of functional networks. The disegregation of the State in

functional networks at Community level encourages, in turn, the development of Community integration. Let us examine how this process comes about.

To start with, national and Commission experts responsible for a determined policy field, join together in the committees that are normally set up by the Community organs (often by the Commission) in order to prepare a given Community intervention. The role of such committees in Community policy making is in many ways still subject to further research[18]. However, the few analyses that have been developed in recent years point out that an important degree of *copinage technocratique* is developed within such networks (Eichner, 1992). Often having similar intellectual backgrounds, concerned by the same issues and speaking the same technical language, a particular environment of *camaraderie* is created amongst these experts which facilitates to a significant extent the adoption of decisions. Further, taking into account the lack of political supervision as a consequence of the traditional complexity and lack of transparency (when not the inexistence) of Community procedures, experts have a wider margin of manoeuvre than in national settings to privilege those solutions which are more connected with their shared values.

Furthermore, once these "lower-level" networks adopt a decision, this is in turn considered by the Council of Ministers. However, and as discussed above, the Council of Ministers works also as a specialised organ. This means that, for instance, a particular decision on telecommunications policy adopted by a sectorial committee will be in turn examined by the Telecommunications sectorial Council. Taking into account that this is the regular way to proceed in Community policy-making, it is not surprising that, as has recently emerged, the decisions adopted by much of the sectorial Councils simply rubberstamp around 70% to 75%

[18]Note in this regard the materials of the European University Institute Conference (Florence, 9 and 10 December 1996) on "Social Regulation Through European Committees: Empirical Research, Institutional Politics, Theoretical Concepts and Legal Developments", organised by Professor Joerges (EUI Department of Law).

of the proposals made by the lower institutional levels (Quermone, 1994:56).

Therefore, the existence of this functional *continuum* explains, at a macro level, why the general tendency towards the growth of the Community has developed. The Member States, or rather, the fragmented organs of the Member States, may find in the Community arena the appropriate context in which many of their pet proposals can develop. Whereas in national contexts the adoption of a given proposal may be difficult due to the resistance of other departments and other political actors, such as, for instance, national parliaments, in the Community context the whole of the policy-making process is developed within the same functional network. Ultimately, the main difference between the national and Community contexts lies in the organization of the national governments' and the Council of Ministers' working methods. Whereas national governments work, as a general rule, as a collective (therefore decisions are adopted by the government and not by single departments, at least at a legislative level), at the Community level decisions are adopted by the meeting of the departments of the same branch. In conclusion, the institutional structure of the Community creates the ideal conditions for the isolation and, therefore, the development, of functional interests.

Further, this framework of analysis also allows one to explain micro-level Community developments which are difficult to be understood in purely intergovernmentalist terms. I return to Eichner's examples. As was explained previously, in the area of workers' protection in the workplace, Eichner has given empirical evidence of the fact that Community regulation may introduce an intense degree of policy innovation, thus implementing the highest rather than the lowest standards of protection. In particular, the so-called "machinery" directive, mentioned above, is a good example of the kind. Eichner has reconstructed the process through which this piece of legislation was adopted at Community level. According to him,

the measure was first proposed by a U.K. civil servant in order to introduce some innovative reforms into British social regulation. As the proposal did not get through in the U.K., the British *fonctionnaire* proposed the same measure at Community level, at a time in which the Commission was considering proposing the adoption of a set of measures in this field. The innovative character of the British civil servant's measure captivated the imagination of the Commission, and finally succeeded in being adopted by the social branch of the Council of Ministers (Eichner, 1992:54).

To conclude, the "State-fragmented" model presented in the preceding lines, and, in particular, the concept of "functional network", offer valuable analytical tools in order to explain, both at a macro and micro level, Community developments. This notwithstanding, it shall be submitted in the next section that this model, as it stands at present, needs to be developed further in order that we may provide more precise answers to the questions that were posed in the introduction of this chapter.

C. A Critique.

The previous argument may be restated by saying that State- fragmented models put the accent on the *sui generis* nature of the Community's institutional structure in order to explain Community developments. The division of the Community's work along functional lines has set up a myriad of committees in which Community action is prepared. Most of these committees' proposals are often simply rubberstamped by the Council of Ministers. This is indeed facilitated by the fact that the Council of Ministers works also according to a functional logic. Therefore, the fragmentation that exists at the lower decisional levels is in

many ways matched at the highest decisional level. The Community's decision-making process is therefore initiated, and decisions adopted, mainly by those more directly concerned by the latter, both at an administrative and political level. Due to the peculiar character of the Community's institutional structure, oversight by other functional networks, not to mention political or public opinion oversight, is therefore seriously undermined[19]. Overall, this thesis concludes, fragmentation of the Community's institutional system has therefore fostered the process of growth of the Community's powers.

Yet the main critique that one may make of the previous model is that by only referring to this framework, variation is difficult to explain. One of the facts that have been exposed in section II of this chapter may be adduced in order to illustrate this criticism. As has been seen earlier, the Community Common Transport Policy (above all as regards road transport) offers an interesting example of policy failure at least until the SEA took hold. According to the previous model, how can the fact that Community Transport Policy stagnated for almost the first 30 years of the Community's history be explained? To be sure, one may assume without further empirical testing that the Common Transport Policy was developed according to the same functional logic that has inspired Community working methods as regards other policy fields. In fact, one of the first sectorial Councils of Ministers that was set was the Transport (and related issues) Council (Majone, 1994:5). In short, *ceteris paribus*, that is, everything being equal, at least institutionally speaking, the failure of the Common Transport Policy is an example that illustrates the need to further develop and qualify State-fragmented models. To this I turn in the following point.

[19]Problems of oversight are furthered by the complexity and lack of transparency, when not the inexistence, of the Community's procedures, as State-fragmented models also recall.

D. A Development of State-Fragmented Models: the Importance of Supranational Community Actors as an Explanatory Element.

In proclaiming the importance of supranational actors for the understanding of Community integration there is no need to rebut State-fragmented models. On the contrary, State-fragmented models offer the correct framework for analyzing the extent to which supranational Community actors are an important element in explaining much of Community integration and of its paradoxes. However, the view here adopted goes beyond State-fragmented models in so far as it differentiates between the distinct actors of which Community functional networks are composed and gives priority to the role of supranational actors within and without such networks.

To start with, when reviewing State-fragmented literature, one has the impression that "functional networks" are a sort of unorganized anarchies, or to use Cohen, March and Olsen's expression, "garbage cans" in which different streams join together without much orchestration in their functioning (Cohen et al., 1988). This would imply that functional networks are sub-optimal systems (ibid:313). Instead, as has been remarked above, they appear to be quite successful in the achievement of their particular interests, both at a macro and micro level. How can this paradox be explained?

The answer to this question is that this paradox is more apparent than real. The impression that functional networks are unorganized anarchies is but superficial. In fact, one actor, the European Commission, plays an essential role in giving the necessary degree of coherence to this functional ensemble. Thus the Commission acts as a "trigger" of functional networks. It has a leading role in creating them. Once created, the Commission plays also a

definitive role in pushing them ahead. Moreover, the Commission plays a certain role of coordination among the different networks and, above all, between lower level and higher level networks. In brief, the Commission is the element that joins together the different streams of the complex institutional picture of the Community. As has been recently concluded by Héritier,

"As a "process manager", the Commission has a view of the overall situation of European policy-making and the opportunities available for a specific issue to be passed. The particular institutional structure of the European Polity allows the Commission to do so since legislative initiatives do not have to remain within the framework of a (coalition) programme of an elected government. Rather, legislative initiatives develop from multiple sources, giving the Commission an important role in the orchestration of policy initiatives. It is the only corporate actor in the European polity with a grasp, and awareness of, all policy strands developing at any point in time. In devising the policy agenda and combining issues in a specific manner, it can prepare package deals (...). The Commission has a long institutional memory and a remarkable amount of patience in persistently pursuing specific policy innovation plans over long periods of time. They are accompanied by multiple activities, such as the issuing of Green Papers, and conducting extensive consultation in order to build supportive networks until the time is ripe for placing the issue on the agenda". (Héritier, 1996:15).

Thus, the essence of the previous quotation may be summarized by saying that the Commission successfully plays the role of "policy entrepreneur" in the institutional Community system. According to Kingdon (Kingdon, 1984), policy entrepreneurs are defined as "those actors willing to invest their resources in order to advance their proposals" (ibid:188). To be successful, a policy entrepreneur must have time, energy and reputation. Further, the qualities of a successful policy entrepreneur are three-fold: technical expertise, political *savoir-faire* and persistence. Of the three, the last (persistence) is the most important

virtue of a policy-entrepreneur. Persistence implies the willingness to invest policy entrepreneurs' resources (ibid:188)[20].

Therefore, as already argued, it has not escaped the notice of some Community analysts that the Commission correctly fits Kingdon's definition (Dehousse and Majone, 1994; Majone, 1994a; Majone, 1995a; Majone, 1995b; Héritier, 1996). First, the Commission counts on technical expertise -sometimes to a greater measure than the Member States. This is because the offices of the Commission responsible for a certain policy area form the central node of "functional networks", as have been examined above. Therefore, the Commission engages in discussion with all these actors, and therefore has within its reach a great deal of information from which it selects in order to advance those proposals that it favours. Second, because of the way they are recruited, the structure of their career incentives and the role of the Commission in policy initiation, Commission officials usually display the rest of the qualities that, according to Kingdon, characterise a successful policy entrepreneur. As Eichner has suggested,

"... the Commission recruits its staff from people who are highly motivated, risk-oriented, polyglot, cosmopolitan, open-minded and innovative. From the beginning of the 60's and up to the present, it has indeed been officials of a special type who chose to leave the relative security of their national administrations to go to Brussels to do there a well-paid but extremely challenging job... The structural conditions of recruitment and career favour a tendency to support new ideas and to pursue a strategy of innovative regulation which attempts to go beyond everything which can presently be found in Member States". (Eichner, 1992:51-52).

Therefore, once a proposal is selected, the Commission plays a key role in "softening

[20]Note also as regards this point Majone (1989a) and Elder and Cobb (1983).

up" the Community's legislative actors, and particularly the Council of Ministers. That is, the Commission's role is of essential importance in attempting to convince and persuade Member States of the interest of its proposals. If one adds to this the fact that, as is remarked by State-fragmented models, the Community system is structured along functional lines (Dehousse, 1996:12), the general trend towards the growth of the Community's powers may be in many ways explained from this perspective. In the following I shall further refine this argument by making reference to more concrete trends of the process of Community growth.

E. Explaining the Paradoxes of Community Integration.

The previous remarks point therefore to the importance of supranational Community actors and, in particular, the European Commission, as an important explanatory element of Community integration in general. In this section it shall be shown that a satisfactory account of more concrete Community developments may be also given by relying on this variable.

First, recall the case of the Community's Common Transport Policy. As was pointed in section II of this chapter, the Common Transport Policy offers an interesting example of the failure of a policy which the Community was granted formal competence to pursue. Further, I noticed that although State-fragmented models provide the necessary analytical framework to deal with this paradox, they fall short of giving sufficiently precise responses to these kind of queries. To be sure, functional fragmentation has also developed within the field of Community Transport Policy. As State-fragmented models predict, growth should also have taken place in this area. What explains then the fact that, instead, Community Transport Policy had serious difficulties in evolving during, at least, the TEEC period?

An answer to this question may be found only in a combination of elements. In particular, as Lindberg and Scheingold (1970) and, more recently, Héritier (1996), have pointed out, there were two determinant elements to explain the failure of the Common Transport Policy. First, these authors notice that due to the particular constellation of interests which were present in this area, and, in particular, the cleavage between large Member States -opposed to liberalisation without prior harmonisation- and small Member States -committed to market principles in the Transport sector-, linkage mechanisms were difficult (though not impossible) to envisage in this field. In other words, to use Kingdon's concepts, "policy windows", through which the Commission could insert its pet proposals, rarely opened. Second, this basic fact notwithstanding, these authors concur that the Commission failed in its approach towards the Common Transport Policy. Instead of proposing middle term measures, the Commission constantly aligned, over the years, with pro-market Member States (such as the U.K. and the Netherlands), thereby focusing on the abolition of trade barriers and the establishment of a "European transport market" as main policy targets. The result of this was that the "decision making-process in the Council repeatedly ended in deadlock" (Héritier, 1996:7). In short, as Lindberg and Scheingold conclude in this regard,

"In spite of policy differences and the problems inherent to the transport sector that limited the possibilities for growth, and in spite of the absence of great pressures for action from the governments, it does appear that there was in transport a sufficient potential for functional and political linkages for the Commission to build a coalition in favour of some sort of common policy (...) had it acted with the skill and imagination shown in agriculture". (Lindberg and Scheingold, 1970:175).

Second, take the example of Community environmental policy before the SEA. Taking into account the fact that this policy was only formally enshrined in the Treaties with the SEA

reform, how can the significant development of it during the previous, TEEC period, be explained? Though a number of different variables also need to be taken into account in order to explain this development, it is submitted that the Commission also played an important role in fostering the development of the Community's environmental policy during the TEEC period, as shall be demonstrated in the following discussion.

As Hildebrand (1993) submits, the initiative for Community intervention in the environmental field came from France (which held the European Council presidency at the time) in the 1972 Paris Summit. The Member States reacted positively to this initiative since public sensitiveness towards ecological problems had grown during the 60's, but also because of functional reasons: different standards of environmental protection could hamper the creation of the common market (Majone, 1989b; Majone, 1991; Arp, 1995). Further, once this major initiative was pushed through, the Commission was successful in presenting the First Action Program[21] on environmental policy to the Council even ahead of schedule. This was due to the intense exchanges that it had developed with, mainly, non-governmental organisations during the years prior to the 1972 Paris Conference (Mazey and Richardson, 1993b:121). Now, at this point, it is important to remember the three main characteristics that proposals must have, according to Kingdon (1984:122-151), in order to be selected and finally adopted by policy-makers: technical feasibility; value acceptability; anticipation of future constraints. The three Action Programs that the Commission presented in the period before the enactment of the SEA[22] exactly fit these characteristics. Take for instance the First

[21]The Member States asked the Commission in the Paris Summit of 1972 (19 and 20 October) to submit an action program to the Council by July 1973. The Commission forwarded the Council its program 3 months in advance, on 17 April 1973. The first Environmental Action Program was formally adopted by the Council on 22 November 1973 (OJEC C 112/3 of 20.12.73).

[22]The second Environmental Action Program covered the period from 1977 to 1981 (although it was extended two more years due to the accession of Greece and to the institutional problems arising from the conversion of the old Environmental and Consumer protection service into D.G. XI). It was formally adopted

Environmental Action Program. This stated clear objectives, selected principles that could be connected with the dominant values of the moment and described concrete and feasible measures to implement them. To start with, the First Action program established that the main objective of Community environmental policy was to "improve the setting and quality of life and the surroundings and living conditions of the Community population". It further established the following set of principles: first, that emphasis should be given to preventive action; second, the "polluter-pays" principle; and third, an early version of the subsidiarity principle (Hildebrand, 1993: 21). Finally, it called for action in the field of air pollution (such as directive 74/290, concerned with the reduction of car emissions into the atmosphere) and for action designed to supplement existing Community policies (such as, notably, the CAP) (Hildebrand, 1993:20).

In conclusion, the development of environmental policy during the TEEC period may be understood, again, as the result of a combination of elements, such as the recognition of ecological damage as a pressing problem, the convergence of private and public interests and the political receptivity of national governments to engage in responses at Community level. In turn, the extreme rapidity with which the Commission drafted and proposed its solutions, as well as the connection of its proposals with the dominant values of the moment, the technical feasibility of these proposals and the Commission's capacity to adapt future constraints through the setting up of programs fixing concrete objectives and measures, account for much of the success that environmental policy had in the period before the SEA.

Third, the Commission is also a necessary point of reference to explain certain

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by the Council on 17 May 1977 (OJEC C 139, 13.6.1977). The third Environmental Action Program covered the years 1982 to 1986 and was adopted on 7 February 1983 (OJEC C 46/1 17.2.83).

important institutional developments which occurred in the Community context. One of these is the shift to majority voting as decided in the SEA reform. How can the Member States' adoption of this decision be explained, given the potentially harmful effects of majority voting upon their sovereignty? More in particular, at the time of the Milan European Council of June 1985, in which negotiation regarding reform of the Treaty of Rome was convoked, there was not even consensus on the necessity of institutional reform, let alone on its substance. Yet only six months later[23], the Member States signed the SEA, thus accepting a substantial expansion of majority voting. How can this rapid change be explained? The relevance of the question may be further highlighted if it is taken into account that institutional reform is one of the most favourable situations in which the intergovernmentalist hypothesis may be corroborated. Yet, as shall be shown below, the role of the Commission is of crucial importance in understanding this far-reaching institutional shift.

As Dehousse and Majone (1994) suggest, the key to understanding the dynamics of the SEA institutional reform and, therefore, the role played by the Commission as regards the introduction of majority voting, is to identify the main bargains contained in the SEA. First, by far, the most important one was the linkage between the Single Market and institutional reform. Things developed in the following way. As suggested above, before the opening of the Milan Conference (June 1985), there was virulent opposition from some national capitals to a strengthening of the supranational features of the Community system. However, things soon started to change. The turning point was the Commission's input in the debates over institutional reform. Thus in September 1985, the Commission, in its first contribution to the

[23]The SEA negotiations ended in December 1985, and the new reform was signed by the Member States in January 1986, in Luxembourg.

SEA debates, took the initiative to present a proposal on the achievement of the single market. This proposal drew directly on the Commission's 1985 *White Paper*[24], presented by the Commission and approved by the Member States in the Milan European Council of the same year. Briefly, what the Commission was proposing in the 1985 *White Paper* was the creation of an area without internal frontiers in which products, services, persons and capital could circulate freely. Further, it also proposed a new approach to harmonisation. Relying on the ECJ judgement in *Cassis de Dijon* of 1979[25], the Commission proposed mutual recognition as the cornerstone of the new Community regulatory approach[26]. As opposed to previous practice, harmonisation would be limited to its basic elements. The details of legislation would be set by European standardisation committees working in cooperation with the Community institutions and under the control of the Member States. Finally, and most importantly, the Commission linked the internal market objective with the need to modify the Community's decision-making procedures: majority voting was presented by the Commission as the most effective means to achieve the internal market objective in due course (1992).

The whole package was clearly appealing to those Member States that had initially fiercely opposed institutional reform of the Community. That was the case of, for instance, the UK. For this Member State, the shift to majority voting was more acceptable if it was oriented to achieve the market objectives set out in the *White Paper*. Further, it represented a minor effort from the perspective of sovereignty since Community regulation would be reduced to its basics due to the clear deregulatory flavour of the *White Paper*. It is not

[24]Completing the Internal Market: White Paper from the Commission to the European Council, COM(85) 310 final.

[25]Case 120/78 of 20 February 1979 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* (*Cassis de Dijon*) [1979] ECR 649.

[26]On the influence of the ECJ as regards the dynamics of Community integration, and, in particular, the regulatory development of the SEA, note my remarks below.

surprising that, due to the way in which things were presented by the Commission, agreement even with the most vocal opponents to institutional reform was easily achieved.

Second, however, the linkage between market integration and institutional reform, though important, does not wholly explain the SEA outcome. Other Member States had much to lose from the turn to majority voting. To start with, Southern Member States feared that the removal of border controls could put at risk their less competitive economies, thereby leading to regional discrepancies. To continue, Member States with long traditions of regulation in the social sphere feared that competition with Member States with lower social regulation standards would lead them into a "race to the bottom". For these two groups, "majority voting was no mere institutional issue; the possibility of being overruled had quite concrete implications" (Dehousse and Majone, 1994:101). Here again, the Commission played a crucial role in bridging the gap between these extremes. Thus the Commission proposed, in two proposals tabled in September 1985, the inclusion in the Treaties of a number of guarantees for these two groups of Member States. These guarantees, finally inserted in the SEA, were "a mix of macro and micro" political elements. Among the former, one may cite the establishment of environmental and regional policies as new competences for the Community. Among the latter, one can mention the insertion in the Treaties of protective measures such as Article 100 a (4) and Article 130 r, allowing Member States facing particular problems not to apply on a temporary basis market liberalisation measures (Dehousse, 1989:118-120).

In conclusion, the core of the SEA negotiations rested therefore on three major bargains: market integration-institutional reform; market integration-social regulation; and market integration-regional policy. All of them (though above all the first), played an essential role in dissipating Member State fears arising from the extension of majority voting. It is

submitted that, as the available evidence suggests, the Commission played a definitive role in establishing linkages and in persuading Member States of the reciprocal assets that the different SEA *quid pro quos* had for them (Dehousse and Majone, 1994:102).

F. The ECJ and the Dynamics of Community Integration.

The previous analysis may be summarized by saying that although the importance of the European Commission as an explanatory variable of the process of growth of the Community's powers (and of some of its more particular trends) has been neglected by current dominant analysis of Community integration, the role that this actor plays -mainly as a policy entrepreneur- is, as has been shown, a key to the understanding of many Community developments.

Further, although the previous lines have mainly focused on the role of the European Commission, it goes without saying that the essence of the argument that they contain could be expanded in order to cover other supranational actors, such as the European Parliament, the European Court of Justice, and still others. To be sure, a comprehensive analysis of Community dynamics should take into account all these actors in order to give more concrete explanations of the process of Community growth. This would, however, clearly go beyond the objectives of this thesis. This is why the following lines will only concentrate on the role that one of these actors, the ECJ, has played in Community integration. This choice is however not random: again, current paradigms of Community integration seem to neglect the explanatory potential of the ECJ in understanding many Community developments. Thus it is usually assumed by such paradigms that the ECJ's rulings reflect either the policy preferences of the majority of the Member States (Moravscik, 1993), or those of the most

powerful Community Members (Garrett, 1992; Garrett, 1995). In particular, the *Cassis de Dijon* ruling, to which analysis the following lines are mainly devoted, has been explained as being based on the interests of France and Germany (Garrett, 1992; Garrett, 1995). Instead, as shall be shown in the following, the ECJ appears to be one of the independent -rather than dependent- variables that allow one to explain some of the facts that were established in section II of this Chapter. More in particular, it shall be argued that the ECJ plays an important role in (i) fuelling the Community's policy process with new ideas and in (ii) opening up new "policy windows", through shaping, be it in an indirect way, Community policy outcomes.

To start with, one of the facts this thesis seeks to explain is why the Member States decided to shift to majority voting in the SEA reform. Thus, as mentioned in the previous point, the Commission played an important role in this regard since it presented majority voting as the logical corollary of the internal market project. Thus in the 1985 *White Paper* the Commission presented an objective (the achievement of the internal market) and a strategy (a new approach to harmonisation based on mutual recognition). Both aspects, but above all the deregulatory flavour of the *White Paper*, had, as was suggested, a decisive importance in persuading the most reluctant Member States to accept the shift to majority voting. Further, the new strategy was not contrary to the liberal winds that blew in most of the other national capitals (Sandholtz and Zysman, 1989). However, mutual recognition did not simply reflect the policy preferences of the Member States. Rather, the process was the contrary. The Court's ruling in *Cassis* acted therefore as the trigger. Though the concept of mutual recognition was not unknown in the Community[27], the innovation introduced by the ECJ was

[27]Note Article 57 of the TEEC.

to reactivate it and to apply it to the area of free movement of goods. As Dehousse remarks,

> *"... reste cependant que c'est la Cour qui a introduit le concept de reconnaissance mutuelle ... dans le domaine de la libre circulation des marchandises. Mieux: elle semble l'avoir fait de sa propre initiative, puisqu'on ne trouve trace de cette logique ni dans les remarques du plaignant ni dans les observations de la Commission, ni même dans les conclusions de l'avocat general".* (Dehousse, 1994b:87).

Thus, by introducing the innovative concept of mutual recognition, the Court offered the Commission an idea through which it could rally the attention of most of the Member States. In fact, both the Court's ruling and the Commission's policy entrepreneurship were mutually reinforcing in introducing the new approach and, later, in provoking the shift from unanimity. As Alter and Meunier-Aitsahalia (1994:552) explain, the legal decision was needed to encourage and legitimize the Commission to launch the new harmonisation programme. In turn, the Commission's role was important in bringing the legal decision to the political arena. However, as these authors suggest, had the Court's ruling not existed, it would have taken much longer for the Commission to introduce the concept of mutual recognition into the Community context. In short, the Court played an important role in this case as a provider of ideas, without whom the shift to majority voting would have probably taken longer to be implemented (Dehousse and Majone, 1994:103).

Yet, the role of the Court is not only important as a provider of new ideas in the Community policy process. Though relevant, this view would be reductive: it would imply that the ECJ performs a function equivalent to that developed by laboratories in the world of empirical science, no more, no less. More importantly, the Court has played a fundamental

role in shaping Community policy outcomes. This fact offers an important tool to understand, for example, why the Community witnessed a regain of its activity during, particularly, the SEA period.

As was noticed in section II of this Chapter, the SEA witnessed an explosion of regulatory Community activity. Although the available data in this regard offer a more complex picture[28], the latter simplification is sufficient for my present purposes. Further, it is clear that the shift to majority voting is an important, if not fundamental, variable to explain this SEA expansion. However, a closer look reveals that the shift to majority voting may not explain all changes. To start with, even when majority voting was the rule, in practice many Community decisions were still adopted by consensus (Weiler, 1991a). Further, even when there was resort to a vote under Article 100a, large majorities were required. Something other besides majority voting is therefore necessary to explain the enormous expansion of the Community's regulatory activity that took place in this period. In this connection, Dehousse (1994b) has suggested that one of the factors that explains the SEA recover is the case law of the Court, as derived from the *Cassis de Dijon* principle. Let us disentangle this argument in the following.

Before *Cassis*, national governments were in a position of strength, since unanimity was required in order to adopt harmonisation decisions. Most importantly: there was no single element in the Community system that could constrain them to adopt a decision. However, the nature of Community decision making was profoundly modified after the *Cassis* ruling. In fact, the Council's failure to arrive at agreement changed its significance. Far from guaranteeing the survival of national regulations, Member States could be obliged by the

[28]Note Chapter I of this thesis, in which it was shown that the regain of Community regulatory activity started a few years before the SEA reform.

Court, in application of the *Cassis* ruling, not to apply their national legislation. The effects of this shift would be two-fold. The first was that the Member States would lose their grip on the Community decision making process, since the final decision on whether a national legislation was legitimate or not would be in the hands of the Court. Further, an ECJ ruling applying the mutual recognition principle would have undesired consequences for Member States in the form of reverse discrimination: national producers would be, paradoxically enough, in a worse position than other Member States' importers. As a result, the Member States would be obliged to change their national legislation in order not to harm national interests but, as is obvious, the margin of manoeuvre remaining would be rather thin. The national legislation at issue would have to accommodate other Member States' legislation, thus producing, at least in some cases, a "race to the bottom" of national standards.

To be sure, the materialisation of this possibility depended much on the area, and within each area, on the particularities of the case at hand. Dehousse himself reports, for example, that the case law of the Court of Justice in the insurance area limited to a significant extent the effects of the *Cassis* rule (Dehousse, 1994b:89). This remark notwithstanding, it must be stressed that the Commission could use the Court's case law as an important threat in order to persuade Member States of the convenience of reaching at agreement. That is -and stated brutally- if agreement was not reached among the Member States, the Commission could threaten to take them to the Court of Justice in order to obtain at least negative integration, which, in turn, could have more harmful consequences for the Member States' sovereignty than positive integration. Thus *la boucle est bouclée*: the Commission's threat to "legalize the political process" (Dehousse, 1994b:96) was an incentive for Member States to

reach agreement in the Council[29]. This shows that the Court played an important role in shaping, at least indirectly, the policy process during the SEA period since its case law was employed by the Commission in order to foster positive Community integration. Together with other elements, such as, notably, the implementation of the majority principle, much of the SEA regulatory dynamism can be explained in this way.

[29]There is some indirect evidence to show that the Commission followed this strategy in order to persuade Member States to reach agreement. Thus Alter and Meunier-Aitsahalia (1994:548) report that the Commission raised 115 cases on the ground of the *Cassis* ruling from 1980 to 1989, which proves its willingness to implement its threats.

IV-. CONCLUSIONS.

This Chapter assumes, as point of departure, that Community integration is driven by a number of engines whose complex interaction needs to be analyzed in detail in order to give explanations of the process of growth of the Community's powers, both at a macro and micro level. Therefore a variate number of different actors and processes, and, above all, the relations of mutual dependence that are created among these elements, constitute the explanatory variables allowing one to account for the facts that were presented in the second section of this Chapter. The following is an attempt to wrap up the different elements that surfaced in my previous analysis.

First, the Member States, or national governments, are an important point of reference in explaining some Community developments. For instance, many Community proposals start as suggestions coming from national capitals, rather than as Commission proposals, as one could be tempted to think at first sight. However, to adopt the view that the Member States are the unique explanatory variable of the process of Community integration is, as Dehousse and Majone have suggested (1994:92), to take a "negligible transaction costs view" of the Community process. Instead, and precisely because policy making has important transaction costs, the role of other actors, and notably, supranational actors, needs to be taken into account in order to refine explanations of Community integration.

Second, a closer look at the institutional structures of the Community and the Member States allows one to determine that, as opposed to what intergovernmentalists seem to assume, Community and Member State policy making is rather fragmented. At the Community level, the majority of proposals are discussed, and then approved, within a set of functional networks. Functional networks exist both at the lower and higher Community policy making

levels. At the lower levels, functional networks are composed of Commission officials and national bureaucrats, but not only: field experts, regional actors, and interest groups with representation in Brussels may also have direct access to such structures. Further, at the higher level, the picture is also of institutional fragmentation. The Council of Ministers, which, if one glances at the Treaty of Rome, could be assumed to constitute a single entity, is also rather fragmented into sectorial Councils (at present, more than 20). Thus policy making is developed through a functional continuum: policy proposals are discussed within sectorial committees, and then approved by sectorial Councils. This structure fosters the process of growth of the Community powers. Such process is further reinforced if it is taken into account that the complexity and lack of transparency of procedures (when not their absence) hamper to a significant extent political and public opinion supervision of Community activity.

Third, within this picture, the Commission plays a fundamental role as "policy entrepreneur". Thus the Commission, which can also be seen as a rather fragmented institution (disseminated in a complex web of services, units, and the like), has a primordial role in setting up functional networks. Once these networks are activated, the Commission performs a leading role in orientating their action. Further, it acts also as main interface among the different lower and higher functional networks. Therefore it selects those proposals worked out within lower level networks that may be more easily connected with the interests and objectives of higher functional networks. Then it plays a basic function in "softening up", in persuading, policy communities of the interest of its proposals. In short, many Community developments, including some of the paradoxes of the process of growth of the Community's powers, may be understood by making reference to the role played by the Commission in Community policy making.

Fifth, it may be submitted that any research agenda of Community integration must

take into account the role played by other supranational actors as a further independent variable. This holds particularly as regards the ECJ. The admonition that the ECJ should be taken into account in this regard is not only directed to intergovernmentalist studies, but also to political science analysis of Community integration. Both assume that the ECJ is either the dependent variable or, worse, not relevant at all[30]. Instead, as has been proved above, the ECJ plays an essential role in the Community's policy process. Thus the ECJ does not only fuel the Community policy making process by injecting into it innovative ideas; most importantly, it opens up new "policy windows", by shaping, be it in an indirect way, the policy process itself, therefore constraining policy makers to adopt determined policy avenues. In short, though often neglected, the ECJ is also an important variable to understand many of the Community developments.

To conclude, although my analysis has been mainly focused on the national governments, the Commission, and the ECJ, it may be pointed out that the Community "game" is not restricted to these actors. Other elements, such as the other supranational institutions, interest groups and their lobbyists, national politicians; other processes and events, such as, for instance, globalisation, economic recessions or petrol shocks; and the relations of mutual dependence among these factors, must be taken into account in seeking explanation of a complex process as Community integration. Admittedly, the result may be rather eclectic and even inelegant. To this it may be only contended that science, just as Community

[30]Though, admittedly, some strands of political science have recently taken note of this criticism and integrated the ECJ in their analysis. Note above all Burley and Mattli (1993) and Mattli and Slaughter (1996). On the other hand, it may be submitted that lawyers, who have traditionally given too much weight to the role of the ECJ in Community integration (the "heroic" version attributing to the ECJ an almost exclusive role in fostering integration: note for instance Lenaerts (1988)), should also move to integrate other explanatory variables. A primary example of a lawyer taking into account legal but also other variables for the explanation of Community integration is Weiler. Note in particular Weiler (1991a).

integration, also has significant transaction costs, unfortunately -or not?- for the scientist.

SECOND PART: "LEGITIMACY".

CHAPTER III: THE IMPACT OF THE PROCESS OF GROWTH OF THE COMMUNITY'S POWERS ON THE MEMBER STATES: THE COMMUNITY'S FEDERAL DEFICIT

"Mr. Chairman... here I would make this enquiry of those worthy characters who composed a part of the late Federal Convention. I am sure they were fully impressed with the necessity of forming a great consolidated government, instead of a confederation (...) but, Sir, give me right to demand, what right had they to say We, the People ... instead of saying We, the States? States are the characteristics, and the soul of a confederation. If the States be not the agents of this compact, it must be one great consolidated National Government of the people of all States". Patrick Henry, 4 June 1788.

I-. INTRODUCTION.

The aim of this chapter is to analyze in depth the particular problems that have resulted from the process of growth of the Community's powers as regards Community vertical relationships. A first layer of analysis will focus on the impact that the process of Community integration has had on the Member States' sovereignty, understood in terms of each State's capacity to define autonomously its own policy preferences. However the following analysis shall not be limited to this point: by definition, any integrative process does curtail the capacity of component units to state policy preferences in an autonomous way. Thus the following pages attempt to address, in a second, more profound layer of analysis, the more compelling question of how, from a social perspective, Member States have

accepted, and to what extent, the limitation of their sovereign powers which has resulted from the process of Community growth. Put in different terms, it attempts to assess the process of growth of Community powers from the normative angle of the concept of legitimacy.

I leave therefore the relatively calm waters of positive description and explanation to enter the rather stormy ones of normative analysis. Thus it is important to start with some definitions, formulated in an impressionistic way at least, of the concepts that shall be used in order to assess the process under examination. However, definitions of prescriptive concepts, such as sovereignty, legitimacy, or "federal deficit", must be open-ended. Therefore the reader will not find in this introduction a "naturalistic" formulation of these concepts but will, rather, have to induce definitions by reading attentively the pages that follow. Nonetheless, the following may be taken as rudimentary points of reference which belong to a more complex picture.

The notion of sovereignty has been thus defined along the lines above: from my perspective, this concept involves above all the capacity of a Member State to establish, independently of the will of other States, its own policy preferences, be they domestic or in the international field. The idea which this definition reflects is also relative -no single polity has an absolute capacity to determine its own policy preferences, even as regards domestic policy, and even in a situation of "splendid isolation". At the very least, functional developments which arise as a result of the pursuit of determined policies -even domestic- in other States will prompt pressures that a single State will not be able to ignore when adopting its own policy preferences. However, it is certain that in any integrative process, and of course in an integrative process such as that of the European Community, the capacity to establish policy preferences in a more or less autonomous way may be further curtailed. Thus the

analysis of how Community growth has impacted upon the Member States' sovereignty is a necessary starting point for the reflections that follow.

Here is where the notion of legitimacy comes in. As suggested above, a legitimacy discourse poses the question of how a polity which was master of its own designs in the previous -non integrated- situation, accepts that the will of other polities will have to be taken into account in the new -integrated- situation. This suggests a social or empirical notion of legitimacy, rather than a formal. Thus it is not the legality of a decision which is or may be contested, but the outcome of the decision as such, above all when it implies a change in previously stated policy preferences. In the last resort, this leads to pose questions about the procedures that regulate the relations between the centre and the periphery. As shall be argued, it is a fundamental requirement in any integrative process that the procedures that regulate those relations are of such a quality that an ideal discursive situation is ensured, in which all those affected by the outcome of decisions are represented, and have an equal opportunity to participate and discuss possible outcomes. When such requirement is not guaranteed, there is then a legitimacy problem of a federal kind -federal since it concerns the relations between the centre and the component units. In short, we may state that the integrative process suffers from a federal deficit.

Once some of the concepts that shall be employed later have been defined, we may return to the point that I wish to make in this chapter. This is to answer the following question: are there indications of a legitimacy problem in the form of a federal deficit in the present Community context? To reply to this question this chapter shall focus on the most problematic elements of the process of growth of the Community's powers, which are, first and foremost, the implementation of the majority principle for the enactment of Community

decisions and, second, but not least, the implementation of policy-making powers by the supranational Community institutions, when this occurs according to procedures that grant them the last say.

Moving to other aspects of this chapter, it must be noted at the onset that reflecting on legitimacy issues poses above all a methodological problem, which is that theoretical discourse must not only be proclaimed, but also illustrated. Here two case studies, one concerning the Community's environmental policy and the other the Community's telecommunications policy, shall provide some flesh to support the bones of the more abstract discussion of the Community's legitimacy, which constitutes, in the final analysis, the core of the argument developed in the following.

Therefore Chapter III is organised as follows. In section II it shall be discussed, both in theoretical and empirical terms, the problems which are posed, from a legitimacy perspective, by the application of the majority principle in the Community context. In section III I shall make the same kind of reflection, again, both in theoretical and empirical terms, as regards the policy-making powers of the Community's supranational institutions. Some conclusions shall be restated in the last section, and answers shall be given to the questions above.

II-. THE COMMUNITY'S FEDERAL DEFICIT I: THE APPLICATION OF THE MAJORITY PRINCIPLE WITHIN THE COMMUNITY WITH A CASE STUDY ON COMMUNITY ENVIRONMENTAL POLICY.

A. The Core of the Matter.

In the first part of this thesis the process through which the Community enlarged its competences since its inception in 1958 was examined. We saw how this process was already of substantial importance under the Treaty of Rome period. However, compared with the Community's performance under the Treaty of Rome, the development of the Community's competences took an unexpected dimension under the SEA. In this period, the Community did not only considerably extend the number of its interventions; it also deepened the scope of its action to an important extent. Before the termination of the 1992 program it was already apparent that Community concerns had gone far beyond the mere elimination of quotas and regulation of tariffs but had entered well into sensitive issues that concerned more profoundly the daily life of the Member States' citizens, such as environmental protection, education, and culture, to cite but a few examples.

This shift as regards the extension of Community intervention would have remained unperceived had the Community institutional structure not been modified. To be sure, under the unanimity rule, Member States were able to secure national sovereignty, and therefore to protect national preferences and interests against Community forays. The SEA was to provoke a fundamental change in the Community's institutional equilibrium. Majority voting was introduced for some Community actions, notably for actions concerning the achievement of the internal market program (Article 100a), the backbone of future Community intervention.

More important, Member States' commitment to the new institutional rules was made clear, as the change of the Rules of Procedure of the Council showed. In short, from the moment of the enactment of the SEA, important Community decisions were made possible even in the face of opposition by a minority of Member States.

This institutional change has provoked, as has been claimed from different quarters, a legitimacy problem in the Community context. The Community is deemed to be currently suffering a legitimacy crisis that has as its origin the shift from unanimity to majority voting[1] (Dehousse, 1995; Weiler, 1995). However, it is important to understand the real meaning and implications of this "legitimacy outcry". The legitimacy discourse is most of the time not more than a convenient label to express many different concerns (Hyde, 1983). Put in different terms, the existence of a legitimacy crisis in the Community, as well as its specific contours, is directly contingent on the theoretical perspective within which the matter is examined (Jachtenfuchs, 1995:116). It is therefore necessary to spell out the particular normative formulation of the concept of legitimacy through which the turn to majority voting shall be examined. Though the introduction to this chapter gave some general indications in this respect, the following attempts to elaborate further this point.

The point of departure is therefore the problem which arises in a polity embracing the majority principle. As is known, the majority principle is one of the characteristic features of the "democratic method" in liberal-democracy systems (La Torre, 1994). However, the implementation of the majority principle in the adoption of decisions that will bind the whole

[1]This is not to negate that other kind of tensions have not a legitimacy dimension, such as the lack of transparency, the so-called "political deficit", etc. However these shall not be tackled here for they are out of the scope of this thesis. For a "back up" version of the different legitimacy problems that affect the Community note Dehousse et al (1996).

polity creates an issue from the perspective of the protection of minorities, and this even in long standing democracies. Minorities which become overruled will then have to accept the outcome of the decision adopted against their will. But then the question arises: in what sense is this actually problematic? Such a fundamental question may receive a variety of answers. Let us examine the possible responses to it in turn, as well as its connection with the legitimacy problem affecting the Community.

First, the implementation of the majority principle could be problematic from the perspective of "formal" legitimacy (Weiler, 1996:1). From the perspective of formal legitimacy, what is questioned is the legal validity of a certain decision. That is, it is the way in which a certain decision has been adopted, and often, the lack of conformity between this and the established decision-making procedures, which is at the basis of this legitimacy criticism. Thus it is not the substance of the outcome that is put into question; rather, it is the challenge to the "rule of law" principle that is considered to be illegitimate. Turning to the Community context, the switch to majority voting would have been problematic from the perspective of formal legitimacy if this had not been priorly accepted by Member States. Yet, as is known, the adoption of the majority principle for the implementation of a set of decisions was accepted by Member States according to their respective constitutional procedures. Therefore the fact that Member States may be overruled posits a dilemma whose essence cannot be captured by a concept such as formal legitimacy. It is therefore necessary to turn to other notions of legitimacy.

Second, the adoption of the majority principle could be problematic from the perspective of a "deontological" concept of legitimacy (Weiler, 1996:2). This means that a particular decision, though it may be accepted as legal (valid in formal terms), can be challenged with regard to other normative standards, such as ontological standards (ethical,

moral) or political standards which set out the conditions for a legitimate government, such as the notion of "democracy". This latest perspective (legitimacy as democratic government) interests us more as regards the problem here examined, since it constitutes a classical charge against the switch to majority voting in the Community system. This point shall be elaborated in the following lines.

The shift to majority voting has been interpreted by an already well established strand of analysis as furthering the Community's democratic deficit. Here I shall not refer to a particular set of writers defending this view, but only offer a capsule version that may serve to capture the essence of their argument (note however Corbett et al., 1992/1995). According to this view, under the unanimity rule, Community legislative action was indirectly legitimized by national parliaments through the decisive role played by national executives in the Community process (Weiler, 1981;1982;1991a;1991b). Therefore where an action was adopted by the Community, the lack of a truly democratic structure at Community level, due to the restricted role of the European Parliament in legislation, was supplemented by the democratic legitimacy on which national governments relied. Therefore the unanimity rule ensured, at least in an indirect way, the democratic quality of the output of Community interventions.

The shift to majority voting implied, according to this reading, that decisions might be adopted without the -indirect- backing of the national assemblies of those Member States that were outvoted. This was perceived as disrupting the system of indirect democratic legitimation on which the Treaty of Rome rested. In this version, the only way to reshape the old equilibrium was to provide the Community with directly-legitimising democratic structures and therefore to place the European Parliament at the centre of the Community's legislative process. At present, the European Parliament does not occupy a central place in the Community's legislative process, irrespective of the progressive enhancement of the powers

of this institution that has taken place in successive Treaty reforms. It follows, according to this view, that, therefore, and due also to the fact that an ever growing number of issues are currently adopted under majority voting[2], the Community suffers at present a legitimacy problem in the form of a democratic deficit.

Critically, it may be asked whether the concept of legitimacy, viewed from the single perspective of democratic governance, captures in their full complexity the dramatic consequences that the adoption of the majority principle had for the Member States. One reflection may directly point to the deficiencies inherent in the previous approach: would, say, the British polity be reassured if Community majoritarian decisions emanated mainly from the European Parliament, instead of coming from the Council of Ministers? That the answer to this question is negative is so obvious that it does not merit further empirical testing. Therefore the problem seems to be of a rather different kind. Submitedly, to avoid the shortcomings of the preceding analysis, a distinct, more complex framework (i.e., definition of legitimacy) is necessary in order to understand in full the problem posed for Member States by the Community's embrace of majority rule. I return to this point below.

Third, an analysis of the extent to which the switch to majority voting has been problematic for the Member States must start by making reference to some of the basic aspects present in any integrative process. A process of integration is one in which a number of polities decide to surrender some powers in favour of a new entity in order to perform in common a series of tasks (Dahl, 1986:114). Among other things, this implies a situation in which the boundaries of the old polities are in the process of being redefined. This re-definition is not only physical -i.e., geographical- but above all -and this is of the utmost importance- of a social or empirical kind. Single polities are required to accept that they

[2]Note Table VII in Chapter I.

belong to a new, different, reality -different since socially larger. However, this process cannot be achieved overnight. Until that day comes in which single polities accept the fact of their belonging to a new social reality, the electorates of particular polities will only grudgingly accept that important decisions affecting their daily life can be taken through processes in which their voice has been overruled by the majoritarian decision of other polities' electorates (Weiler, 1991b:188).

This points therefore to the importance of those procedures that regulate the relation between the new and the old polities. In an integrative process (that is: as long as the process of re-drawing of social boundaries lasts), these procedures must be of such a quality that they tend to an ideal discursive situation in which all actors be allowed to discuss in equal conditions is ensured, and in which all affected by the outcome of decisions participate in equal terms in their design (Habermas, 1975;1984; Eriksen, 1994). The second is a condition for the success of the first. If the participation of all actors in the final shaping of a certain outcome is not ensured, the ideal discursive situation will be as such negated.

Therefore, procedural rules should foster consensual decision-making. This does not necessarily signify, however, a ruthless embracing of unanimity as the only legitimate decision-making procedure for all cases. Though unanimity may be an essential legitimating factor in any integrative process, since it always gives the possibility to veto the adoption of decisions by single polities, it may also produce tensions of a federal character. In other terms, if the application of the majority principle may imply a majoritarian bias, the implementation of the unanimity rule may produce a minoritarian bias, consisting in the imposition of the will of the minority over the will of the majority (Komesar, 1994).

To restate, the foregoing implies a social or empirical concept of legitimacy (Weiler, 1996:3), whose main normative implication is a focus on the quality of procedures. Turning

to the Community context, the previous analysis drives the point home as regards the tensions that, in a polity like the EC, which is constituted by previously fully autonomous states, the application of the majority principle causes. As the following case study demonstrates, it is far from clear whether, say, the British people would accept being overruled by other Community Member States, above all if the issue in question were perceived as being of essential national interest for the British. Therefore, the majority principle has, according to this latter reading, produced a legitimacy problem in the form of a "federal deficit" (Bellamy et al., 1995:61) in the Community setting. To assert the existence of a federal deficit in the Community means, in the last analysis, that the procedures that regulate centre-periphery relations (in this case, majority voting) lack the quality which is required in the present stage of the integration process. It implies, in summary, the existence of a lack of correlation between, on the one hand, the "immature" Community social reality and, on the other, the procedures that regulate the relations between the different levels of governance, which presume wider degrees of social "maturation". The following case-study provides the necessary micro-foundations upholding the thrust of the previous argument.

B. An Illustration: the Case of the U.K. and the Community's Environmental Policy.

The following case study, concerning the Community's environmental policy and U.K., illustrates with a concrete example the theoretical discussion presented above. However, before approaching the ensuing discussion, it is necessary to make one important remark. In order to ascertain the extent to which the implementation of the majority principle has been problematic for the Member States, it is not sufficient (though necessary) to speak about

sovereignty in general terms. To be sure, when a Member State is overruled, its sovereignty is curtailed and therefore its capacity to pursue its own policy preferences undermined. But this can not only be assumed: it must be demonstrated. Therefore, it is necessary to spell out the particular policy preferences that were maintained by a particular Member State as regards one policy, and then, in a second step, analyze how the majority principle has entailed a modification of previous policy preferences. I shall start therefore the following analysis of the Community's environmental policy with some remarks regarding the U.K.'s policy preferences concerning this field before the majority principle applied in the Community system. Next, I shall undertake an examination of the impact of the adoption of the majority principle on the U.K.'s environmental policy preferences.

B.1. The Distinctive British Approach to Environmental Protection.

The U.K. is claimed to be one of the first European countries in which awareness for environmental matters was born. The oldest conservation movement was British[3]; the first agency for environmental matters was also British[4]; and the first comprehensive air pollution control act was enacted in Britain[5]. Nevertheless, its traditional approach to pollution matters has, in general, widely differed from continental approaches, and also from the environmental philosophy of other anglosaxon countries, such as the U.S.A. (Vogel, 1986:21[6]). Thus the

[3]Lead by philosophers such as John Ruskin, John Stuart Mill and William Morris. It dates back to the last two decades of the nineteenth century. Note Vogel (1986:33).

[4]Known as the Alkali Inspectorate, created in 1863. Vid. my remarks below.

[5]The Clean Air Act dated 1956. Note Golub (1994:3).

[6]Vogel asserts: "On balance, the American approach to environmental regulation is the most rigid and rule-oriented to be found in any industrial society; the British, the most flexible and informal".

British approach to pollution control is construed on an inductive, flexible, case-by-case and non-legalistic basis, whereas continental approaches have traditionally relied on the establishment of uniform standards and general principles encapsulated in law. With regard to enforcement, Britain has relied on voluntary and cooperative enforcement, whereas other countries such as, notably, Germany, have relied on the more traditional method of imposing sanctions and fines (Vogel, 1986:106).

The singular British approach as regards environmental matters is most noticeable in the field of water protection. Though the following remarks concern this field, they must be also taken as a concrete illustration of a more general point -which is the rather unique character that, in general, has traditionally characterised the British regulatory approach to environmental matters[7].

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[7]The characteristics that define the British approach to environmental matters as "unique" are also present as regards other important fields of action within the environmental domain, such as air and waste. Here I shall give but a brief hint of them.

Firstly, the British approach in the field of air protection has traditionally pivoted around two axes: 1) the practice of setting "presumptive limits"; and 2) the principle of "best practicable means". As regards presumptive limits, it is normally assumed that firms that comply with those limits exercise a correct control over their emissions. If, on the contrary, presumptive limits are violated, this does not involve direct sanctions, but is considered a matter of fact that may be used against a firm in court. Note therefore that quantitative control of emissions is an *ex post* control, exercised once it is understood that the quality of the air in a determined area does not attain a minimum standard. Note also that emission limits are not legally binding -but only general guidelines. The uniqueness of the British approach as regards environmental protection is best illustrated, however, with regard to the BPM principle. According to British environmental protection authorities (Alkali inspectorate, 1957, cited by Vogel, 1986:79), the "best practicable means" philosophy constitutes a compromise between, on the one hand, "the natural desire of the public to have pure air", and, on the other, "the legitimate desire of manufacturers to meet competition by producing their goods cheaply and therefore to avoid unremunerative expenses". In British practice, however, the term "practicable" has never been defined and it has been for the Alkali inspectorate to make a case-by-case judgement of whether the technique used by a firm under scrutiny meets the requirements of the BPM principle or not. In this connection, Vogel (Vogel, 1986:79-80) contends that the term has come to encompass "local conditions and local circumstances, the state of technological knowledge, and, above all, the costs of pollution control in relation to the economic size of the particular firm", which has allowed, according to the same author, "a very flexible application of the requirements of air pollution control in the U.K.".

Secondly, with regard to waste control, Haigh asserts that before the Control of Pollution Act of 1974 (which was the major effort of the 70's as regards environmental protection, due to its comprehensive character, and due to the fact that it established a number of concrete measures that were unknown until that date as regards not only waste control but also other fields, such as the setting of a series of obligations upon the waste-disposal authorities and a licensing system for the disposal of waste), the matter was regulated in a piecemeal fashion, mainly in laws designed to protect public health, rather than environmentally oriented. Further, the Public Health Act of 1936, which consolidated earlier legislation, gave local authorities the power to remove house and trade

Firstly, before any legislation was implemented in the U.K., private individuals relied on the common law to protect water against pollution. The first public actions regarding water protection date from 1876, in which Parliament dictated the Rivers Pollution Prevention Act. This established a different regulation for sewage and industrial emissions. As regards sewage, the Act established that it could only be discharged if the best available means were used by polluters. Industrial emissions were instead prohibited, as a general rule. However, the Act limited to a considerable extent the circumstances under which the latter aspect of law could be implemented (Haigh, 1987:25).

Secondly, more recent legislation starts with the Rivers Act of 1951. This Act gave to the River Boards (regional water authorities) two kinds of power. First, the power to grant authorizations for discharges, subject to conditions. And second, the power to prescribe emission standards within the authorizations. Concerning the first power, the River Boards were only obliged to ensure the "wholesomeness" of the rivers. In fact the river authorities enjoyed a wide margin of manoeuvre, which allowed them to pursue an individual, case-by-case approach. The second power could have entailed, as Haigh notes, a certain uniformisation of standards. But as the same author remarks, this power was hardly ever used and finally repealed in 1961 (Haigh, 1987:25).

Thirdly, contemporary to the British entry into the EEC, the matter was regulated by the 1973 Water Act and the 1974 Control of Pollution Act. However, neither of these Acts established a specific duty on local or central authorities to impose specific standards. Therefore, before the Community directives on water protection were applied, the U.K. still

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refuse and to require removal of "any accumulation of noxious matter". It also placed on them a duty to inspect the areas for which they were responsible. As Haigh comments, these inspection powers could not prevent nuisances arising, but should have ensured that they were not unknown. The discovery made during the 60's and the 70's of major toxic deposits in Britain gives an idea of how strictly the existing regulation was implemented (note Haigh, 1987:127).

relied on its old approach based on consent given by the regional authorities. Vogel remarks that the granting of consent was, in fact, a matter of negotiation among the water authorities and the polluters. While on the whole the conditions of consents tended not to vary greatly, in practice the way in which they were enforced depended heavily on the capability of the receiving environment (Vogel, 1986:78). In this connection, regional authorities usually followed as a guide the non-legally binding quality standards that the central administrative authorities set (Haigh, 1987:27).

The rationale underlying this flexible approach to pollution control, not only for water but also for the rest of the sectors[8], lies, on the one hand, in a different conception of pollution, and on the other, in the special geographical conditions of the U.K.. Regarding the first aspect, Haigh notes that the notion of pollution is defined in Britain with reference to the target. According to this author, pollutants are

> *"substances causing damage to targets in the environment".* (Haigh, 1987:13).

It follows from this definition that if the pollutant reaches no target in damaging quantities because it has been rendered harmless, either by being transformed into another substance or into a form where it cannot affect the target, or because it has been diluted to harmless levels, then "there has been no pollution" (ibid:13). Haigh contrasts this approach with the German, which is primarily based on the control of emissions with reference to quantitative standards. As he notes,

[8]Note the preceding footnote.

"For those who believe that man should emit the least possible quantity of pollutant, even if it is having no known effect -an approach being developed in Germany under the name of vorsorgeprinzip -the principle of anticipation or foresight- then the point of emission is the logical point to set the controls" (Haigh, 1987:21).

Concerning the second point (the particular geographical conditions of the U.K.), Golub explains that Britain has an uniquely favourable ecosystem characterised by the existence of tidal sea waters, the greater capacity of absorbtion of rivers, the resilience of soil and strong winds. The British approach has therefore taken advantage of an ecosystem which will be able to absorb or remove greater quantities of pollutants (Golub, 1994:5).

To sum up, we can say that Britain has developed, since the inception of its efforts against pollution, a distinct approach to environmental protection which is characterised by its informality and flexibility. This has been translated into a preference for individual rather than uniform regulation; for quality rather than quantity standards; and for cooperative enforcement styles rather than hierarchical. The reasons that justify this approach lay, according to British specialists in the matter, in a different concept of pollution and in the special geographical characteristics of this country. This was therefore the situation, with regard to environmental policy, before the British entry into the EEC[9].

[9]However, the question of the extent to which this approach constituted a policy is discussed in the British context. Note for instance the remarks of MacCormick (1991:9) arguing that before the British entry into the EC there was virtually no environmental protection in that country. Golub (1994:5) argues that, though environmental protection was never high enough on the government's agenda, one may trace (as I have done) the existence of fundamental views regarding environmental policy that may be described as a policy.

B.2. The Development of Community Environmental Policy under Unanimity.

Environmental policy was formally introduced into the Community system in the Paris summit of 1972. Although Britain would formally enter the Community on the 1st of January 1973, it also participated in the deliberations that took place in Paris (Hildebrand, 1993:20). The British position was of certain reluctance towards the changes that would be introduced by the Paris summit (Golub, 1994:6). A new increase of Community powers would imply a correlative curtailing of British sovereignty. Nevertheless, the fact that decisions concerning the environment were to be taken by unanimity played an essential role for the final British acceptance. Although British autonomy in the field of environmental protection would be curtailed by Community action, British preferences (materialised in its distinct approach to environmental matters) should not be put in danger. The review of some of the most important measures adopted in the period from 1972 to the enactment of the SEA, presented in Table I, seems to confirm that, on balance, the British prediction would prove correct.

From the nine cases presented in Table I, only six may be catalogued as "curtailing" British sovereignty. These are directive 80/779[10] "sulphur dioxide", directive 83/351[11] "emissions from vehicles", directive 84/360[12] "emissions from industrial plants" and the directives on water protection (75/440[13] "drinking water"; 76/160[14] "bathing water";

[10]OJEC L 229/30 of 30 August 1980.

[11]OJEC L 197/1 20 July 1983.

[12]OJEC L 188/20 of 16 July 1984.

[13]OJEC L 194/26 of 25 July 1975.

[14]OJEC L 31/1 of 5 February 1976.

76/464[15] "dangerous substances in water"). In all these cases there was a certain curtailment of British sovereignty since Community directives impose legally binding standards. However, the types of standard that the directive imposes are qualitative, which means that there is no major reversal of Britain's previous approach. The only exceptions to this trend may be found in directive 84/360, which gives the Council powers to impose quantitative air emissions on industrial plants, and in directive 83/351, which also imposes quantitative standards on emissions from vehicles. However, in the first case, the U.K. succeeded in introducing unanimity for the establishment by the Council of emission standards, whereas in the second case one cannot speak of the existence of an obligation, since the mode of harmonisation used by the directive is "optional". The three cases that remain may be catalogued as "highly consistent" with British interests. These are directive 78/611[16] "lead content in petrol", directive 75/442[17] "on waste" and directive 78/176[18] "titanium dioxide". In all these cases the final outcome was in line with British policy preferences. Therefore, none of the nine cases constitutes a clear case of impact, that is, a case in which not only British sovereignty but also its policy preferences were affected by the enactment of Community legislation.

Further, in some of the cases examined, the threat of a veto played a considerable role in the protection of British policy preferences. Notable examples that illustrate this point are directive 84/360 "emissions from industrial plants", directive 76/464 "dangerous substances on water" and directive 78/176, "titanium dioxide".

As regards the first, directive 84/360, the initial Commission proposal imposed an

[15]OJEC L 129/23 of 18 May 1976.

[16]OJEC L 197/19 of 22 July 1978.

[17]OJEC L 194/39 of 25 July 1975.

[18]OJEC L 54/19 of 25 February 1978.

obligation on polluters to apply "state of the art" technology and provided for the setting of emission standards by a qualified majority of the Council. Britain succeeded in shifting the expression "state of the art" technology, which could have been interpreted as imposing on firms the obligation to establish the most recent technology available in the market, to the expression "best available means not entailing excessive costs", more in line with the British "best practicable means" air protection philosophy. Second, British negotiators also succeeded in changing the decision-making rule for Council adoption of emission standards from qualified majority to unanimity (Haigh, 1987:226). To be sure, the extent to which Britain could play with the threat of vetoing the proposal was not absolute; the directive produced a certain impact on British preferences insofar as it introduced the possibility for the Council to set quantitative standards, which was against common British practice in the field of air pollution.

A second example that illustrates how British preferences were protected by the veto power is provided, as indicated above, by directive 76/464, on "dangerous substances in water". This represents a better example of the protection of British policy preferences by veto. In fact, the initial Commission proposal provided for the setting of quantitative (emission) standards to control the deposition of dangerous substances into water. The Commission proposal was widely supported by other countries, such as Germany. This country had traditionally relied on this means of control. Moreover, the establishment of qualitative standards would imply a comparative disadvantage for its strong chemical industry. Britain threatened to veto the proposal if amendments were not introduced. The final result consisted of the set up of two lists of substances, one for which quality standards would be applied (List II) and the other for which a system of quantitative and alternative qualitative standards would apply (List I). In the Council meeting of 4 May 1976, all Member States,

except Britain, decided to apply the preferred standards (quantitative standards) for List I (Haigh, 1987:71-74). This shows that Britain was the only country interested in the implementation of qualitative standards and demonstrates the effectiveness of the veto threat as exerted by this Member State.

A final example of this trend is given by directive 78/176, "titanium dioxide". The initial Commission text proposed establishing uniform emission standards for the industrial emission of pollution coming from TiO2. Haigh notes that it was not only Britain which was opposed to this measure. However, Britain, as the major Community producer and exporter of titanium dioxide, had the greatest incentive to water-down the directive in order not to impose excessive burdens on its industry, and therefore, it lead the opposition to the Commission proposal. Again, the veto power produced as a result a very general obligation upon Member States to periodically control TiO2 emissions and send the Commission programs for the elimination and reduction of emissions (Haigh, 1987:113-117).

To sum up, it can be said that the period prior to the SEA was characterised by the curtailment, to a certain extent, of British sovereignty by Community action. Nevertheless, as my review demonstrates, the U.K. was able to avoid, on balance, the enactment of Community measures contrary to long-standing British preferences (Golub, 1994:7).

Table I: Review of environmental measures adopted under SEA.

Field	Legislation	Com. proposal	U.K. position	Outcome
A I R	Dir. 80/779 "sulphur dioxide"	Sets air quality standards for s.d.	Initial opposition to legally binding standards.	Sets quality standards for s.d.
A I R	Dir. 78/611 "lead in petrol"	Sets 0'40 g/l in first stage and 0'15 g/l in second stage. Second stage to be implemented on 1 Jan 78.	Favourable to directive. But wanted establish. of both a max (0'40) and min limit (0'15). Pushed for implementation of dir. in 1981.	Sets max. (0'40) as well as min. (0'15) limits. Implementation in 1981.
A I R	Dir. 83/351 "emission from petrol engines vehicles"	Sets emission (quantitative) standards.	Opposed to Com. proposal.	Adoption of "optional" standards based on ECE standards.
A I R	Dir. 84/360 "emissions from industrial plants"	Sets a system of prior authorization of plants; imposes on plants "state of the art" technology; imposes emission stand. to be set by Council by Q.M.	Above all, opposed to the setting of uniform standards by Q.M. and "state of the art" technology.	Replaces "state of the art" with "BAT-NEC" notion. Emission limits by unan.
W A T E R	Dir. 75/440 "quality of surface water for drinking".	Sets quality standards.	Opposed to setting of uniform standards.	Sets quality standards.

Table I: Review... (cont)

Field	Legislation	Com. proposal	U.K. position	Outcome
WATER	Dir. 76/160 "bathing water"	Quality standards; imposes obligation on water authorities to monitor quality of water.	Favourable to Com. proposal.	Sets minimal quality standards.
WATER	Dir. 76/464 "dangerous substances in water".	Sets emission (quantitative) standards.	Opposed to quant. stand. Pushed for qual. stand.	Alternative approach for List I substances (quantitative or qualitative standards) and qualitative standards for List II substances.
WASTE	Dir. 75/442 "on waste"	Appointment of authorities resp. for waste; waste disposal plans; authorization system; Polluter pays pple.	Favourable to the Com. proposal	M.S. must appoint competent authorities responsible for waste; waste disposal plans are to be prepared by them; authorization system for polluters;.p.p.p.

Table I: Review... (cont) (1).

Field	Legislation	Com. proposal	U.K. position	Outcome
W A S T E	Dir. 78/176 "titanium dioxide"	Sets quantitative standards; authorizations system; programs.	Opposed to setting of e stds.; favourable for the rest.	General obligation upon M.S. to present the Com. progrs for elimin reduction emissions coming TiO2

(1): The nine measures here reviewed are selected from Hildenbrand and Weizsäcker's list of the 20 most important environmental measures adopted by the Community prior to the SEA. Note Hildebrand (1993:27) and Weizsäcker (1989:42).

B.3. The Development of Community Environmental policy under Majority Voting.

As has been seen, prior to the SEA, all measures related to environmental protection were adopted by unanimity. The SEA was to alter the previous nature of EC environmental policy-making. Article 100a introduced majority voting for harmonisation of Member State legislation affecting the establishment of the internal market. In turn, the SEA introduced a new provision for Community environmental action. Article 130s provided for unanimity in Community regulatory intervention related to the environmental field. Given the dangers that the shift to majority voting posed for both British sovereignty and preferences it is important to understand, before examining the extent to which the new provisions altered the previous

status quo, why the U.K. accepted such an institutional switch. It is to this aspect that the following lines turn.

When negotiations to reform the Treaty of Rome started, Britain -which opposed in a first moment to engage in any reform of the Treaty of Rome (Moravcsik, 1991:49)- was against the extension of majority voting. Why did this country finally accept Article 100a? Here it is important to mention the role of the Commission *White Paper* of 1985. This aspect has already been covered by Chapter II, and shall not be developed in depth again. Here I shall therefore recall the following two-fold point: first, the focus of the *White Paper* on the achievement of the internal market; and second, the *White Paper*'s preference for a regulatory approach based on mutual recognition. These were the essential elements that explain the final British acceptance of majority voting. Majority voting was therefore interpreted by Britain to be the logical continuation of the *White Paper* objective to implement the internal market. It represented a minor effort from the perspective of sovereignty that could be afforded in exchange for market integration. Further, in those cases in which, according to the new strategy, mutual recognition of environmental standards was not possible, Article 130s provided the locus for future Community action regarding environmental protection. Consequently, Community action in this field would continue to be ruled by unanimity. Therefore, for British negotiators, the SEA outcome was highly consistent with British interests and changed "virtually nothing[19]" with regard to the Treaty of Rome.

Existing evidence seems to confirm the view that in the British perception, the SEA outcome was in line with U.K. interests. In this connection, Golub reports that Lynda Chalker,

[19]This sentence is attributed to the British Prime Minister at the time, Margaret Thatcher. Note Sked and Cook (1990:498).

Minister for Foreign and Commonwealth Affairs at the time, assured, in an audience in the House of Commons that

"our special interests are fully safeguarded... There has been no change whatsoever in the so-called Luxembourg compromise. It remains open to us, where necessary, to invoke that compromise to protect a very important national interest". (Golub, 1994:13).

Concerning Article 130s, the Minister asserted that

"What we have done is to establish criteria for [environmental] activities (...) We will be able to ensure that, where we wish, decisions continue to be taken by unanimity". (Golub, 1994:15-16).

In short, what can be inferred from the preceding lines (which are supported by the previous evidence) is that, according to the British view: first, majority voting would be circumscribed to the area of market integration; second, environmental policy would develop through Article 130s, that is, unanimity; and third, even in the context of Article 100a, when the U.K. disliked a measure, the Luxembourg compromise could be invoked as a last resort (Golub, 1994:9-18)[20].

However, Community environmental action during the SEA developed, at least in part, contrary to British expectations. Although Article 130s was employed to enact measures in the environmental field, Article 100a was also used to this end. In support of this finding, I

[20]According to Golub (1994), the British government placed also an important emphasis on subsidiarity, as introduced by Article 130s. For this author, the perception of the U.K.'s government was that the principle of subsidiarity would limit Community environmental action to those areas in which Community intervention was strictly necessary. In other words, the British government viewed subsidiarity as a further safeguard of U.K. sovereignty in the field of environmental protection. This was a complementary element that explains British acceptance of the switch to majority voting in the SEA reform.

present, in Table II, a review of the measures that were adopted under Article 130s and under Article 100a.

Table II: Measures adopted under 130s/100a in SEA.

Adopted under 130S	Adopted under 100A
Dir 87/416: Amends 85/210 lead in petrol	Dir. 88/76: Amends 70/220 vehicle emissions
Dir 88/346: Amends 86/85 sea spillage	Dir. 88/77: Gas pollutants from diesel engines
Dir 88/347: Amends 86/280 dangerous subst	Dir. 88/180: Amends 84/538 on lawnmower noise
Reg 1734/88: Dangerous chemicals (export/import)	Dir. 88/181: idem
Dir 88/381: Adding c.t. to Rhine Protocol on ch. pollution	Dir. 88/182: Amends 75/442 on waste
Dir 88/540: Ozone layer	Dir. 88/436: German transitional measures
Dir 88/609: Large combustion plants	Dir. 89/458: idem
Dir. 88/610: Amends 82/501 on major industrial accidents	Dir. 90/660: idem
Dir 89/369: Municipal waste incineration	Dir. 91/441: idem
Dir 89/427: Amends 80/779 on air qual. and nitrous oxides	Dir. 89/235: Amends 78/1015 on motorcycle noise
Dir 90/170: Acceptance OECD decision on transb. hazardous waste	Dir 89/677: Amends 76/769 on marketing use of dangerous substances
Dir 90/219: Genetically modified microorganisms	Dir. 89/678: idem
Reg 1210/90: European Environmental Agency	Dir. 91/173: idem
Dir 90/313: Free access information on environment	Dir. 91/338: idem
Dir 90/956: German transitional measures	Dir. 90/220: Genetically modified organisms
Dir 91/271: Urban waste water treatment	Dir. 91/157: Batteries containing dangerous substances
Reg 594/91: Ozone Layer	
Reg 563/91: Protection of environment mediterrancan sea	

Table II: Measures... (cont) (1).

Adopted under 130S	Adopted under 100A
Dir. 91/598: Protection of Elbe	Dir. 91/542: Diesel emissions.
Reg. 3907/91: Nature Conservation	
Reg 3908/91: Coastal areas	
Dir. 91/676: Nitrates	
Dir. 91/689: Hazardous waste	
Dir. 91/90: Ozone	
Dir. 91/629: Imple. information reports	

(1): Source: Golub (1994:22-25).

As may be implied from an examination of Table II, at least 19 measures were enacted under Article 100a, against at least 25 measures adopted under Article 130s, during the SEA period. Whether Britain was in fact outvoted in cases in which the measure was adopted under Article 100a article is something that cannot be ascertained since votes were not published under the SEA. Nevertheless, it is apparent that the Member States' power to veto proposals, and therefore the possibility for Britain to protect its sovereignty and preferences, was considerably weakened under the SEA. Furthermore, the possibility to employ the veto power depended entirely on the legal basis on which the proposal rested. Thus the crucial point in this situation of choice among legal bases (and therefore, of different decision-making rules) was where, from the Community supranational institutions or Member States, did the power to determine the appropriate legal basis of a particular proposal lay. That this power did not always lay on the Member States' side is well illustrated by the *Titanium Dioxide*[21] case. I shall examine this judgement in the following pages.

[21]Case C-300/89, *Commission v Council* (*Titanium Dioxide*), [1991] ECR I-2867.

The Commission had issued on 18 April 1983[22] a proposal concerning the amendment of directive 78/716 (as last amended by directive 83/29) which dealt with the establishment of an obligation upon Member States to draw up programs designed to reduce or eliminate waste coming from the titanium dioxide industry. Article 9.3° of that directive established that, once Member States had submitted to the Commission the elimination/reduction programs, the Commission would make proposals for the harmonisation of those programs. As it may be recalled, the titanium dioxide directive 78/716 was one in which the U.K., but also other Member States, succeeded in introducing substantial modifications to the original Commission proposal. As a matter of fact, directive 78/716 imposed very loose obligations upon Member States. The only way for the Commission to establish more stringent requirements for the control of pollution coming from titanium dioxide was through the indirect means of harmonising Member States' programs. The Commission proposal of 18 April 1983 was intended to achieve this aim.

Therefore the Commission proposed, firstly, the elimination and the reduction of certain kinds of discharge coming from the titanium dioxide industry. Secondly, the Commission also proposed to establish time limits within which Member States were to implement the directive. Article 7.3° of the proposed measure established that Member States could depart from the timetable set by the directive, though extensions could only be granted for 12 more months. Thirdly, concerning the reduction of discharges to water and pollution in air, the Commission proposed quantitative limits.

Following the entry into force of the SEA, the Commission changed the legal basis of the proposal and based it on the new Article 100a. Although the more stringent proposal

[22]Proposal for a Council directive on procedure for harmonising the programmes for the reduction and eventual elimination of pollution caused by waste from the titanium dioxide industry, OJEC C 138/5 of 26 May 1983.

offered by the Commission might have inflicted serious burdens on some Member States, there was the real possibility that it would have met with the agreement of a majority in the Council (Golub, 1994:28). However, the Council, in a meeting held on 24 and 25 November 1988, arrived at a common position whereby the future directive would be based on Article 130s of the EC Treaty. Subsequently, the proposal was adopted by unanimity and became directive 89/428[23].

The adopted directive substantially modified the original Commission proposal. These changes were mainly two-fold: first, the possibility for Member States to "defer" the implementation of the directive for two or three more years, depending on the provision[24]; and second, for the reduction of discharges to water, Article 8 provided for alternative harmonisation, whereby Member States could use either quantitative or qualitative standards. The "spirit" of the British approach to water control may be traced back to this article of the directive. In general, the directive was considerably more lax than the original Commission proposal (Golub, 1994:28).

Following the adoption of the directive by the Council, the Commission, supported by the European Parliament, brought an action before the ECJ for the annulment of the directive. The main charge of the Commission and Parliament was that the directive should have been based on Article 100a, instead of on Article 130s. Arguments concerning the more democratic character of Article 100a and the aim and content of the directive, which was, according to the applicant and supporter, primarily designed to harmonize the conditions of competition in the titanium dioxide market, were used to uphold their position. In its ruling, the Court

[23]Council directive 89/428 on procedures for harmonizing the programs for the reduction and eventual elimination of pollution caused by waste from the titanium dioxide industry, OJEC L 201/56 of 14 July 1989.

[24]Note in this respect Articles 5 and 7 of the directive.

started by repeating the principle that the choice of legal basis cannot depend on an institution's conviction as to the objective pursued but should be based on objective factors "which are amenable to judicial review[25]". Second, it analyzed the content and aim of directive 89/428, and concluded that the directive was intended to further both protection of the environment and market integration[26]. Thus from the analysis of the aim and content of the directive it could not be determined which legal basis should take priority. Third, the Court went on to analyze both Articles 100a and 130s of the EC Treaty. Fourth, it rejected the possibility that *both* articles could serve as the legal basis of the directive, since "use of both provisions as legal basis would divest the cooperation procedure of its very substance[27]", which is "to increase the involvement of the E.P. in the legislative process", and which in turn reflects "a fundamental democratic principle that the people should take part in the exercise of power through the intermediary of a representative assembly[28]". Fifth, the Court concluded that Article 100a should constitute the legal basis of the directive in question, for an "action intended to approximate national rules concerning production conditions in a given industrial sector with the aim of eliminating distortions of competition in that sector is conducive to the attainment of the internal market and thus falls within the scope of Article 100A[29]". It added that the objectives of environmental protection could be also effectively pursued by means of Article 100A[30]. Consequently, the ECJ annulled the Council

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[25]Para. 10 of the ruling. This principle was set for the first time in Case 45/86 *Commission v Council* [1987] ECR 1493, para. 11.

[26]Para. 13 of the ruling.

[27]Para. 18 of the ruling.

[28]Para. 20 of the ruling.

[29]Para. 23 of the ruling.

[30]Para. 24 of the ruling.

directive[31]. In short, the example of the *Titanium Dioxide* case demonstrates that, during the SEA period, the Member States lost the grip on the decision as to which voting procedures should be implemented in the field of environment.

B.4. Conclusions.

To sum up, evidence extracted from the evolution of Community environmental policy before and after the SEA enactment points to the following conclusions. First, the U.K. was able to protect, on balance, its sovereignty and distinct approach to environmental protection in the period prior to the SEA due to the exercise of the veto power. Second, this situation was modified in the period that followed the enactment of the SEA. Environmental policy developed under the SEA, at least in part, contrary to British expectations. Article 100a was in fact used for the adoption of Community measures affecting pollution control. This weakened the previous U.K. position whereby this country could exercise its veto power in order to protect sovereignty and national preferences. Third, the choice amongst the legal bases (Article 100a/Article 130s) was a battle whose final arbiter was not the Member States, but the Court of Justice. Not only did the Member States lose their grip on the decision concerning legal basis, but the ECJ was also likely to support the use of Article 100a for the implementation of environmental policy, as the *Titanium Dioxide* case demonstrates. This element further weakened U.K. control of Community environmental policy. As a result of the combined effect of both elements (the introduction of majority voting and the shift of the decision regarding legal basis to the legal arena), one may conclude that, during the SEA

[31]Compare, nevertheless, case C-155/91 *Commission v Council* (known as *Waste*) [1993] ECR I-939, in which the Court, in a similar problem, arrived at the opposite conclusion. For comment on the ECJ's case law on legal basis related to the field of environment note Lenaerts (1994).

period, both British sovereignty and preferences became partially unprotected from potential impacts derived from the evolution of the Community's powers in the field of environment.

III-. THE COMMUNITY'S FEDERAL DEFICIT II: THE IMPLEMENTATION OF POLICY-MAKING POWERS BY COMMUNITY SUPRANATIONAL INSTITUTIONS (ACCORDING TO PROCEDURES GRANTING THEM THE LAST SAY) WITH A CASE STUDY ON TELECOMMUNICATIONS.

A. The Basic Question.

Though the problem that has been examined in the previous section has been the main focus of recent analysis regarding Community integration, it is important to remark that not all legitimacy problems affecting Community vertical relationships are derived from the implementation of the majority principle. Similar (though not identical) problems have arisen in those cases in which the Community supranational institutions enact decision-making powers, i.e., general and abstract binding powers, according to procedures that grant them the last word. Therefore it is important to understand the extent to which this is problematic from the perspective of the legitimacy concept[32].

To start with, and distinct from the case of majority voting, the enactment by the Community supranational institutions of policy-making powers has posed legitimacy problems from a formal perspective. This has happened, for instance, in those cases in which Community supranational institutions have interpreted their powers beyond the original intention underlying their establishment. One example in this regard is the implementation of policy-making powers by the Commission under Article 90.3° of the EEC Treaty, a case

[32]Many of the concepts and notions used in this section have been already elaborated in section II. Therefore its discussion is avoided here.

which shall be examined in detail below. Another example of this variety may be found, for instance, in the "implied powers" doctrine of the ECJ. As is widely known, in the *ERTA* case[33], to cite the first in a series of cases of dubious legitimacy from a formal perspective[34], the ECJ established that the Community had been granted implicit powers as regards, in this particular case, the external aspect of the Common Transport Policy. This meant that the Community -and not the Member States- had the competence to enter into international agreements regarding this field, even if faced with the absence of explicitly attributed powers. Therefore by giving an extensive reading of its powers of interpretation of the EEC Treaty, the ECJ granted, going beyond the original intention of the Member States, a new power to the Community (Dehousse, 1994b; Weiler, 1991a).

However, the formal challenge to this kind of attitude on the part of the Community supranational institutions is the most obvious one. More profoundly, the enactment by supranational institutions of policy-making powers, when this occurs according to procedures that grant the power of decision of last resort to the supranational organs (and independently of whether this has been or not formally accepted by the Member States), pose problems from the perspective of social legitimacy. A reflection similar to the one made as regards majority voting applies here as well: are single polities mature enough to accept the possibility of being overruled, so to speak, by Community supranational actors? As regards the Community context, the probable response must be, at least at present, of a negative character[35]: in such

[33]Case 22/70 *ERTA*, [1971] ECR 263.

[34]Note the following cases, which have further developed the ECJ's "implied powers" doctrine: Joined cases 3,4 and 6/76, *Kramer*, [1976] ECR 1279; Opinion 1/76, [1977] ECR 741. This doctrine has been recently confirmed by the Court in its Opinion 2/91 [1993] ECR I-1061.

[35]A good illustration of this point is provided by the present discussion as regards the generalisation of Community regulatory agencies. Thus Member States are reluctant to support the spread of regulatory agencies with wide regulatory powers. For the present discussion note Shapiro (1996a), Majone (1994b) and Everson (1995).

cases, not only are those affected by the outcome of a particular decision not allowed to participate in equal conditions (with the supranational actors) in its making, but the very possibility to engage in a free and equal discussion is negated by definition[36]. In summary, the implementation of policy-making powers by supranational institutions has posed even more dramatic issues than those that derived from the embracement of the majority principle in the Community setting, since legitimacy could result challenged both from its formal and social perspectives. The following case, which concerns the enactment by the Commission of legislative powers under Article 90.3° of the Rome Treaty, is a clear example that serves to illustrate this argument.

B. An Illustration: the Commission's Powers under Article 90.3° and the Telecommunications Directives.

The telecommunications case offers a good illustration of the legitimacy problems arising from the implementation of policy-making powers by supranational institutions (in this case, the EC Commission), following procedures that grant them the last decisional word. In this particular case, the EC Commission enacted, under the scope of Article 90.3°, two directives related to the liberalisation of the telecommunications sector of the Member States. These were directive 88/301, "terminal equipment[37]", and directive 90/388, "services

[36]And it is not enough to counter-argue that, for example, in the course of a process before the ECJ, the Member States have procedural opportunities to intervene in the proceedings. To start with, not all actions before the ECJ accept to the same extent participation of the Member States in proceedings [note in this regard, for instance, the action for non-contractual liability -Articles 178 and 215.2° of the EC Treaty. The ECJ has set that only those Member States affected by the damage caused by the Community Institutions may have *locus standi*. Note in this sense Mangas y Liñan Nogueras (1996:467)]. Second, and more importantly, the last word is always pronounced by the ECJ. Discussions as regards potential outcomes are therefore limited as a consequence of this important fact of procedure [note in this sense Scharpf (1995:11, at footnote n° 6)].

[37]OJEC L 131/72 of 27 May 1988.

directive[38]", both adopted under the SEA period. I shall analyze in this section the main features of this case and the extent to which this was problematic from the perspective of the concept of formal and, above all, social legitimacy.

B.1. Members States' Telecommunications Policies Prior to the Enactment of the Commission's Telecommunications Directives.

To understand the reason why the enactment of the Commission 90.3° directives regarding telecommunications liberalisation produced an impact on Member State sovereignty one must start by recounting the situation in the Member States, regarding the provision of telecommunications, before the Community began to consider liberalisation of this sector in 1987[39].

Before 1987, telecommunications were a public monopoly in the majority of Member States. Telecommunications monopolies were born in Member States during the 19th century. As such, they constituted an extension of the existing national postal public monopolies. In fact, until the late 1980's the provision of telecommunications in Member States was typically entrusted to the Post, Telegraph and Telephone Ministries, the so-called PTTs (Sauter, 1995a:187).

The traditional justification for the existence of telecommunications monopolies was that they constituted natural monopolies. In a few words the "natural monopoly" argument means that due to the characteristics of a particular market, competition that emerges is either

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[38]OJEC L 192/10 of 24 July 1990.

[39]The same remarks that were made in point B of section II of this chapter apply here as well. It is therefore important to individualize national policy preferences and, in a second step, to examine the extent to which the enactment of policy-making powers by supranational institutions implies a pressure to modify them.

inefficient or inexistent (Müller, 1987:252). In the case of telecommunications, since technology required large investments and the service provided was basic, economies of scale and scope could only be achieved by establishing a single network. Hence the provision of telecommunications infrastructure and services was considered to be a natural monopoly (Sauter, 1995a:186).

The natural monopoly argument as such did not entail public ownership of the monopoly. Reasons linked to military security, the integrity of the network and, above all, the desire to provide the same basic service with a universal character under the same conditions irrespective of costs (universal service principle) justified public ownership in this sector[40]. Nonetheless, lurking behind this functional and social justice rationale, Sauter suggests that political reasons influenced the decision to create and maintain public telecommunications monopolies. Rural constituencies, which tend to be overrepresented in some countries, the unionized labour of the PTTs as well as privileged suppliers stood to gain from the existence of national public monopolies, and formed a coalition in support of monopoly provision (Sauter, 1995a:187).

Initial pressures against national monopolies were of a technical nature. Technological advances started to reduce costs in the provision of certain services: in particular, long-distance calls. Where tariffs were maintained, the resulting profit was used to subsidize less profitable services, in particular local calls. A gap grew between actual costs and prices. This was translated into attempts by business to "by-pass" the public network and construct own

[40]Scott (1995:198) notes in this regard that the notion of universal service has evolved throughout the time. According to Scott, "when Theodore Vail, chairman of AT&T, coined the term "universal service" in 1904, he was apparently referring to the right of a company to service the entire region without competition, rather than the right of everyone in the region to receive affordable service".

infrastructure and networks. This phenomenon was first experienced in the USA, where AT&T (a private company) enjoyed a monopolistic status regarding telecommunications. As a result of these pressures, AT&T was obliged, in 1982, to divest itself of its 22 regional operating companies and to open up to competition (Botein, 1987:199). Therefore, from the beginning of the 80's, the USA market evolved in a liberalised environment[41].

Following the USA deregulatory movement, Japan opened telecommunications up to competition in 1984. In December 1984 the Japanese Parliament passed three acts aiming at liberalising the sector. The first of them abolished monopolies enjoyed since 1952 by the Nippon Telegraph and Telephone Public Corporation in domestic telecommunications and since 1953 by the Kokusai Denshin Deanwa Co. Ltd. in international telecommunications. The second act converted old public monopolies into a private joint-stock company. The third act revived and adjusted existing laws to make them compatible with the principles established by the liberalising telecommunications laws (Ito and Iwata, 1987:232).

The overall effects of the liberalisation of the American and Japanese telecommunications market on the Community's Member States were three-fold. First, although Europe benefitted from access in some sectors (for example, in the terminal equipment sector in the USA market), it found itself subject to pressures to match the opening of other sectors (for example, in information technology and advanced services in the US market)(Sauter, 1995a:191). Second, Member State telecommunications monopolies found themselves under enhanced competitive pressure to maintain their shares in international

[41]In particular, before the Community 1987 Green Paper on telecommunications the situation in USA was the following. First, regarding the local basic services market there was no competition and it was subject to strict regulation by state authorities. Second, for long distance services competition was permitted, although "dominant carriers" were subject to strict oversight from the Federal Communications Commission whereas "other common carriers" were only lightly regulated. In this market, AT&T remained in a dominant position. Third, with regard to long distance enhanced services, the market remained unregulated and open to competition. Fourth, regarding local enhanced services, competition was permitted and the market lightly regulated (Ungerer and Costello, 1990:107).

markets. And third, European market became itself a target for the industrial forces set up by the de-regulatory movement in both the USA and Japan (Ungerer and Costello, 1990:107).

Turning to the EC Member States, the first response to the de-regulatory movement in the USA and Japan came from the U.K. Further, the reform that would take place in this country formed part of the general de-regulatory and privatisation program of the Conservative government of Margaret Thatcher, which program affected other sectors besides telecommunications, such as water, railways, postal services, etc. The reform of the telecommunications sector took place in two stages in Britain. The first stage was completed with the implementation of the Telecommunications Act of 1981. This act split telecommunications from the postal service (formerly united) and made of British Telecom a state corporation. The second stage was accomplished with the Telecommunications Act of 1984, which converted British Telecom into a private owned company (although the government retained 49% of the shares). A separate regulatory body (OFTEL) was created and a private company (Mercury Consortium) received a 25 year license to operate a private digital network for voice and data in competition with British Telecom (Müller, 1990:250).

In the rest of the Member States a movement towards the rethinking of national telecommunications policies developed as a result of the British reforms and the ever more liberalised international environment (Sandholtz, 1993:254). Nevertheless, in some cases national reactions were addressed more to the protection and restructuring of the old national monopolies than to truly opening up the market. A good illustration of this point is given by the Spanish case, as shall be shown below. In general it can be argued that the de-regulatory and privatising movement in the USA, Japan and the U.K., did not really spill-over into the majority of the Community Member States (Müller, 1987:250). Policy preferences in

continental Europe were in general still centred on the old monopolistic model when the Commission launched the debate regarding the liberalisation of this sector on a Community-wide scale.

Therefore, as a result of technological change, the reforms that were taking place in the USA and Japan, and changes in some Member States, telecommunications appeared on the agenda of the Community. The debate regarding the need for a Community telecommunications policy was initiated by the Commission in two stages. In 1984, the Commission succeeded in persuading the Council to approve a Commission action plan for implementing a Common telecommunications policy[42]. The goals introduced by the action program were three-fold: first, promoting the creation of an advanced European Telecommunications infrastructure; second, contributing to the creation of a Community-wide market for services and equipment; and third, contributing to the competitiveness of European industry and service providers (Sauter, 1995b:96). Yet it would be in 1987, with the adoption by the Commission of the Green Paper "on the Development of the Common Market for Telecommunications Services and Equipment[43]", that the real debate on the need to reform Member States telecommunications' policies was launched. This document was designed to promote discussion among the Community institutions, Member States and interested parties on four main points: first, to open up to competition the provision of telecommunications services, except for basic services (in particular, voice telephony) which was to remain, in principle, under the monopoly; second, to open up to competition the provision of terminal equipment within the Community; third, to split the regulatory and commercial functions of the Member States' public operators; and fourth, to maintain Member States' exclusive and

[42]COM(84) 277, Telecommunications Progress Report and Proposals for an Action Program, 18 May 1984.

[43]COM(87) 290 final of 30 June 1987.

special rights with regard to the provision and operation of the network infrastructure (Green Paper, 1987:185).

For their part, the Member States endorsed the Commission's approach, as established in the 1987 Green Paper, in Council Resolution 99/C257 of 30 June 1988, "on the Development of the Common Market for Telecommunications Services and Equipment[44]". The way seemed therefore clear to the smooth adoption of Article 100a directives regarding the liberalisation of the terminal equipment and service markets. Nevertheless, despite the Member States' official support of liberalisation, agreement was impossible to obtain, above all with regard to services liberalisation. Two camps started to emerge: on the one hand, those Member States that favoured liberalisation, such as Germany and Britain, and to a lesser extent, the Netherlands and Denmark; on the other, those who opposed liberalisation (above all of the services market). This camp was lead by France, Spain, Greece and Italy (Sandholtz, 1993:264). With the opposition of these Member States the adoption of Article 100a directives providing for liberalisation was virtually impossible. Finally, the Commission would break the deadlock by issuing two directives under Article 90.3°, one concerning liberalisation of the terminal equipment market and the other regarding the liberalisation of the services market.

It is important to note at this point that the Member States' opposition towards the Commission proposals did not only reflect the traditional national monopolies negative reflex in front of European-driven liberalisation but, in some cases, a determined positive policy preference. The Spanish case may be cited as a good example that serves to illustrate further this point.

The regulatory framework regarding Spanish telecommunications was, before 1987, regulated by the contract between the Spanish government and *Telefónica* (the Spanish

[44]OJEC 1988, C257/1.

national company charged with the monopoly of telecommunications, state-owned) and some other dispositions of minor rank (Torres Simó, 1995:66). In 1987, right after the adoption by the Commission of the 1987 Green Paper, Spain decided to enact the LOT (Ley de Ordenación de Telecomunicaciones[45]). The act explained, in its preamble, that it was intended to implement in Spain the principles of the 1987 Green Paper and prepare the Spanish context for a situation of competition. In fact, the law was conceived to defend -and even extend- the boundaries of the national monopoly (Torres Simó, 1995:66). The provision of terminal equipment, network infrastructure and telecommunications services was to remain within the reach of the monopoly. Only some value-added services were excluded from the monopoly and made subject to competition (ibid:66). The underlying strategy of the Spanish government was, on the one hand, to take advantage of the liberalising movement that was taking place in some South-American countries and extend to South-American markets in order to gain economies of scale and scope. This process started at the beginning of the 80's. On the other hand, regarding the European market, the strategy was oriented to protect the spanish market for as long as possible, in order to have time to restructure the national monopoly. The combination of both strategies was intended to place the Spanish public monopoly in an adequate position to challenge its European competitors in an eventually liberalised European market (Torres Simó, 1995:69). The adoption of the Commission's liberalising measures hindered the pursuit of such strategy by the Spanish government.

[45]Ley 31/1987 de 18 de Diciembre 1987. B.O.E. nº 303, de 19 Diciembre 1987.

B.2. Article 90.3° of the EC Treaty and the Commission's Telecommunications Directives.

Faced with the impossibility of agreement within the Council regarding the adoption of the telecommunications proposals, the Commission adopted under Article 90.3° two directives regarding the liberalisation of the terminal equipment and services markets. Here I shall analyze the content of both measures. However, before doing so, I shall comment on the origin of the provision on which both measures are based (Article 90 EC Treaty) and, in particular, on the legal basis through which the Commission justified its action (Article 90.3°).

Article 90.1° of the EC Treaty states:

"In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in this Treaty, in particular to those rules provided for in article 7 and articles 85 to 94".

For its part, Article 90.2° establishes that:

"Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules of competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community".

In the opinion of most commentators, the origin of Articles 90.1° and 90.2° constitutes

a compromise between, on the one hand, the competition rules of the EC Treaty and the system of undistorted competition that the EC Treaty intends to establish (Article 3f of the EC Treaty) and, on the other, Article 222 of the EC Treaty, which allows in substance public ownership (Pappalardo, 1991; Sauter 1995a;1995b; Esteva Mosso, 1993). From this perspective, it may be suggested that Article 90 establishes an exception regarding to the application of the competition rules of the Treaty to public monopolies. In principle, therefore, the aim of Article 90 is to exclude national monopolies from the application of the competition rules of the Treaty. To be sure, this exception is not unlimited. National public monopolies have to be justified, according to Article 90.2°, by reasons of general interest. Further, this traditional view is supported if the political negotiation among Member States leading to the introduction of Article 90.3° into the Rome Treaty is taken into account. As Küster remarks in his historical account of the Treaty of Rome negotiations, the origin of Article 90 may be explained as a "truce between, on the one hand, those Member States that viewed under a more positive light the extension of the competition rules of the Treaty to national monopolies (although in a case by case basis) and those Member States that maintained a principled opposition to such an extension" (Küster, 1990:244).

Yet, what is more difficult to understand is the scope of Article 90.3°. This article states that

"The Commission shall ensure the application of the provisions of this article and shall, where necessary, address appropriate directives or decisions to Member States".

The origin of Article 90.3° is obscure. I have not been able to trace the rationale

underlying the Member States' decision to introduce this clause in the EEC Treaty, nor the process through which Article 90.3° was enshrined. However, (i) a textual, (ii) a contextual and (iii) a legal-historical interpretation of Article 90.3° seems to reinforce the idea that the original intention of the Member States was to grant the Commission surveillance and enforcement powers, and not with legislative powers. First, from a textual perspective, the wording of Articles 90.1° and 90.2° indicates, as has been hinted above, that, in principle, national monopolies are not prohibited by Community law, unless they cannot be justified by reasons of general interest. From this perspective it seems therefore unlikely that the Member States' intention was to grant, through Article 90.3°, a general power to the Commission to eradicate national monopolies. Instead, a more consistent way to interpret the scope of Article 90.3° is to say that Member States granted the Commission a more limited power of surveillance and enforcement in order to suppress particular State's monopoly violations of the competition rules of the Treaty in those cases in which the Commission could not find justification for the State's monopoly action based on reasons of general interest. Second, the same conclusion may be reached if Article 90.3° is interpreted in the context of the competition rules of the Treaty. The Community competition rules are established in Articles 85 to 94 of the EC Treaty. Within these provisions, three Articles grant powers to the Commission, besides Article 90.3°. These are Articles 89, 91 and 93. All three confer enforcement powers on the Commission. Firstly, article 89 grants the Commission the power to investigate cases of suspected infringements of the principles in Articles 85 and 86 of the EC Treaty. It also grants the Commission the power to send decisions to the infringers obliging them to put an end to their conduct. Secondly, article 91 grants the Commission the power to send recommendations to the person or persons who undertake dumping practices in breach of the EC Treaty. Finally, Article 93 gives the Commission the power to investigate

the accordance with the EC Treaty of aids granted by Member States to undertakings and, in case of breach, the power to send decisions to Member States in order to abolish or alter incompatible aids.

From the interpretation of these provisions, it may be concluded that the intention of the Member States, when negotiating the Treaty provisions regarding competition, was to grant to an independent agency, the Commission, the power to control the correct application by Member States and particulars of the competition rules of the Treaty and the correlative power to suppress particular deviations. The correct understanding of Article 90.3° must be made, therefore, in the light of the rest of the provisions that grant power to the Commission in the field of competition. Accordingly, Article 90.3° should be interpreted as granting the Commission surveillance and enforcement, not legislative, powers.

The previous two indications are reinforced by a third, "legal-historical" element, which is the fact that, before the ECJ telecommunications decisions, all legal scholars interpreted Article 90.3° as granting only surveillance and enforcement powers to the Commission[46].

In this connection, one may take as a reference an article published by Pappalardo in 1991, which summarizes the state of affairs as regards legal academia's interpretation of Article 90.3°. The argument used by Pappalardo was that Article 90.3° should be interpreted as a derogation, or *lex specialis*, of Article 169[47]. As is known, Article 169 regulates the action for Member State failure to comply with Treaty obligations. It grants the Commission

[46]Lacking (at least to my knowledge) further historical evidence as regards the rationale underlying the introduction of Article 90.3° in the Treaty of Rome, the stance traditionally adopted by legal scholars in this regard may serve as alternative source of historical interpretation.

[47]Article 169 reads: "If the Commission considers that a Member State has failed to fulfil an obligation under this Treaty, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations. If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice".

the general power to bring before the ECJ infringement procedures against a Member State that is found to be in breach of Community obligations. According to Pappalardo, Article 90.3° constituted therefore a special procedure of the general procedure established in Article 169. Following Article 90.3°, Pappalardo suggested, the Commission may address directives or decisions to the Member State that infringes the EC Treaty whereby the conditions of Article 90.1° and 90.2° are met. The opinion of Pappalardo is of relevance since, as hinted above, it summarizes the general mood that existed in the legal milieu as regards Article 90.3°. No legal commentator maintained, before the ECJ telecommunications cases, that Article 90.3° granted a legislative power to the Commission.

Against my interpretation stands, nevertheless, one element: the fact that Article 90.3° mentions the possibility for the Commission to use as an instrument not only decisions, but also directives. Directives seem not to be the most appropriate instrument for enforcement purposes, due to their general character. However, if Article 189 of the EC Treaty is read carefully[48], it is not clear whether directives were originally intended to have that general character which, with the years of Community operation and ECJ interpretation, this instrument has acquired. Directives seemed to be originally thought of as a flexible and hybrid instrument that could be employed both for general and particular purposes, for both legislation and enforcement. If this interpretation is correct, the dilemma contained in Article

[48]Compare how article 189 defines regulations, directives and decisions:
"A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.
A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.
A decision shall be binding in its entirety upon those to whom it is addressed". Note that, whereas the general character of regulations is mentioned, the Treaty is silent with regard to directives. Note also that the definition of decisions and directives is similar concerning the subject of both instruments. For regulations the Treaty specifies that they shall bind all Member States, a clarification that is not made for directives and decisions. This implies that, originally, both directives (and decisions) could be employed for both general and particular purposes. From this it may be deduced that the drafters of the Treaty did not intend to restrict the employ of directives to legislation only.

90.3° is solved. The Commission, in its action addressed to correct particular infringements by a national monopoly, had the choice to adopt a more stringent instrument (decisions) or an instrument that would have left Member States the choice as to the form and methods to use in order to eliminate the particular infringement. The choice for the Commission between both instruments can be explained precisely by the peculiar sensitivity of the public monopolies issue.

I may now turn to the examination of the content of the Commission telecommunications directives. As regards the terminal equipment directive, its Article 2 provides for the abolition of Member State special or exclusive rights granted to undertakings concerning import, marketing, bringing connections into service and maintaining of terminal equipment. Terminal equipment is defined in Article 1 of the directive as the equipment directly or indirectly connected to the public telecommunications network in order to send, process or receive information. Article 1 includes in its definition receive-only satellite stations not connected to the public network of a Member State. Other important provisions are Articles 6 and 7. Article 6 provides for the splitting of the regulatory and commercial functions of the public operator. The national independent regulator is to be charged with the task of drawing up technical specifications and the type-approval procedure necessary for terminal equipment to connect to the network. It is also responsible for the task of monitoring the implementation of technical specifications and granting type-approval. Article 7 orders the termination of contracts between public operators and suppliers of terminal equipment subject to exclusive and special rights. In turn, Article 10 specifies that the provisions contained in the Act of Accession of Spain and Portugal, and in particular its Articles 48 and 208, should be respected.

As regards the service directive, its Article 2 provides for the elimination of Member States' special and exclusive rights concerning the supply of telecommunications services, with the exception of voice telephony. Article 1 also excluded telex, mobil radiotelephony and satellite services, to be regulated by specific measures. Therefore VAS (value added services[49]) immediately opened to competition whereas packet -or circuit-switched data services opened to competition on the 1st January 1993[50]. Another important provision is Article 7, which, in line with Article 6 of the terminal equipment directive, entrusts to a national independent regulator the tasks of: granting operating licenses; controlling type-approval and mandatory specifications; allocating frequencies; and monitoring usage conditions. In turn, article 10 calls for an overall assessment of the situation of the telecommunications sector in relation to the aims of the directive, to be made in 1992. This constituted the Commission's foothold for reviewing the exception on voice telephony established in Article 2 (Sauter, 1995b:100).

It is important to remark at this point that, at the time, the "exception" of voice telephony concerned around 90% of the sector revenue (although expected to fall to 85% within about 15 years) (Telecommunications Green Paper, 1987:74). However the economic impact of the liberalising measures contained in the services directive must not be disregarded. To give an example, even if revenues attributable to VAS were still a minute proportion of the total monopolies revenue, the Commission expected a considerable growth of these services in the future, of 25 to 30% annually (Ungerer and Costello, 1990:55) (vid. also Telecommunications Green Paper, 1987:51).

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[49]VAS include services such as: videotext, ticket reservations, automatic bank tellers and other financial services, other retail services including teleshopping, electronic data interchange within industries for ordering, supply, etc, mailbox services, interfacing/protocol conversion, etc. Note Telecommunications Green Paper (1987:51).

[50]Note Article 3 of the services directive.

Both terminal and services directives were challenged by Member States and gave rise to two pronouncements by the European Court of Justice. The next point turns therefore to the analysis of both Court decisions.

B.3. The Court's Case-Law Concerning National Monopolies: in Particular, the Terminal and Services Directives Cases.

The Court upheld in the terminals and services cases the broad lines of the Commission's action regarding the liberalisation of the telecommunications sector. Further, the adoption of the Commission directives could not be easily explained had the case-law of the ECJ concerning telecommunications monopolies, and monopolies in general, not existed. The ECJ case-law that preceded the adoption of the Commission directives constituted therefore an essential element that opened a "policy window" for the Commission's action in the field of telecommunications. Therefore, before my review of the terminal and services cases, I shall briefly analyze the ECJ case law regarding national monopolies before the telecommunications cases were pronounced by the Court.

The Court's drive against national monopolies started in 1974[51]. In the *Sacchi*[52] case the Court had to decide whether the Italian national television monopoly was contrary to the EC Treaty. In the case at hand, the Court examined the national monopoly with regard to both

[51]Pappalardo (1991) has traced two earlier cases in which the Court examined the compatibility of national monopolies with the EC Treaty. Both were related to relatively unimportant issues. In case 10/71, *Hein*, [1971] ECR 723, the Court stated that Article 90.2° lacked direct effect; and in case 127/73, *SABAM*, [1974] ECR 313, the Court established that in order to enjoy the exemption provided in Article 90.2°, an undertaking must have been set up by an act of the public authority.

[52]Case 155/73, *Sacchi*, [1974] ECR 409.

Articles 30 and 90 *juncto* Article 86. As a result, the Court proclaimed that there was no *per se* incompatibility between the mere existence of a national monopoly and Article 30. Nevertheless, it stated that a national monopoly would contravene Article 30 if it was discriminatory or not proportionate to its purpose. With regard to Articles 90 and 86, it reiterated that neither the existence of exclusive rights nor the extension of the monopoly was as such contrary to the Treaty. It then went on to state that a national monopoly would be contrary to the Treaty if it abused its dominant position in the market. Such would be the case if, in particular, the undertaking imposed unfair charges or conditions on users of its services or if it discriminated between national products or national operators and those of other Member States.

In *Italy v. Commission*[53] the Court had to decide for the first time the conditions for the application of Article 90.2°. In doing so it construed very narrowly the exception contained therein. *In casu*, the Court established, first, that the application of Article 90.2° was by no means to be left to the discretion of the Member States. Instead, it was established that it is the Commission which is charged with the task to monitor "such matters" under the supervision of the Court. In the second place, the Court made clear that from then, a Member State that claimed application of Article 90.2° would be charged with the burden of proving that the performance of the task of improving the general economic interest would be undermined as a result of the extinction of exclusive rights. We see then that this judgement constitutes already a substantial departure from the prudent formulae used some years before in *Sacchi*.

The Court had the opportunity to go beyond what it itself had established in the

[53]Case 41/83, *Italy v. Commission*, [1985] ECR 873.

Telemarketing[54] case. In particular, it judged that the extension of exclusive rights to ancillary activities that might be carried out in free competition constituted in itself an abuse of dominant position. In the case at hand, the Benelux television operator had contracted with Telemarketing an exclusive right to conduct telemarketing operations aimed at the Benelux market. When the contract expired, RTL (the Benelux T.V. operator) decided not to renew Telemarketing's contract and instead decided to perform "tele-sales" activities itself.

It was at this point that the Commission adopted the terminal equipment directive. This directive provided for the extinction of exclusive and special rights that Member States might have granted to undertakings for the commercialisation and bringing into service of telecommunications terminal equipment. Consequently, France, supported by Italy, Belgium, Germany and Greece, brought an action for the annulment of the Articles of the directive that provided for liberalisation. In its ruling[55], the Court rejected the applicant's claims, on the basis of Article 30. For the Court the mere existence of exclusive rights in the telecommunications terminal sector was as such capable of restricting intra-Community trade, therefore contrary to Article 30. No proportionality test was used since, according to the Court, the directive took into account the essential requirements constituting the limits of the withdrawal of exclusive rights.

The applicant and supporters also challenged the use of Article 90.3° as the legal basis for the Commission's action. Two arguments were employed against the Commission: misuse of procedure and lack of competence. With regard to the first, France argued, firstly, that the Commission should have used Article 169 (failure to comply with EC Treaty obligations by

[54]Case 311/84, *Telemarketing*, [1985] ECR 3261.

[55]Case C-202/88 *French Republic v Commission* [1991] ECR I-1223.

a Member State) instead of issuing a 90.3° directive. The Court answered that Article 90.3° empowers the Commission to specify in general terms the obligations arising from Article 90.1°. With regard to the second argument, Belgium and France argued that the Commission had encroached upon the powers of the Council under Article 100a. In particular, the applicants alleged that a policy aimed at the restructuring of the telecommunications market could be pursued only by the Council and not by the Commission. The Court rejected this line of argumentation and stated that in the area of national monopolies, the Council and the Commission enjoy concurrent powers. Therefore, Commission power to legislate under Article 90.3° was henceforth accepted by the Court.

The Court developed a more restrictive view regarding the compatibility of national monopolies with the EC treaty in its subsequent case-law, and in particular in cases *Macrotron*[56], *E.R.T.*[57], *Porto di Genova*[58] and *R.T.T.*[59]. These cases came before the Court before the Commission adopted the services directive. I shall therefore briefly review these cases before entering into the merits of the services directive case.

In *Macrotron*, the Court had to examine the compatibility of the Federal Office for Employment -the German national monopoly charged with the task of putting in contact offer and demand of employment- with the rules of the Treaty. In the *E.R.T.* case the Court was asked to examine the compatibility of the Greek T.V. monopoly with the EC Treaty. Both cases have in common that there was no evidence of abusive behaviour by the undertakings

[56]Case C-41/90 *Höfner and Elser v Macrotron* [1991] ECR I-1979.

[57]Case C-260/89 *ERT* [1991] ECR I-2925.

[58]Case C-179/90 *Merci Convenzionali Porto di Genova SpA v Siderurgica Gabrielli SpA* [1991] ECR I-5889.

[59]Case C-18/88 *Régie des Télégraphes et des Téléphones v SA GB-INNO-BM* [1991] ECR I-5951.

under examination. Moreover, in the *Macrotron* case, competition was *de facto* and *de iure* allowed by the Federal monopoly.

Despite the circumstances present in the cases at hand, the Court saw no problem in stating the illegality of both monopolies with regard to the Treaty rules. In the *Macrotron* case the Court stated that "the responsibility imposed on a Member State by Articles 90 and 86 is engaged only if the abusive conduct on the part of the agency concerned is *liable to affect* trade between Member States". In *E.R.T.* the Court used a somewhat similar formula, by stating that a national measure granting exclusive rights to undertakings is contrary to article 90.1° where those rights are "*liable to create* a situation in which that undertaking is *led to infringe* article 86".

A renewed version of the *Macrotron* and *ERT* formulae is given by the Court in the *Porto di Genova* case. Nevertheless, by contrast with its predecessors, in *Porto di Genova* there was ample evidence of abuses committed by Merci, an Italian undertaking entrusted with exclusive rights for dock-work activities in the Port of Genoa. *In casu*, the Court established that a Member State is in breach of Articles 90.1° and 86 when merely by exercising the exclusive rights granted to it, it cannot avoid abusing its dominant position or when such rights are liable to create a situation in which that undertaking is induced to commit such abuses.

In *RTT*, the Belgian *Régie des télegraphes et des téléphones* had reserved for itself the right to supply the first telephone and enjoyed statutory powers to set technical standards for telephone equipment and to grant type-approval for second telephones. The Commercial Court of Brussels asked the Court whether the statutory powers enjoyed by RTT were compatible with Article 30 and 86 of the EC Treaty. As far as Article 30 was concerned, the Court applied the proportionality test and declared incompatible the RTT monopoly. But it is with

regard to the application of the competition rules that the implications of this case turn out to be more interesting. In order to examine the compatibility of the Belgian monopoly with competition rules, the Court started by using its traditional approach; that is, it applied Article 90.1° *juncto* Article 86, and it reasserted the conclusion that it had drawn for the first time in *Telemarketing*: the extension of a monopoly constitutes as such abusive behaviour and therefore is contrary to Articles 90.1° and 86. Nevertheless, the Court did not end its analysis at that point, and considered it necessary to examine the situation with regard to one of the general Treaty goals, the creation of a "system of undistorted competition". From this perspective, the Court judged that to grant statutory powers to an undertaking that markets terminal equipment is as such incompatible with that Treaty objective.

It was at this point that the Commission service directive was challenged by Member States. As opposed to the terminal directive case, in which most Member States had partially or totally opened up their terminal equipment markets (for example, France -the applicant- had completely liberalised its market[60]) the service directive case entailed serious risks for Member States. This was at least true for the applicant, Spain, whose telecommunications policy differed greatly from the liberalising orientation adopted by the services directive[61].

Therefore Spain, supported by Italy, Belgium and France, challenged the validity of the services directive. As described above, this directive provided for the abolition of exclusive and special rights in the market for telecommunications services, with the exception of voice telephony. One of the arguments against the directive regarded the Commission's lack of competence of the Commission to issue general norms on the basis of Article 90.3°.

[60]Note opinion of Advocate-General Tesauro in the terminals directive case, p. I-1251.

[61]This has been remarked in point B.1. of this section, *supra*.

In its ruling[62], the Court rejected this allegation using the arguments employed in the terminal directive case: the Commission has the power to issue general norms under 90.3° in order to specify the rules of the Treaty concerning national monopolies; the Commission and the Council enjoy concurrent powers in this field. The other argument was that the abolition of exclusive and special rights in that area is not justified since the existence of national monopolies is not as such contrary to the Treaty. To reject this allegation, the Court made no examination of Articles 90.1° and 86. Instead, it simply stated that the grant of exclusive rights to the telecommunications undertakings leads to a restriction of competition and is therefore contrary to the EC Treaty. However, the Court annulled the part of the directive regarding special rights for lack of motivation on the part of the Commission. The Commission could nevertheless claim victory: the Court had upheld the main aspects of the services directive and it had confirmed the broad reading of the Commission's powers under Article 90.3° given by the terminal directive case.

B.4. Conclusions.

To conclude, the case of telecommunications offers a good illustration of the impact upon Member States of the exercise of the policy-making powers of supranational institutions when this happens according to procedures that grant the latter the last word. A minority of Member States which was sufficient to block the Community decision-making process under Article 100a of the EC Treaty, was contrary to the measures initially proposed by the Commission in the field of telecommunications. The Commission, therefore, giving an

[62]Affaires jointes C-271/90, C-281/90 et C-289/90 *Royaume d'Espagne e.a. contre Commission des Communautés Européenes* [1992] ECR I-5833.

imaginative reading to Article 90.3°, enacted legislation providing for the liberalisation of the terminal and services telecommunications markets. By doing so the Commission by-passed the normal political process, thereby impeding the Member States from stopping the process and protecting both their sovereignty and their preferences. Further, the Commission was upheld in its action by the ECJ, which gave a restrictive reading of the compatibility of national monopolies with the Treaty of Rome and a wide interpretation of the Commission's powers under Article 90.3°.

Therefore, one may notice that the problems arising from the use of Article 90.3° for legislative purposes are both of a formal and a social kind. From the perspective of formal legitimacy, the enactment of legislation by the Commission under Article 90.3° goes far beyond the original intention of the drafters of the Treaty, which was to simply grant enforcement powers to the Commission, and not to give it an alternative instrument to combat deadlocks in the political arena (Quadra Salcedo, 1995). Further, and more importantly, the enactment of legislative powers by the Commission under Article 90.3° raises an issue from the perspective of social legitimacy, since the Member States may not yet be prepared to accept a modification in their policy preferences as a consequence of the implementation of policy-making powers by supranational institutions, above all when this was not originally provided by the Treaty. The actions brought by some Member States before the ECJ against the Commission directives may be adduced as a proof of the discomfort that existed in this regard in the case here reviewed.

Finally, the kind of problems arising from the enactment of 90.3° legislation may not be restricted to the field of telecommunications, which further shows the relevance of this case. To be sure, the fight against national monopolies, such as, for example, electricity and

postal services, remains high on the present Commission agenda[63]. Whether the Commission is willing to pay the political costs of enacting other 90.3° directives is something that remains to be seen. However, in the meantime, the threat of regulating under the shadow of Article 90.3° may be strong enough to continue to deepen the Community's federal deficit.

[63]For an overview of the Commission plans in the field of electricity, note Ehlermann (1994) and Schmidt (1995). Concerning postal services, note Estella (1996). Note in general Scott (1995:193).

V-. CONCLUSIONS.

Chapter III's working hypothesis was that the Community suffers at present from a legitimacy problem in the form of a federal deficit. This legitimacy problem is the result of a serious mismatch between, on the one hand, some of the procedures that regulate Community vertical relations (the majority principle and the implementation of policy-making powers by the Community supranational institutions according to procedures that grant them the last word), which presume a high degree of social cohesion between the polities comprising the Community, and, on the other hand, the reality upon which they are applied, which is *de facto* rather fragmented and lacks the sufficient doses of social compact.

In order to substantiate this hypothesis I have made use of two case studies. The first case, which concerns the development of the Community's environmental policy under the Rome Treaty and SEA periods, shows the consequences of the application of the majority principle for the protection of the Member States' sovereign powers and policy preferences. That Member States may find themselves in a minority, therefore being obliged to change their policy preferences even against their will, is more than a hypothetical possibility, as is shown by the experience of the U.K. in the field of environmental policy. Further, the second case study, which concerns the Community telecommunications policy, shows the consequences that the implementation of legislative powers by the Community supranational institutions, according to procedures that grant them the last say, may have on the protection of Member States' sovereignty.

Both cases demonstrate therefore the relative lack of protection of the Member States' sovereignty as a consequence of the growth of the Community competences and powers. However, the point that I wished to make went beyond this empirical constat. That is, the

partial unprotection of Member States' sovereignty which is shown by these cases constitutes but the factual basis of the legitimacy problems affecting the Community at present. In turn, such factual basis needs to be analyzed, in a second step, from the perspective of legitimacy, in order to really understand the meaning that the process of growth of the Community's powers had as regards the Member States. By way of conclusion, the connection between both aspects (sovereignty and legitimacy) shall be further elaborated.

In the case of UK and Community environmental policy, it was shown how unanimity was able to protect, in general, U.K. policy preferences during the Rome Treaty period. I also analyzed how the turn to majority voting (plus, as was shown, a sometimes aggressive ECJ case-law regarding the issue of legal bases), rendered more difficult the protection of UK sovereignty. Even if it may not be ascertained whether the UK was *de facto* overruled during the SEA period, the available evidence shows that, at the very least, the Community's environmental policy developed in part contrary to British preferences during this period. Viewed from the -normative- angle of the concept of social legitimacy, this evidence shows that cases such as that of the UK's and the Community's environmental policy are problematic not only because they curtail Member States sovereignty, but mainly because they produce tensions of social legitimacy. In this connection, it may be submitted that the polities composing the Community are not yet prepared to accept that important areas of their daily life be ruled by the designs of other polities (above all when this implies a shift in previous policy preferences), since the sense of belonging to a larger polity is not yet sufficiently developed. This is the reason why majority voting, as a procedural rule regulating the relations between the centre and the periphery in the Community, is highly problematic, at least in the present Community context, and at least as long as a further degree of social cohesion is not developed within the Community political setting.

As regards my case study on Community telecommunications policy, I attempted to show that the implementation of policy making powers by Community supranational institutions, when they have the last decisional power, may put serious pressure on Member State capacity to state and pursue divergent policy preferences. From the perspective of legitimacy, this case study was of interest since it showed the intertwining between the notions of formal and social legitimacy. To start with, the telecommunications case was problematic from the angle of formal legitimacy. I analyzed how the enactment by the Commission of policy-making powers under Article 90.3° was a way to by-pass the normal political process, which would have been the implementation of an Article 100a measure. However, though the traditional contention is that cases of this kind constitute a challenge to the concept of formal legitimacy, I showed that an issue arises as well from the perspective of social legitimacy. This is so due to the fact that a procedure of the kind such as Article 90.3° involves the negation of participatory rights to Member States in the Community policy making process, and that any discussion among Member States and supranational actors about possible outcomes may be severely limited. The conclusion that may be drawn from this case is that it is far from evident that the Member State polities are ready, in the present social context, to accept that important areas of their daily affairs may be ruled by Community supranational organs acting according to procedures that severely curtail their participatory rights in the Community decisional process.

In conclusion, as this Chapter's discussion showed, both majority voting and the implementation of policy making powers by supranational institutions (according to certain kind of procedures) have created a legitimacy problem in the form of a federal deficit in the Community context. The introduction of the subsidiarity principle by the Maastricht reform

constituted, as shall be argued in the following Chapter, a visible manifestation of this legitimacy discomfort.

THIRD PART: "REMEDIES".

CHAPTER IV: THE PRINCIPLE OF SUBSIDIARITY AS A REMEDY FOR THE COMMUNITY'S FEDERAL DEFICIT.

"En fait, les mots exercent un pouvoir typiquement magique: ils font voir, ils font croire, ils font agir. Mais, comme dans le cas de la magie, il faut se demander où réside le principe de cette action; ou plus exactement, quelles sont les conditions sociales qui rendent possible l'efficacité magique des mots. Le pouvoir des mots ne s'exerce que sur ceux qui ont été disposés à les entendre et à les écouter, bref, à les croire".
Bourdieu, *Le pouvoir des mots*, 1986.

I-. INTRODUCTION.

Institutional reforms may be seen as attempts to introduce technical devices oriented to the effective resolution of conflicts among parties, but also as metaphors reflecting wider socio-political concerns. In the Community system, the symbolic value of institutional reform acquires, if possible, still greater relevance: lacking sufficiently structured channels for the expression of public opinion, institutional reform may be taken as an alternative way to measure the perception that Member States' societies have at a particular moment as regards state of affairs in the Community.

The introduction of the principle of subsidiarity into the Community constitutional order is a good example of this kind. In particular, subsidiarity epitomizes the existence of a significant social discomfort as regards Community integration. Member States seem by now

to be aware that the shift to majority voting and the setting up of Community supranational actors with policy making powers constrain to an important extent their autonomous capacity to fix and achieve their own policy preferences. Subsidiarity reflects therefore this growing discomfort and the need to search for remedies to present patterns of Community centre-periphery relations.

Precisely because of the socio-political significance of the introduction of subsidiarity in the Community context, recent years have witnessed the emergence of a debate within the public realm as regards different aspects of the principle, such as its historical origin, its substantive content, the criteria for its implementation, and the issue of its justiciability. The primary aim of this Chapter shall be to address all these issues and therefore to answer the question of what the role of this principle is and will be in the Community institutional architecture.

To proceed with the analysis that follows, this chapter's discussion shall be placed between two extreme theses regarding the viability of the subsidiarity principle as a remedy for the Community's federal deficit. Such an approach may be useful, firstly, to demonstrate the range and variety of views and expectations that have grown up as regards subsidiarity and, secondly, to root a point of reference which shall enable me to guide my own reflections. In the following lines we present a condensed version of both theses.

A first thesis regarding subsidiarity consists of arguing that this principle constitutes a valuable mechanism to stop, or at least, make considerably difficult, undue Community forays into the Member State sphere of autonomous powers. Further, this thesis highlights the fact that Community institutions are entrusted with the application of and respect for the

principle. The Court of Justice is seen as the final guarantor of the application of subsidiarity by the other Community institutions. Subsidiarity should, therefore, be translated by a diminution of the number of actions undertaken by the Community institutions, as well as by a limitation of the intensity of Community intervention.

A second thesis stresses the inability of the principle of subsidiarity to establish real limits to the process of growth of the Community's powers. According to this reading, the principle is seen as an empty concept, devoid of a clear substantive content, recalling the obvious. Its application by the Court of Justice would not only not reduce either the number or the extent of Community interventions: on the contrary, its justiciability would bring a tide of new cases before the Court of Justice therefore overloading this institution even more. In addition, the judgements of the Court on subsidiarity would bring about legal uncertainty, due to the political -not legal- nature of the principle. The foreseeable outcome derived from the implementation of subsidiarity would be nothing but the increase of confusion as regards Community objectives and an addition to the cumbersome character of Community decision-making.

Both theses are currently echoed by both political actors and by sectors of the academic realm. The first, "virtuous", thesis is probably best captured by the following passage of Jacqué and Weiler. According to both authors,

"Justice must be done and also seen to be done. What is needed in our view is a dramatic change which will demonstrate a new approach to jurisdiction/competences/powers, which will help instil a new ethos and which will be operational in practice (...). In our view, it is not enough to create an ex ante review procedure and simply use the term "lack of competence" found in article 173. One has here to grapple with what has been

considered impossible: making subsidiarity justiciable. Can this be done? The problems are well known. The question of what is best achieved at which level is often a question of political judgement -not of judicial consideration (...). At the same time, it goes without saying that courts unavoidably deal with delicate political issues and, in all states with judicial review of legislation, overturn majoritarian legislation of an elected parliament. True, this is done under the guise of a check against a material norm, and not often on the basis of a norm which calls in itself for political judgement. But this is a guise. To decide when life begins (in matters of abortion), or where the balance should be struck between free speech and, say, ordre public is no less, in our view, a political decision and we trust our courts to do so (...). We believe that (...) the control of subsidiarity is feasible and will go a long distance in addressing this issue". (Jacqué and Weiler, 1990:203-206).

The second, "demonic", thesis, is well illustrated by the following words of Toth. According to him,

"All things considered, then, the incorporation of the principle of subsidiarity in the Maastricht Treaty has been a retrograde step. Without providing a cure for any of the Community's ills, it threatens to destroy hard-won achievements. It will weaken the Community and slow down the integration process. It will suit those who would like to see the Community move not towards but away from a truly federal structure". (Toth, 1992:1105).

In this chapter I shall therefore attempt to challenge both theses as regards the ability of subsidiarity to cope with the growth of Community intervention. It shall be argued that one may speak neither of a direct link between the application of subsidiarity as a substantive concept and the present apparent diminution of the rhythm of Community intervention, nor of the increase of confusion, legal uncertainty and cumbersomeness in the Community's political and judicial decision-making processes as a result of the enshrinement of subsidiarity in the Treaties. Further, this line of argumentation shall be illustrated with empirical evidence

regarding the practice of subsidiarity up to the present. A final point will be to argue that, irrespective of my critical view towards the principle, the introduction of subsidiarity in the Community has provoked several positive effects, mainly at a symbolic level.

Chapter V is therefore organised as follows. In the second section the introduction of the subsidiarity principle into the Maastricht Treaty shall be discussed. I shall make a reference therein to aspects such as the historical origin of the principle and of the different expectations that the introduction of subsidiarity provoked amongst political actors. Further, in section III, the implementation of subsidiarity by the Community judiciary shall be discussed, whereas in section IV I shall discuss the implementation of the principle by Community political actors, notably the Commission. Finally, in the last section my conclusions shall be restated[1].

[1]Recent years have witnessed a growing interest among scholars from the whole spectrum of the social sciences about the different problems raised by the principle of subsidiarity. My aim here is not to exhaust the list of publications on the principle (it is, by the way, inexhaustible). It is simply to give a list of the writings that the reader should first tackle if wanting to get an impression of the state of the question on subsidiarity. I have classified the following list of contributions along the lines of the two theses on subsidiarity that have been established in the introduction to this chapter. To be sure, in many cases authors do not perfectly enter one or the other classification (and they shall forgive me for the inexactitudes that any classification entails), but the following division gives at least an idea of the thrust of their argumentation. Within the "virtuous" thesis we find the following: Cass (1992); Constantinesco (1991); Constantinesco (1992); Lenaerts et Ypersele (1994); Lenaerts (1994); Golub (1996); Emiliou (1992; 1994); Feral (1994; 1996); Grote (1993); Toulemonde (1996); Ehlermann (1995a); Sun and Pelkmans (1995a); Sun and Pelkmans (1995b); Palacio Gonzalez (1995); Chung (1995); Sinn (1994); MacCormick (1993); MacCormick (1994); Scott et al (1994); Bermann (1994); Seurin (1994); Orsello (1993); Sinn (1994); Harrison (1996). Belonging to the "démonic" thesis we find the following: Dehousse (1993); Dehousse (1994a:103); Dehousse et al (1996); Scharpf (1994); Scharpf (1995); Areilza (1995a); Teasdale (1993); Bribosia (1992); Kapteyn (1991); Toth (1992); Toth (1994a); Toth (1994b); Gaudissart (1993); Brent (1995); Pisany-Ferry (1995); Cox (1994); Peterson (1994); Verbeek (1994); Wyplosz (1994); Strozzi (1994); Vandersanden (1992); Fischer (1994).

II-. THE INTRODUCTION OF SUBSIDIARITY AS A LEGAL PRINCIPLE INTO THE COMMUNITY SYSTEM.

In this section I shall examine, first, the path that was taken towards the enshrinement of subsidiarity as a legal principle in the Community system. Second, I shall analyze the interpretation of the principle that different Community actors have made since the end of the Maastricht negotiations. Third, I shall reconstruct the different expectations that those actors that supported subsidiarity had as regards the introduction of the principle into the Community context. A prior discussion regarding the socio-political roots of the principle shall allow me to introduce the analysis of the emergence of the principle in the Community context.

A. The Birth of the Principle of Subsidiarity.

Subsidiarity emerged as a relevant principle of social organisation in 1931. Concerned with the protection of the individual and small social groups' autonomy faced with the action of larger social groups and, at the last resort, the State, Pope Pius XI recalled the principle of subsidiarity as a useful guideline in order to trace the dividing line between the public and private spheres, and within the private, between the respective spheres of action of, on the one hand, large groups, and on the other, small groups or individuals. In particular, the encyclical letter *Quadragessimo Anno* expressed that

"Just as it is wrong to withdraw from the individual and commit to a group what private enterprise and industry can accomplish, so too it is an injustice, a grave evil and a disturbance of the right order, for a larger and a higher association to arrogate to itself functions which can be performed efficiently by smaller and lower societies. This is a fundamental principle of social philosophy, unshaken and unchangeable. Of its very nature

the true aim of all social activity should be to help members of the social body, but never to destroy them or absorb them". (Pius XI, 1936:31) (Emphasis added).

Although the English version of the Papal encyclical letter did not use the word "subsidiarity" but the expression "fundamental principle of social philosophy", the German translation of the Latin text -in which the encyclical letter was originally drafted- included the wording "prinzip der subsidiarität". Further, the French version used the expression "fonction supplétive de toute societé", which, over time, was substituted by the present "principe de subsidiarité" (Wilke and Wallace, 1990:13). However, even if the expression "fundamental principle of social philosophy" has not been substituted by that of "principle of subsidiarity" in the English version of the papal letter, the Oxford English Dictionary[2] contains the word "subsidiarity" and connects it with the encyclical letter *Quadragessimo Anno*. In addition, subsidiarity is defined therein as "the principle that the central authority should have a subsidiary function, performing only those tasks which cannot be performed effectively at the more immediate or local level[3]".

The encyclical letter constitutes therefore the first clear official mention of the subsidiarity principle in modern times. However, the sources of the principle may be traced back to the Thomist philosophical tradition, and then to Greek philosophers such as Aristotle and Plato. For instance, even if he does not directly mention the word "subsidiarity", Aristotle

[2]Note Supplement of the Oxford English Dictionary, Vol. IV, page 605 (1986).

[3]Etymologically speaking, the word subsidiarity comes from the Latin term "subsidium" (the connection being made not by the Oxford English Dictionary but by the Grand Larousse de la Langue Française, Tome II, p. 5774 -1977-). In turn, the British-Latin Dictionary by Lewis (p. 1781) defines the Latin word subsidium as follows: "A. The line of reserve, reserve ranks; B. A body of reserve, an auxiliary corps, auxiliary forces; C. Support in battle, aid, help, relief, succour, assistance".

recounts in his *Politics* (1944) the idea that society is structured following the lines of an organic model, in which individuals belong to groups and groups are the organs of the larger social body. Each group, and each individual within the group, is called to accomplish a particular task which should be performed autonomously. Each group's autonomy must be respected, a group being allowed to interfere within the sphere of autonomy of other groups only in cases of absolute need. Further, the Thomist perspective as developed by Saint Thomas Aquinas (1978) connects the previous ideas with the notion of human dignity. Human dignity is therefore understood as the recognition of a sphere of freedom for the individual that must be respected by both larger social groups and the power of the State.

Beyond the Catholic tradition, other authors may be also considered as being the source of the concepts and notions that formed the intellectual background of the subsidiarity principle. A relevant example in this regard is John Stuart Mill, within the utilitarian tradition (Mill, 1861/1972). Mill was mainly concerned with the idea of devolving power to the local and regional authorities in Britain since he considered them as more democratic by their proximity to the citizen. Yet Mill strongly qualified his initial position for reasons linked to efficiency, as he did not view lower levels as sufficiently functionally equipped to perform complex modern tasks[4].

Moving from subsidiarity as a concept of socio-political organisation to subsidiarity as a constitutional principle, it is often said that subsidiarity appears, at least implicitly, in the constitutional texts of some federal arrangements (Areilza, 1995a:66). Maybe the clearest case in this regard is given by the German Basic Law. Referring to the exercise of concurrent powers by the Bund, article 72.2° of the German *Grundgesetz* asserts:

[4]For a full discussion of the different theoretical sources of the subsidiarity principle note Millon-Delsol (1992;1993).

"Article 72.2°: In this field the Bund will have the right to legislate if federal legal regulation is needed:

1) because a matter could not be settled effectively by the legislation of the various Länder, or

2) because the regulation of a matter by a Land law could affect the interests of other or all Länder, or

3) to safeguard the legal or economic unity, and in particular, to safeguard the homogeneity of the living conditions beyond the territory of a Land".

As Constantinesco (1991:39) suggests, in the German constitutional context, subsidiarity presides over not only the exercise of the Bund's competences when they concur with those of the Länder, but also the distribution of power between the Bund and the Länder as set out by the Basic Law. Although subsidiarity has never been explicitly mentioned in any judgement of the German Federal Court, the trend towards the contention of the Bund's powers is apparent in some of its judgements, at least until the introduction into the constitution of the so called "joint-tasks" in 1969 (Blair, 1991)[5]. Further, article 72.2° has been used by the German Federal Court on some occasions to exert control over the exercise of concurrent powers by the Bund, although this control has been kept to a minimum. In particular, Constantinesco reports that the implementation of article 72.2° by the German Federal Court has been done through mechanisms such as "misuse of power" and "manifest error" (Constantinesco, 1992:120[6]).

From this brief historical survey of the sources of subsidiarity it may be concluded that, irrespective of how it is defined in a particular philosophical tradition or in a particular

[5]Read also: Bulmer (1991); Christiansen (1992); Gunlicks (1995); Hrbek (1992); Merkl (1963); Von Beyme (1983).

[6]Note in the same sense Schwarze (1993:617).

constitutional context, the function of the principle remains the same in all cases. Its function has traditionally been that of regulating the relation between the public and the private realms, and/or within the private or public realms, in order to restrict the action of the big as a means to protect the autonomy of the small[7]. To be sure, this negative aspect of subsidiarity is more or less highlighted depending on the constitutional tradition or the ideological background in which the principle is analyzed. But it cannot be denied that the first aim of the principle is to come to grips with undue interferences in the legitimate sphere of autonomy of individuals, groups, and layers of public power different from the central one. To be more explicit, it may be useful to differentiate between three overlapping aspects: first, the theoretical content of the principle; second, its traditional function; and third, the intellectual universe in which the principle has developed. Theoretically speaking, subsidiarity could be seen as a "Janus-faced concept", as some authors argue (Golub, 1996:1). Therefore it might be conceptually construed as a sort of neutral principle that could be used to justify both the retrenchment and the entrenchment of the State and large groups. However, functionally speaking, the principle has been historically used as a brake on rather than as an accelerator (of, for example, central power intervention, as my analysis on the German constitution reveals). To this it may be finally added that the philosophical debate on the principle has always been placed in the wider intellectual context of a discussion regarding the ways to limit State and large groups' action as a means to protect the small.

To conclude, it should be noted that to stress that the principle has mainly a negative

[7]There are, as is here suggested, different sides of subsidiarity: 1) The public-private side: restriction of State intervention for the protection of civil society. This would be a liberal version of the principle, defended by authors such as Hayek. 2) Within the public sphere, subsidiarity would be an instrument employed to limit central intervention in order to protect the autonomy of the component units. This would be the version of subsidiarity adopted in the German Basic Law. 3) Within the private sphere, subsidiarity would attempt to limit the action of larger social groups in order to protect smaller ones and, in the last resort, the autonomy of the individual. This is the side of subsidiarity which is mainly highlighted by the Catholic social doctrine.

character goes beyond a pure theoretical discussion. Instead, it is submitted that this played an important role in choosing subsidiarity as a principle regulating centre-periphery relations in the Community context, as shall be seen in the next lines.

B. The Introduction of Subsidiarity as a Legal Principle for the Community...

"Closer cooperation requires neither centralization of power in Brussels nor that decisions shall be taken by a bureaucratic apparatus which is not accountable before the electorate... We have not successfully reduced the State to its just terms in order that the State re-establishes its old borders at European level, constituting a super-European State that exerts a new power from Brussels". (Thatcher, 1988[8]).

These words, pronounced by British Prime Minister Margaret Thatcher in her speech of inauguration of the 1988 academic year in Bruges, were the fist warning signal addressed to the Community institutions in the sense that some Member States would no longer accept unstoppable Community forays into the spheres of national sovereignty.

The second indication that the Community was suffering a legitimacy crisis derived from the growth of its intervention was given in a meeting between President of the Commission Delors and some Länder representatives in November 1988 in Bonn. The Länder expressed to the President of the Commission their concern about the Community's advances into fields such as broadcasting and education, which were traditionally considered to fall within their exclusive competence[9]. The word subsidiarity was suggested by the Länder to

[8]Translated from Areilza (1995a).

[9]To be sure, other actors besides the Member States were affected by the process of growth of the Community powers, and notably regional actors. Here I have avoided this discussion since it would take this thesis too far away from the central node of its main argument. It is nevertheless necessary to mention that Community integration has also produced as an effect the erosion of the (sometimes exclusive) powers of the regions. A case in point is the famous T.V. "sans frontier" directive, which was adopted at the Community level

President Delors as constituting both a useful and flexible means to establish limits on Community intervention (Wilke and Wallace, 1990:3).

The idea of approaching the debate on the limits to Community intervention from the angle of the subsidiarity principle apparently captivated the imagination of the President of the Commission. This is illustrated by the response given by Delors to Thatcher a year later in the same framework in which the former U.K. Prime Minister had initially queried the excesses of Community intervention. At the inauguration of the 1989 academic year at Bruges, Delors stated:

"J'ai souvent l'occasion de recourir au fédéralisme comme méthode, en y incluant le principe de subsidiarité. J'y vois l'inspiration pour concilier ce qui apparait à beaucoup comme inconciliable: l'emergence de l'Europe unie et la fidelité à notre nation, à notre patrie; la necessité d'un pouvoir européen à la dimension des problémes de notre temps, et l'impératif vital de conserver nos nations et nos regions...". (Delors, 1989[10]).

Furthermore, the concept of subsidiarity was not unknown in the Community context. The first important references to the principle of subsidiarity were made in the mid seventies, in the Tindemans report on the European Union[11] and in the MacDougall report on fiscal federalism[12] (Wilke and Wallace, 1990:23). Further, the European Parliament Draft Treaty

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with the support of the German government and against the opposition of the German Länder. In turn, this gave rise to a case before the German Federal Court, which has been recently decided upholding the position adopted by the German national government (Judgement of 22 March 1995-2 BvG 1/89). Note for comments on this case Herdegen (1995). For the question of the impact of Community integration on Länder and other regional actors note the following: Kellas (1991); Christiansen (1992); Hoogue (1995); Hrbek (1992).

[10]Extracted from Wilke and Wallace (1990).

[11]Note "Tindemans Report on the European Union", (Supplement 1/76, Bull.EC).

[12]Note "Report of the Study Group on the Role of Public Finance in European Integration" (1977).

on European Union made an implicit reference to subsidiarity in its Article 12.2°. In addition to this, the SEA incorporated subsidiarity, in 1987, in Article 130r of the EC Treaty, relating the principle to environmental protection (Lenaerts, 1994).

Thus the fact that the principle was not a new term for the Community, the connection of its social Christian flavour with the intellectual origins of President Delors and that historically the principle had been used in various contexts as an argument for restraining State intervention, made subsidiarity move smoothly onto the agenda for institutional reform of the European Communities. Therefore, once the two intergovernmental conferences on monetary and political union were officially opened in December 1990 to reform the Rome Treaty, the representatives of the Member States backed subsidiarity as an important element of the future Community constitutional architecture. In particular, the European Council of Rome established that:

"Le Conseil Européen reconnaît l'importance que revêt le principe de subsidiarité, non seulement lorsqu'il s'agit d'étendre les compétences de l'Union mais, aussi pour la mise en oeuvre des politiques et des décisions de l'Union". (European Council of Rome, 1990[13]).

Following the European Council of Rome, a debate took place among different actors as regards the place that the principle of subsidiarity should have in the Treaty. Two camps emerged (Elorza, 1992:126). On the one hand, some Member States advocated a mere mention of subsidiarity in the preamble of the Treaties. This "political" position was maintained by, notably, Spain, France and Italy. On the other hand, another set of actors favoured the inclusion of the principle of subsidiarity in the operative part of the Treaty. This

[13]Note Bull.CE 12-1990 at 11.

"legal" stance was defended by the Commission, the European Parliament, and amongst Member States, by the U.K. and Germany, though for different reasons[1415].

However, even in the camp that defended the legal profile of the principle, there were also important divergences as regarded the concrete formulation of subsidiarity and its exact location within the Treaties. At one extreme, the Commission[16] circumscribed inclusion of the principle of subsidiarity within the framework of Article 235 of the EC Treaty. Therefore the Commission understood that subsidiarity should be applied only to cases in which the Community lacked sufficient means for action and therefore needed to enact new powers. At the other extreme, the U.K. and Germany advocated a text that underlined the negative aspect of the principle, and supported the establishment of subsidiarity as a broader principle of Community law (Cloos et al., 1993:149).

In turn the European Parliament maintained an intermediate position between these extremes. It advocated the introduction of subsidiarity as a general legal principle, but also limitation of its scope of application to the exercise of Community concurrent competences. Moreover, the European Parliament report on the principle of subsidiarity advocated an *ex ante* subsidiarity control of Community legislation before the Court of Justice. Legally binding acts adopted by Community institutions could be sent for scrutiny by the Court before they entered into force. The Council, the Commission, the European Parliament and Member States were accorded *locus standi*. In the case of a negative opinion of the Court, the European Parliament report suggested the procedure of Treaty revision (Article 236 of the EC Treaty)

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[14]Note, reporting both positions, *Agence Europe*, n° 5514 of 17 and 18 June 1991 at 3.

[15]Note my remarks *infra*, in point D of this section.

[16]Avis de la Commission Européenne du 21 Octobre 1990 relatif au projet de révision du Traité instituant la Communauté Economique Européenne et concernant l'Union Politique, COM(90) 600 final, 23 Octobre 1990.

for the adoption of the act in question[17].

In parallel, the Luxembourg Presidency of the European Community circulated a draft Treaty "on the Union" during the first six months of 1991. The draft Treaty included a new Article 3b which served as the basis of negotiation regarding the formulation of the principle of subsidiarity and its location within the Treaty. In particular, Article 3b of the Luxembourg draft established that:

"Article 3b: The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein. In the areas which do not fall within its exclusive jurisdiction, the Community shall take only action, in accordance with the principle of subsidiarity, if and in so far as those objectives can be better achieved by the Community than by the Member States acting separately because of the scale or effects of the proposed action".[18]

The principle of subsidiarity would finally be retained in Article 3b2° of the Rome Treaty as amended by the Maastricht reform. The final outcome consisted in a *quid pro quo* between the different camps above mentioned. On the one hand, the "legal" camp succeeded in making the subsidiarity principle justiciable. Further, Article 3b2° adopted a stricter formulation than that established by the Luxembourg draft (Dehousse, 1993:6). In particular, the U.K. and Germany were responsible for the markedly negative overtone of the wording

[17]Note report of the Commission of Institutional Affairs of the European Parliament on the Principle of Subsidiarity of 31 October 1990. Doc. A3-0267/90.

[18]Note Europe Documents, n° 1722/1723 of 5 July 1991 at page 4.

of Article 3B2° that was finally adopted[19] (Cloos et al, 1993:149). In addition, Article 3b3° inserted the proportionality principle in connection with both the exclusive and concurrent Community competences. This was a concession made to the U.K., unhappy with the limitation of the scope of subsidiarity to simply the Community concurrent competences (House of Commons, 1992:17[20]). Finally, the principle of attributed competences was included in the first paragraph of Article 3b, in order to underline the limited character of the transfer of sovereignty from the Member States to the European Community. On the other hand, the political camp succeeded in limiting the scope of the principle to Community concurrent competences, as suggested by the European Parliament, and in saving the "better attainment" clause of the Luxembourg draft in the last sentence of Article 3b2° (Elorza, 1992:126). As a result of protracted negotiations, Article 3b of the Maastricht Treaty presently establishes:

"The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.

In areas which do not fall within its exclusive competence, the Community shall take action, in accordance to 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 the scale or effects of the proposed action, be better achieved by the Community.

Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty".

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[19]In particular, Teasdale reports that the sentence "the Community shall take action... only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States" was suggested by the U.K. who maintained a vision of subsidiarity as basically equivalent to a "necessary" clause. This formulation was then upheld by the German delegation in the Maastricht negotiations. Note Teasdale (1993:191).

[20]Note House of Commons, session 1991-92, Foreign Affairs Committee, second report "Europe After Maastricht", Vol. II (minutes of evidence) p. 17.

C. ...and Beyond.

The Treaty on European Union was signed by the Member States in Maastricht on 7 February 1992. Officially, the negotiations lasted one year, from December 1990 to December 1991. However, taking into account the preparatory work that preceded the intergovernmental conferences, the whole negotiation took more than two years[21]. This illustrates with particular accuracy the difficulties of the undertaking (Cloos et al., 1993:vii).

The Maastricht reform resembled nevertheless other major negotiations that had taken place in the history of the European Community. It was conducted following the lines of traditional international agreements among States. The negotiations took place away from the eye of public opinion, behind closed doors, and within an environment dominated by secrecy and lack of transparency. All this seemed to point therefore to a smooth process of ratification of the Maastricht outcome, as had happened on other occasions.

However, the geo-political *status quo* in which the world had found itself at the end of the second world war was about to change in the years in which the negotiation of Maastricht took place (Areilza, 1995a:71). The end of the cold war, the fall of the iron curtain, the political changes in the Eastern part of Europe, all these elements resulted in Europe being a major theme of discussion within national public opinions at the beginning of the 90's. The discussion focused in the first place on the problem of whether the European Community would have the means necessary to respond to the new international environment. But it inevitably spilled over into aspects related to the Community's internal structure. The outcry over Community legitimacy, which had been a subject of academic and erudite

[21]Compare with the short period of time in which the SEA was negotiated. Note Chapter II, *supra*, in this regard.

discussion until that moment, abruptly became a major theme of debate in the public opinions of the Member States.

The clearest signal in this regard was the debate that took place in Denmark concerning the ratification of the Maastricht Treaty. Unexpectedly, this debate resulted in the rejection of the Maastricht outcome by the Danish people in June 1992. The main effect of the Danish negative vote was to reopen, within the Community context, the debate on the limits of the growth of the Community's powers, and, therefore, on subsidiarity (Teasdale, 1993:193).

The first reactions to the Danish outcome came from the Commission and were of panic. A few days after the Danish "no", the Commission President Delors presented a secret document to the Foreign Ministries of the Member States on ways in which the Community might give flesh to the principle of subsidiarity. The document went so far as to propose the possibility of repatriating some areas of Community policy, including aspects of environmental policy, the Single Market and competition policy (Teasdale, 1993:194).

The first official reaction to the crisis produced by the Danish vote was given by the Member States in the European Council that took place in Lisbon in June 1992. Although the European Council explicitly mentioned that the Maastricht Treaty would "not be renegotiated", the Heads of State and government stressed the need for subsidiarity to be strictly applied, and called on the Council and the Commission to look at the procedural and practical steps needed to implement the principle[22]. This was a strong political message aimed at calming down French public opinion, in which a sometimes heated debate on the virtues of Europe was taking place in view of the referendum convoked by President Miterrand on the Treaty of Maastricht.

[22]Note Bull.EC 6-1992 at 8, 11 and 12.

Apparently, this political message was not sufficient to placate all the French criticisms of Maastricht, since the Treaty only obtained the support of a close majority in the referendum that followed in September 1992. After the French vote, the British presidency of the European Community convoked an emergency European Council in Birmingham, in October 1992. The Member States' response to the French outcome was to issue a declaration in which they stressed their "determination to respond to public concern by focusing on transparency, subsidiarity and democracy[23]".

Pushed by the British presidency, the next steps attempted to go beyond mere reiterative declarations on the virtues of the subsidiarity principle and dealt directly with the issue of the procedural ways to implement its philosophy. The first move in this direction was the Commission "Communication to the Council and the European Parliament on the Principle of Subsidiarity" of October 1992[24]. The second was the declaration of the European Council at Edinburgh on an "Overall Approach to the Subsidiarity Principle", in December 1992[25]. The final move to clarify the procedural content of the principle was the interinstitutional agreement signed by the Council, the Commission and the European Parliament in October 1993, "on Procedures for Implementing the Principle of Subsidiarity[26]". Due to their importance, I shall make a brief reference to their content in the lines that follow.

The Commission communication on the subsidiarity principle starts by acknowledging the importance recently attributed to the principle, and connects subsidiarity with the need to

[23]Note Bull.CE 10-1992 at 17.

[24]Communication of the Commission of the European Communities to the Council and the European Parliament on the Principle of Subsidiarity, SEC(90) 1990 final of 27 October 1992.

[25]Note Bull.EC 12-1992.

[26]Printed in *Europe Documents*, n° 1857 of 4 November 1993.

pursue greater democratic control and transparency in the Community. Further, the Commission divides its communication into three parts, each of which deals with different phases of the policy-making process. The first part deals with the decisional phase, the second with the implementation phase and the third with the enforcement (control and sanction of implementation) phase. The remarks that follow are restricted to the first, decisional, phase.

Regarding the decisional phase, the document starts, in the first place, by defining subsidiarity as having a two-fold dimension: first, the dimension of the "need" for Community action; and second, that of the "intensity" of Community intervention. As regards the first dimension, the Commission introduces the discussion about the need for Community action with an initial reflection on the distinction between the exclusive and concurrent competences of the Community. After a series of analyses, which includes the list of what, according to the Commission, constitutes the "block" of exclusive Community competences by subject-matter, the document reaches the conclusion that "the exclusiveness of [Community] powers is not determined by the matter covered, but by the imperatives of free movement".

In the second place, the Commission discusses subsidiarity as a rule which can be used to decide on the need for Community action. In particular, and although the document warns that each subsidiarity assessment must be made on the grounds of each case, the Commission establishes two criteria for the assessment of the need for Community action. The first criterium is the "comparative efficiency test". This entails a comparative assessment of the means that Member States have at their disposal in order to achieve a Treaty objective. The means to be balanced include national, regional and local legislation, codes of conduct, agreement between social partners, as well as financial means. The second criterion is the "value-added test". This test involves the assessment of the effectiveness of the Community action in terms of, notably, the scale of the action, the transboundary dimension of problems,

the consequences of failure to act, the critical mass, etc.

However, irrespective of the Commission's claim that a subsidiarity assessment must be made on a case-by-case basis, the Commission states in its communication that "it is possible to propose a guide to the various ways of exercising shared powers". Accordingly, the Commission document establishes the following items: 1) legislative measures (internal market; common policies; certain social regulatory measures); 2) Joint measures (economic and social cohesion; research; development cooperation); 3) Supportive measures (certain social regulatory measures; trans-european networks; industrial policy; vocational training); 4) Complementary measures (education; culture; health). According to the Commission communication, for the first two items there would be a "very strong political resolve" to take action at Community level; for the third item, the Treaty would give a "great deal of latitude" to the Community institutions for deciding whether to take action or not; finally, regarding the last item, the "political resolve" for action would be very small, since "the Treaty itself excludes harmonisation".

In the third place, the Commission communication deals with subsidiarity used as a rule to determine the "intensity" of Community action. Here the Commission draws a dividing line between, on the one hand, the discussion of the "appropriate forms of Community action" and, on the other, the discussion of the "intensity of Community legislative action". As regards the first point, the Commission applies the proportionality principle and states that the Community should choose, as far as possible, the less restrictive form of action, unless uniformity reasons and the degree of technical complexity recommend otherwise. This implies, in practical terms, that preference should be given, whenever possible, to recommendations, international agreements, support programmes, rather than to legislation.

As regards the second point, the intensity of Community legislative action, the

Commission establishes that use of directives should take priority over the use of more stringent legal instruments, such as regulations. However the Commission acknowledges that, in practice, the distinction between directives and regulations "has become blurred" due to the degree of detail of directives. To avoid this effect, the Commission advocates the establishment of a hierarchy of norms, in which directives would be substituted by a "framework law" which would lay down the basic principles. Regulations would become instruments designed to implement Community laws.

The Commission communication may be criticized on three major grounds. First, it actually adds little to the implementation of the subsidiarity principle. For example, in its discussion of the "need" dimension of the principle, the Commission concludes by relying on the lines established in Maastricht, and "excludes" from the reach of Community activity what was already excluded by the Maastricht reform (education, culture and health). The same can be said with regard to the discussion of the "intensity" dimension of subsidiarity. Though the Commission apparently introduces the innovation of the "hierarchy of norms", in fact the document tells one nothing as to how the new concept of "framework law" could be used to avoid over-regulation and detail. Second, the discussion of the problem of the distinction between exclusive and concurrent competences is biased towards the Community side. On the final Commission interpretation, which relies on the connection between the proposed action and the "imperatives of free movement", it is indeed difficult to give an example of an action that would not fall within the Community's exclusive powers. Finally, the Commission communication is deceptive, for it seems more an act designed to discharge responsibilities as regards the accusation of being the promoter of the process of growth of Community powers than an in-depth reflection on effective ways to implement subsidiarity. The

continuous references that are made in the communication to the idea that subsidiarity has always been the Commission policy, and to the notion that subsidiarity is simply a commonsense principle, serve to illustrate this latter point[27].

Of more interest for the purposes of implementing the subsidiarity principle was the European Council "Overall Approach to the Subsidiarity Principle" issued in December 1992 and the Commission, Council and European Parliament Interinstitutional Agreement "on Procedures for Implementing the Principle of Subsidiarity". As regards the first, Member States introduced the following points in the Edinburgh declaration. In the first place, it invited the Commission to assess all proposals of legislation according to the subsidiarity principle. Further, the Commission was requested to include its subsidiarity assessment both in the preamble of legislative texts and in the explanatory memorandum accompanying its proposals. In addition to this, the Commission was further asked to intensify consultation before proposing legislation, and to recur more systematically to "green papers" as a means to foster the debate among interested parties on the need for future Community intervention. In the second place, the European Council at Edinburgh clarified the question of whether the Council should make a separate assessment of subsidiarity, on the one hand, and of the content of the measure, on the other hand. In this connection, the European Council proposed

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[27]Note for example: First page of the communication: *"In practical terms [subsidiarity] implies for the Community institutions, the application of the simple principle of common sense..."*. First page of the annex to the communication: *"This commonsense principle..."*. First and second pages of the annex to the communication: *"For more than forty years the subsidiarity principle has satisfied two requirements: the need for Community action and the need to ensure that means employed are commensurate with the objectives pursued... All the major initiatives taken by the Commission have been based on a justification of the need for action"*. Paradoxically, the Commission adds in the same page: *"What is surprising is that certain other obligations to act, imposed by the authors of the Treaty, have still not been met in full"*, and even adopts a cynical tone when it asserts that *"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"*.

changing the rules of procedure of the Council in order to take due account of subsidiarity, though it made clear that, in order to avoid putting an excessive burden on the Community decision-making process, the assessment of subsidiarity and of the content of the measure would not be separated[28]. In the third place, the European Council established a number of criteria to be followed by the Council in the assessment of the need for Community action. These criteria are: 1) the existence of transborder aspects; 2) the production of distortions of competition, restrictions on trade or the weakening of economic and social cohesion; 3) the Community action should produce clear benefits by reason of its scale and effects, compared with action at national level. In the fourth place, the Edinburgh European Council requested the Commission to submit to the Council and to the European Parliament an annual report on the application of the subsidiarity principle. Finally, the European Council at Edinburgh urged the Council of Ministers, the Commission and the European Parliament to seek an interinstitutional agreement on the procedural ways to give effect to the principle of subsidiarity.

As regards the interinstitutional agreement, the Commission, the Council and the European Council agreed, on November 1993, on the following points of procedure. Firstly, the agreement recalls the commitment made by the Commission to assess its proposals on subsidiarity grounds and to include this assessment in the explanatory memorandum accompanying its proposals. Secondly, the interinstitutional agreement obliges the Council and the E.P. to take due account of subsidiarity. Thirdly, it orders that any amendment made by

[28]The Internal Rules of Procedure of the Council were modified subsequently to the Edinburgh declaration, by decision 93/662 of 6 December 1993 (OJEC L 304/1 of 10 December 1993). However, the only reference made to the principle of subsidiarity appears in point f) of a Council declaration annexed to the decision, in which it is simply stated that the Council takes note of the commitment of the Commission to justify its proposals on subsidiarity grounds.

either the Council or the E.P. to the Commission's text must, if entailing more extensive or intensive intervention by the Community, be accompanied by a justification in terms of the subsidiarity principle. Finally, the Interinstitutional Agreement reiterates the request made to the Commission in the Edinburgh European Council to draw up a general report for the European Parliament and the Council on the application of the subsidiarity principle.

Even if both the Edinburgh declaration on subsidiarity and the Interinstitutional Agreement have been criticized as "openly inefficient for developing the principle of subsidiarity" (Areilza, 1995a:78) the truth of the matter is that they represent, at the very least, a starting point as regards the real issue, which is the limitation of the process of growth of the Community's powers through political and procedural, rather than legal and material, devices. To be sure, both documents should only be viewed as a very first step in that direction, one that should be further developed if the question of the limits of Community intervention is really to be tackled.

A different question is to ask about the legal effects of acts, such as the Interinstitutional Agreement on subsidiarity[29]. If, for instance, the Commission violated its commitment to include its subsidiarity assessment in the explanatory memorandum accompanying its proposals, as the Interinstitutional Agreement requests, could the Court of Justice annul the Community measure in question on the grounds of lack of implementation of the Interinstitutional Agreement? The question is of interest since Article 3b2° does not establish any positive obligation on the Community institutions, but simply imposes on them

[29]The same issue could be raised as regards the declaration in the final conclusions of the European Edinburgh Council, which also develops subsidiarity. However, as the procedural developments of subsidiarity established in Edinburgh basically overlap the Interinstitutional Agreement, the remarks that follow deal only with this latter act.

a general obligation to respect the subsidiarity principle.

First, in order to find answers to this question we need to turn to the existing case law on the matter. The Court of Justice has given its opinion on the legal effects of interinstitutional agreements[30] on several occasions. As Snyder points out (Snyder, 1994a:15), the ECJ's case law on this matter may be summarized by making reference to the following extremes. At one extreme is the 5 April 1977 "Joint Declaration on Fundamental Rights"[31]. The European Court of Justice established, in the *Hauer* case[32] and in *Johnston*[33], that the Joint Declaration lacks independent legal force and serves only as a source of information and as an aid to interpretation of other legally binding acts. At the other extreme, we find the Joint Declaration of 30 June 1982 by the European Parliament, the Council and the Commission "on Various Measures to Improve the Budgetary Procedure[34]". The Court of Justice has indirectly confirmed the legal effects of the Joint Declaration. Thus in case *Council v. European Parliament*[35], the ECJ stated that "the problems regarding the delimitation of non-compulsory expenditure in relation to compulsory expenditure are the subject of an interinstitutional conciliation procedure set up by the Joint Declaration... and are capable of being resolved in that context[36]".

Second, drawing on the previously examined case law, Snyder has concluded that

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[30]For the sake of convenience, interinstitutional agreements are understood as those acts which are formally designated as "interinstitutional agreements" or as "joint declarations". Note Snyder in this regard (1994a:2).

[31]OJEC 1977 C 103/1.

[32]Case 44/79 *Hauer v Land Rheiland-Pfalz* [1979] ECR 3727.

[33]Case 222/84 *Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651.

[34]OJEC 1982 C 194/1.

[35]Case 34/86 *Council v European Parliament* [1986] ECR 2155.

[36]Para. 51.

interinstitutional agreements needs to comply with a number of conditions in order to deploy legal effects. These conditions are the following: 1) Interinstitutional agreements must not modify the Treaties or secondary legislation; 2) Interinstitutional agreements have to be consistent with the principle of legal certainty, therefore they must be expressed in sufficiently clear and unambiguous terms; 3) Interinstitutional agreements must respect the principle of legitimate expectations; 4) Interinstitutional agreements must respect the division of powers among the Community institutions as given by the Treaties.

The Interinstitutional Agreement on Subsidiarity seems to fulfil all four requisites. As regards the first, the Interinstitutional Agreement does not modify either the Treaties or secondary legislation, but develops according to the implications that Article 3b2° of the EC Treaty has for other Treaty provisions, such as, for instance, Article 190 of the EC Treaty[37]. Concerning the second, the obligations established within it are drafted, in general, with sufficient precision and clarity. As regards the third, it does not refer to the rights or obligations of third parties, thereby not breaching the principle of legitimate expectations. Finally, it clearly respects the institutional balance among the different Community Institutions.

It could therefore be concluded that the Interinstitutional Agreement on Subsidiarity could create legal effects, in the sense given by the question above. That is, if the Commission, for example, violated the request of the Interinstitutional Agreement to include, in the explanatory memorandum of its proposals, its assessment on subsidiarity, that could be condemned by the ECJ following an Article 173 procedure. However, to arrive at this conclusion does not mean supporting bluntly the way in which subsidiarity has been

[37]Since the Interinstitutional Agreement imposes a precise obligation of motivation of Community acts on the grounds of the subsidiarity principle.

procedurally developed. Interinstitutional agreements, and other measures equivalent to them, are acts of an imprecise legal nature whose legitimacy may be contested due to the problems of legal certainty that this may cause (Snyder, 1993). They should be considered therefore as a kind of second-best institutional alternative through which constitutional provisions could be developed (*contra*, Reich, 1994).

D. Reconstructing Different Actors' Expectations Arising from the Introduction of Subsidiarity as a Community Legal Principle.

Now that the path leading to the introduction of subsidiarity as a Community legal principle and the developments subsequent to its enshrinement in the Maastricht Treaty have been examined, I shall attempt to reconstruct the concrete expectations that the different actors that upheld subsidiarity as a legal principle attempted to derive from its introduction in the Community legal architecture. This shall give an indication of the divergent aims that lurked behind the apparent unity that existed among those actors that, during the Maastricht negotiations, defended the legal profile of the principle. I shall further return to this aspect in other parts of this work, when analyzing the difficulties involved in the translation of subsidiarity into general and universally acceptable criteria.

As has been said in the previous point of this section, the main actors that supported the juridification of the principle of subsidiarity were four: the U.K. and Germany, of the Member States, and the Commission and the European Parliament, of the Community institutions. The lines that follow focus therefore on these four actors.

The U.K. interpreted subsidiarity as a necessary and useful safeguard of national sovereignty against Community intervention. The words pronounced by British Prime Minister John Major in 1992 before the House of Commons serve to illustrate this point. In the debate on the ratification of the Maastricht bill, John Major commented that:

"Many in this House and throughout the country have expressed anxiety that decision-making in the Community is becoming too centralised. In fact, many of the issues that are most problematic for us (...) are ones that arise from the application of the original Treaty of Rome, not the Maastricht Treaty. The Maastricht Treaty marks the point at which, for the first time, we have begun to reverse that centralising trend. We have moved decision taking back towards the Member States in areas where Community law need not and should not apply. Let me inform those who are unaware of the fact that we have done so in a number of ways. We have secured a legally binding text on subsidiarity...". (House of Commons, 1992[38]).

Thus the U.K.'s position was to apply subsidiarity to almost all areas of Community action, and in particular to environment, health, education, consumer protection, worker protection, and even monetary policy, as shall be seen below. Further, the U.K. government interpreted the Community's exclusive powers very restrictively. In the British government's view, these were restricted to the CAP, the Common Commercial Policy, the conservation of fisheries resources, and the Common external tariff[39] (Emiliou, 1994:157). In short, for the British government, subsidiarity was viewed as an adequate mechanism for the protection of national sovereignty; instead it rejected the idea that the principle had been introduced in the Community legal order in order to protect British regions autonomy in front of the central

[38]Note House of Commons debates, in Weekly Hansard, issue n° 1588 of 20 May 1992, Vol. 208, col. 265.

[39]Note for a discussion on exclusive competences of the Community the House of Lords debates, 17 June 1993, col. 1662.

government's intervention through Community organs (Scott et al., 1994[40]).

Different from the British position, Germany interpreted the application of the principle of subsidiarity at Community level as a logical extension of the implementation of this principle between lower levels of government and the central government within the Federal Republic. In this connection, the Federal government, pressured by the Länder governments, fought for the introduction of subsidiarity in the legal body of the Treaty. That was part of the price to be paid by central government if it wanted to secure approval of the law of ratification of the Maastricht Treaty by the Bundesrat (Hrbek, 1992). Consequently, the Federal government interpreted subsidiarity as a brake on Community intervention in areas that constituted a part of the Länder *Kulturhoheit*, such as, mainly, education, culture (including broadcasting), health and regional policy. To give an example regarding the latter, Germany interpreted subsidiarity as meaning "that Member States and their regions have an appropriate margin of manoeuvre in the framework of the EC structural policy" and, consequently, that the Community "must only fix a general regulatory framework to be completed at the level of the Member States and the regions[41]".

Turning to the Community institutions, the European Parliament upheld the principle of subsidiarity as part of its strategy to gain a wider role for itself in the Community decision-making process. By stressing the need for subsidiarity, and, therefore, for searching checks upon the process of growth of Community competences, the European Parliament saw itself as being placed in more legitimate position to play the card of its necessary involvement in

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[40]Note on this point House of Commons debates in Weekly Hansard, issue n° 1588 of 20 May 1992, Vol. 208, col. 266.

[41]Note German Memorandum on the Principle of Subsidiarity, reprinted in *Europe Documents*, n° 5834 of 12/13 October 1992 at 13.

Community governance. In this sense, the European Parliament's approach was not very different from the strategy it followed in 1984 through the European Parliament Draft Treaty on European Union, in which, on the one hand, it asked for contention of Community intervention and, on the other, for wider decisional powers. The continuous link made by the European Parliament between the subsidiarity discourse and the democracy deficit -in the sense of the lack of real involvement of the European Parliament in the Community decisional structure- seems to illustrate this point (Wilke and Wallace, 1990:25).

What is more difficult is to explain the Commission's insistence on subsidiarity. As has been mentioned[42], it was mainly the Commission, and more in particular, its President Jacques Delors, who introduced the notion of subsidiarity as a major theme for debate in the Community framework. However, its search for real limits to Community intervention seems paradoxical if the fact that this actor has been one of the main engines of Community integration is taken into account[43]. Was the Commission sincere in its support for subsidiarity? It is submitted that the Commission employed subsidiarity for purposes different from that of establishing clear limits to Community intervention. First, the Commission turned to subsidiarity as a rethorical device oriented to placate charges from different quarters that the Community is "running wild". In this connection, the Commission believed that once subsidiarity was underpinned in the Treaties, things would return as they were before the discussion of the Community's legitimacy[44]. Second, the inclusion of subsidiarity in the

[42]Note point B of this section.

[43]Note on this point Chapter II of this thesis.

[44]This was suggested in the course of an interview with a top Commission official of the Task Force for the 1996 Intergovernmental Conference undertaken on 12-May-1995: "Delors used subsidiarity strategically as a way to respond to the challenges that the Community, and the Commission, were a kind of "big brother" with an unlimited hunger for power. When people said "Community intervention is illegitimate, for the Community lacks

Treaties would leave the ground fertile for the Commission to advocate, in the intergovernmental conference leading to Maastricht, the strengthening of the Community powers in some areas, particularly as regards monetary union[45]. Third, the Commission interpreted subsidiarity as an argument to be used against Member States in order to avoid the excessive detail of Community legislation. As in the case of its support for mutual recognition in the 80's, the Commission was, also in the 90's, against detail in Community directives and regulations, but not against a substantial limitation of Community regulation. Subsidiarity was therefore imagined to be a shorthand argument which would be raised by the Commission when Member States invited it to introduce details in the negotiations of Community legally binding measures. Some indications suggesting that the Commission disliked the idea of a real subsidiarity policy and that it endeavoured to introduce this principle for other purposes are given in the following.

First, the Commission has always put the case for the interpretation of subsidiarity as a "double-edged" principle, a sort of neutral device that can be used to argue in favour of or against Community intervention. As the Commission communication on subsidiarity of 1992 established:

"Subsidiarity is a dynamic concept in the Community system. Far from putting the Community's 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"[46].

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democratic structures", the Commission could use the subsidiarity word to argue that it only proposes to achieve at Community level what can be more efficiently done at Community level".

[45]Note again my comments in the previous footnote.

[46]Page 2 of the Annex to the Commission Communication on the Principle of Subsidiarity, cited *supra*.

Second, the Commission has always insisted on the fact that subsidiarity is only of application as regards the Community's concurrent competences. Consequently, it has always given a very wide definition of what is to be understood by exclusive Community competences. Moreover, the discussion on the extent of the exclusive Community competences is always approached as if it were not a subjective interpretation, but a logical implication of what the framers of the Treaties (i.e. the Member States) decide. This contention is best illustrated by the following words of Delors:

"Obviously, when Member States decide politically and unambiguously to divide their sovereignties and to exercise them together in the Community framework and by way of the common institutions, they cannot later stop the Community institutions from deciding and engaging in actions according to pre-determined procedures... There is however this proviso -one cannot in the name of subsidiarity refuse in practice to accept the consequences for the common policies of the commitments formally endorsed in the Treaty. Some examples, among others, illustrate how this incorrect recourse to subsidiarity is used to hinder progress. If the Community decides to harmonize workers' health and safety conditions -and therefore to protect workers- it is difficult to see how the solutions related to risk exposure to asbestos ... could differ profoundly from one Member State to the other". (Delors, 1991:12-13).

Third, the fact that the Commission has always viewed subsidiarity as mainly being an argument to persuade Member States not to support the introduction of detailed legislation is illustrated by the insistence on the connection between subsidiarity and the hierarchy of norms as the best way to develop the principle of subsidiarity. Here the reference is once again the words of Delors:

"Subsidiarity cannot be just a state of mind, a fervent obligation; it has to be given body. This is what

the Commission is suggesting in the framework of a new hierarchy of norms (...). The complexity of the texts ...is more often the fruit of laborious compromises within the Council of Ministers. This lack of clarity is to be regretted all the more because it damages the quality of the democratic debate and the effectiveness of the operation. It is often the result of the obstinacy on the part of national administrations in an attempt to weaken a text's scope and return to national level the perpetual quarrels on the terms for its correct implementation(...). A real hierarchy of norms aims not only at strengthening democracy but also efficiency." (Delors, 1991:13-16).

In short, it may be said that the Commission did not search for a real subsidiarity policy but that its support of the principle was motivated, above all, for strategic reasons[47].

To conclude, it must be said that the previous discussion illustrates that those actors that upheld the introduction of subsidiarity as a Community legal principle had very different expectations of what they could obtain with the legal implementation of the principle. A final illustration of the divergent and even contradictory aims that lurked behind these actors' support for subsidiarity is illustrated by the different visions that the U.K. and the Commission had on the issue of monetary union (Dehousse, 1990:51). Both actors argued on the grounds of subsidiarity, but they arrived at opposite results. For the Commission, subsidiarity justified the creation of a single currency and the objective of a monetary union, taking into account

[47]Of course it is difficult to demonstrate, black on white, the previous finding. To arrive to this conclusion I have patched bits and pieces of a different calibre (such as my formal and informal interviews with different Commission top officials -note the list of interviews that are enclosed at the end of this thesis-, the writings of Delors on subsidiarity and the Commission's official pronouncements at this respect). The result maybe rather inelegant, but I think that it was worthwhile to introduce in this work what is my firm impression of the Commission's real position as regards subsidiarity. I concede that a simplification is made in the previous lines: to talk about the Commission as it were an individual. In fact the strategic use of the principle was, to my knowledge, above all in the mind of those Commission members that fought for its introduction in the Community legal order. It must be admitted that different views from the one that I have set here could be supported by particular Commission officials. However, in general, the impression that I obtained from my interviews was that of a general Commission's discomfort with the principle.

the general benefits that would result for market integration from the single currency. For Britain, monetary policy should remain in the hands of the Member States, for it constituted an inalienable part of their national sovereignty. In marked contrast with the Commission approach, the U.K. advocated the creation of a "hard ECU" that would run in parallel with the national currencies. This was not considered to be a stage previous to monetary union, although this possibility for the future was not entirely closed by Britain[48]. In short, the case of monetary union demonstrates how the convergence of divergent aims was at the very source of the introduction of subsidiarity in the Treaties[49] (Dehousse, 1993:5).

[48]Note, for a discussion of both the British and the Commission proposals on monetary union, the House of Lords Report "Economic and Monetary Union and Political Union" cited *supra*, at point 53 onwards.

[49]Although, admittedly, the nature of the concern was the same, at least for the Member States: the limitation of the exercise of competences by the Community. Particular uses of subsidiarity diverged, as described above.

III-. THE APPLICATION OF THE SUBSIDIARITY PRINCIPLE BY THE EUROPEAN COURT OF JUSTICE.

Subsidiarity is, since the coming into force of the Maastricht Treaty, a new legal Community principle. It is important therefore to understand, first and foremost, the extent to which it may be applied by the Community's judicial actors. Such an issue poses questions of both a functional and a normative character. To be sure, both are different aspects of the same discourse. However, for the sake of simplification, they shall be treated separately here.

A. The Functional Issue.

The first difficulty with which the European Court of Justice[50] may be confronted when the time comes to enforce the subsidiarity principle is of a functional character. How will the Court apply the (binding) lines of Article 3b2°? To answer to this question, let us start by reminding the wording of Article 3b2° of the TEU:

"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 the scale or effects of the proposed action, be better achieved by the Community".

To enforce the subsidiarity principle, the ECJ would logically start with the textual interpretation of Article 3b2° in order to deduce legal criteria for its application. Admittedly,

[50] I shall refer here to the ECJ, though the following remarks also apply to the Court of First Instance.

the wording of Article 3b2° does not offer many grounds for optimism in this regard. A proof of this are the very different, even contradictory, interpretations of Article 3b2° that legal authors have provided[51].

Maybe the most balanced translation of Article 3b2° into legal terms is provided by Lenaerts and Ypersele (Lenaerts et Ypersele, 1994). Further, taking into account the important place that Lenaerts personally occupies in the present judicial architecture of the Community[52], his interpretation may be understood as a useful guide to the course that the ECJ could adopt for the analysis of Article 3b2° of the TEU.

According to Lenaerts, the main problem posed for the interpretation of Article 3b2° of the EC Treaty is the ambivalence that exists between the "sufficient attainment" and the "better attainment" clauses. Both clauses seem to establish different tests according to which the need for an eventual Community measure could be assessed on subsidiarity grounds. The "sufficient attainment" clause seems to imply an effectiveness assessment, whereas the "better attainment" clause seems to point to the need to compare both Community and national actions according to an efficiency assessment. The application of both tests may produce different results. If the effectiveness test is preferred, it would suffice for the ECJ to establish that action by the Member States may effectively attain the Community objective. By contrast,

[51]Compare, for instance, Dehousse, Toth and Kapteyn. According to Dehousse, Article 3b2° provides for an effectiveness and an efficiency test. But he argues that "rather than two distinct conditions, what we have here are but two facets of the same problem, effectiveness being a necessary component of the efficiency assessment which subsidiarity entails" (Dehousse, 1993:9). Instead, for Toth, although Article 3b2° entails also a double test (the effectiveness and the scale test), the implementation of both tests may lead to contradictory results. According to Toth, "situations may be envisaged, particularly in the field of environmental protection, where the effectiveness test would require Community action whereas the scale test justifies national action, or viceversa" (Toth, 1994b:43). Further, for Kapteyn, Article 3b2° entails not two tests, but four: (i) the "better attainment" test; (ii) the "more effective attainment" test, which may be coupled with (iii) the "cross-boundary dimension" or "effect" test; and (iv) the "absolutely necessary" test (Kapteyn, 1991:40-41).

[52]K. Lenaerts is presently judge of the Court of First Instance. Further, he is widely considered to be one of the most charismatic members of the present Community judiciary, not only for the quality of the rulings in which he participates but also for the important academic work related to Community constitutional-institutional issues that he has developed in the recent years.

the application of an efficiency test will imply a more complex analysis, in which not only the means to reach a determined result (effectiveness test) but also the relative costs of both a Community and a national action should be taken into account in the assessment of the Court. If this second test were preferred, the Court could accept the Community measure if, giving equality of results, the Community action entailed lower costs. *Prima facie* it seems, therefore, that the application of the first, effectiveness test, would be more protective of Member States' autonomy whereas the application of the second, efficiency test, would be more favourable to Community intervention[53]. Therefore Lenaerts gives preference to the application of the first test over the second. Proof that Member States may sufficiently achieve a given Community aim would suffice to overrule the Community measure.

However, such an assessment may raise important difficulties for the Court, as shall be shown in the following lines.

To illustrate the whole discussion with a recent example, let us take the case of the recently issued *Working Time Directive* Court of Justice judgement[54]. The U.K. sought, through this action, the annulment *in toto* or *in parte* of the "Working Time Directive", adopted by the Council on November 1993. Among others, one of the grounds of the British

[53]This difference of results derived from the application of the "sufficient attainment" and the "better attainment" clauses seems logical if taking into account how and why both clauses were introduced in Article 3b2°, during the intergovernmental conferences that gave rise to the Treaty of Maastricht. Note my remarks in section II of this chapter.

[54]This decision shall be further examined in this chapter. The example is taken at this point of my discussion for the sake of convenience: it does not imply that the ECJ has followed in its decision, totally or partially, the path that is here indicated. That question is irrelevant for my present purposes.

action was that the measure breached the subsidiarity principle[55].

How should the Court deal with the application of the subsidiarity principle in order to assess the need of the Community measure? According to the path established by Lenaerts, the Court should, in the first place, analyze the extent to which national measures effectively achieve the objective pursued by the Community action. In my particular example, the Court should check, first, whether the Member States have enacted measures dealing with the question of working time. The term "measures" should be interpreted here in its wide sense, as implying not only legislation but also regulation through collective agreements between employers and workers. Second, the Court should analyze whether these measures effectively achieve the objective of protecting Member States' workers' health and safety. If this was so, national measures would be preferred to Community ones.

It is obvious that the Court would in this way be confronted with a difficult assessment. How to determine, given the existence of national measures, whether Member State measures adequately achieve the stated objective? Admittedly, this assessment would clearly go beyond a mere technical analysis and would need the introduction of value-laden judgements that the Court would have a hard time to "guise" in technical or legal reasoning. This is the reason why some authors have claimed that, as a matter of fact if not of principle, both the effectiveness and efficiency assessments will have to go hand in hand (Dehousse,

[55]The directive has Article 118a of the EC Treaty as its legal basis. This Article allows the Community to adopt legislation regarding the protection of health and safety of workers. The directive at issue deals with certain aspects of the organization of working time. Particularly, important provisions of this directive are Articles 3, 4, 6, and 7. Article 3 establishes that every worker is entitled to a minimum daily rest period of 11 consecutive hours per 24-hour period. Article 4 establishes that where the working day is longer than six hours, every worker shall be entitled to a rest break. Article 5 regulates the weekly rest period by establishing that every worker is entitled to a minimum uninterrupted rest period of 24 hours per each 7 day period. One of its most conflicting provisions is found in the second paragraph of Article 5. It establishes that the minimum rest period referred to above shall in principle include Sunday. Further, Article 6 regulates the maximum weekly working time (48 hours). Finally Article 7 establishes that workers are entitled to an annual paid leave period of at least four weeks per year. Note my comments on the content of the directive later in this chapter.

1993:9). The efficiency analysis implies, as noted above, an assessment not only of the means but also of the costs that Community and Member State actions may entail. In other words, it entails a comparison of the relative costs and benefits of both Community and Member State action. A cost benefit analysis seems a safer examination than a mere effectiveness test since it has a more technical profile. The legitimacy of the Court would be in this way better protected from challenges of a "gouvernement des juges[56]". Turning to my particular example, the Court could undertake a cost benefit analysis, for example, in the following way. Firstly, it could analyze the costs that the Community action puts on the Member States. At this regard, Article 118a2° gives an indication of the criteria that the Court could use to analyze the matter. The second paragraph of Article 118a establishes that "directives are to avoid imposing administrative, financial and legal constraints in a way that would hold back the creation and development of small and medium sized undertakings". The Court could use these parameters to judge the eventual costs of the Community action for the Member States. Secondly, the Court could analyze the costs that national measures could produce for the Community. In this connection, the Court could use for such assessment the criteria that are established in Article 3b2° itself. To implement the better attainment test, the Court could take into account the "dimension" and the "effects" of the proposed action. Therefore, if the Community action had a clear Community dimension, or clear effects on other Community objectives, this could be interpreted by the Court as an apparent presumption of the high costs for the Community that would result from supporting national measures (or, what is the same, from Community inaction). In the particular case that I am using here, if the Court could establish (after an analysis of the evidence submitted to it by the parties) that, for example, more flexible working time regulations in some Member States could have the effect of

[56]Note my remarks in point B of this section.

disrupting competition as regards undertakings based in other Member States with stricter working time regulations, this could be used as a strong presumption in favour of the Community measure. Therefore the Member State(s) challenging the measure (the U.K in my example) should bear the burden of proving the contrary.

Irrespective of the advantages that an efficiency assessment seems to have over a simple effectiveness test, it is clear that the employment by the Court of an efficiency assessment (or to be more exact, of a cost-effectiveness test) brings also some set of problems. First, I have shown in the previous discussion that an efficiency test (above all if it uses the "dimension" and the "effects" criteria) will be, in most cases, biased in favour of the Community. Accordingly, it will be easy for the Court to judge the Community measure favourably. This would be in itself a paradoxical result: the subsidiarity principle, which has been introduced into the Community in order to limit Community intervention, would be employed in the majority of cases to justify Community intervention in the final legal analysis before the Court. Subsidiarity would not hinder Community action but, far from it, it would foster it, at least in a certain way. Second, even if this was not the case, and the efficiency test proved to be a balanced means for the assessment of the need for a Community action, would the ECJ be well equipped in terms of human and technical resources to make the complex analysis that is demanded by the efficiency assessment? The answer is most probably not. Third, assuming that the Court had the means to correctly perform an efficiency analysis, a final question remains to be answered: would not the Court be going beyond their task - which is that to interpret and apply the law- by using tools for analysis not of a legal but rather of an economic character? The answer to this question is probably affirmative. However its full response brings us to a rather different discussion -that of the understanding that one

has of the ways in which the Court legitimizes its own intervention- which shall be dealt with next.

Some authors have indicated other ways in which the ECJ could apply the subsidiarity principle. Lenaerts himself argues that the most correct and safe way for the Court to control the implementation of subsidiarity by the Community institutions is through Article 190 of the EC Treaty (Lenaerts et Ypersele, 1994:72-80). The Court would therefore check whether the preamble of legally binding Community measures provides an adequate statement of the reasons why, according to the subsidiarity principle, the Community has deemed action to be necessary. However, Lenaerts concludes that the control of the motivation of Community measures on the grounds of subsidiarity would be restricted to the ascertaining of whether the Community authorities had committed a manifest error or had misused their powers (ibid, 1994:79). This means in practical terms that the Court would limit its control to a verification that a subsidiarity assessment was incorporated in the preamble of the Community measure and that it lacked visible errors of appreciation. Admittedly, this would be a safer way for the Court to go about its assessment, since the control of motivation is procedural rather than substantive, and remains within the legal realm. However, from a functional perspective, the scope of Article 3b2° would be seriously undermined. The cases in which the Court would overrule a Community measure for lack of motivation on subsidiarity grounds would be very exceptional, as suggested above. Article 3b2° would then risk remaining dead letter. Furthermore, this kind of control could be easily manipulated by the Court in order to impose its own policy preferences in a hidden way.

Is there any means to avoid the obsolescence of Article 3b2°? One possible way in

which Article 3b2° could be saved would be to employ the proportionality criterion which is included in the subsidiarity principle[57]. Article 3b2° includes the proportionality principle among the parameters that can be used to apply subsidiarity when it uses the expression "only if and in so far as". Subsidiarity and proportionality are not synonymous, but the proportionality aspect of the subsidiarity principle could be retained to assess, if not the need, at least the intensity of the Community measure[58].

How could this proportionality criterion of the subsidiarity principle be applied? There is in this regard well-established case law of both Community Courts in which the principle of proportionality has been applied to both Community and Member State measures[59]. This case law can be summarized as follows[60]. First, there should be two objectives considered to require legitimate protection by the Court. Member States could argue that the achievement of an objective by Community action contradicts another objective which deserves protection. This second objective should be something else than the mere protection of national

[57]Note also Hartley (1994:161). He asserts that "...in view of [subsidiarity] generality and affinity to the other general principles, especially proportionality, it will be treated in the same way by the Court".

[58]Although the practical result would be the same: the Community measure would be either overruled or confirmed by the Court.

[59]Although, as Dehousse (1993:15) correctly points out, the Court's case law is not very promising as regards the application of the principle to control Community measures. He argues: "In assessing whether a Community measure was suited to the purpose of achieving the objective pursued, the Court has always shown great caution when the Treaty gave the Community legislator a wide margin of discretion; it has generally confined itself to examining whether the measure at issue was obviously inappropriate for the realisation of the desired objective". In fact, one may see in examining the Court's case law on proportionality that the Court employs a sort of "double standard" to check the conformity of Community and Member State measures with the proportionality principle (more relaxed for Community measures than for Member State). A good illustration is given in the *Working Time Directive* case, which is analyzed later. Thus the Court seems content if the Community measure is "suited for the achievement of the Community objective" and if it does not "exceed what is necessary for its attainment". Notwithstanding this trend, it is submitted that the inclusion of subsidiarity in the Treaties should be a trigger for the Court to, at least, apply more strictly the principle of proportionality as regards Community measures.

[60]For a thorough summary of the application of proportionality by the Court note Lenaerts (1994:52-71), on which my analysis largely draws. For a detailed review note Schwarze (1992:708-866).

sovereignty, as Lenaerts proposes[61] (Lenaerts et Ypersele, 1994:63). In this way the Court would compare things that are comparable (the free market with a fundamental right, or with another objective such as consumer protection), and not two things that are difficult to compare (the free market, for example, and national sovereignty). Second, once the Court has established that the objective claimed by the actor that challenges the Community measure is legitimate, the Court should assess whether there are other Community measures that, while effectively achieving the Community objective, are less restrictive of the other objective in issue. Third, in cases in which there was no alternative to the Community measure, the Community measure should be respected, unless it violates a fundamental right. Fourth, in this case the Court would have to assess whether the violation of that fundamental right would be of such a kind as to leave it without its substance. Only in that case could the Community measure be overruled.

The proportionality assessment would be easier for the Court to perform from a functional perspective, and safer, from that of legitimacy. Functionally speaking, the Court would not need to enter into the complex analysis that an efficiency assessment would entail. From a legitimacy perspective, the Court's legitimacy would be safeguarded since the proportionality test entails a less risky judgement than that entailed by a subsidiarity assessment. This is so for the reason that, in the proportionality assessment, the Court may rely upon a framework for analysis which is established by the two objectives at issue. This fact allows the Court to reason deductively and to make logical connections more easily, in short, to use "the way in which the law thinks". However, this discussion introduces a rather

[61]The kind of analysis that I defend here would restrict the scope of application of Article 3b3° of the Maastricht Treaty. Admittedly, this would be the "price to be paid" for my interpretation of the application of the proportionality principle to concurrent Community competences. However, Article 3b3° would still be of application as regards exclusive Community competences.

different debate: that concerning the normative implications of the application of subsidiarity by the Community's judiciary.

B. The Normative Issue.

A second argument that could provide a clue to understand why the ECJ will have difficulty applying subsidiarity as a substantive principle to assess the need for Community intervention, regards the extent to which the Court fears that this kind of analysis could put at risk the legitimacy of their decisions and, at the last resort, its legitimacy as institution (Dehousse, 1993:17; Dehousse et al., 1996:148). This poses, as is apparent, a more compelling, normative, question.

To start with, the previous remark must be connected to a discussion of the ways through which courts (courts in general, not only the Community Courts) understand their institutional role. Democratic societies rest on the assumption that a division of powers exists between the different branches of government. Although the present picture is in fact more complex, this premise is sufficient to drive the point home. Within this structure, the judiciary is the branch of power charged with ensuring that the rule of law is respected. The judiciary checks, therefore, that the actions of the other institutions do not go beyond what is permitted by the law. Further, in performing this control, the judiciary is also bound by the rule of law. The nature of this bond is even stronger than the nature of the bound on other branches of power. Other branches of power may adopt decisions of a political character (although within certain boundaries that will be controlled by the judiciary). By contrast, courts may not adopt political decisions. They are charged with a very well defined institutional mission: to

interpret and apply the law. Further, in the European tradition, judges are, in general, not chosen by direct popular election but coopted according to career merits. This fact should make courts yet more vigilant as regards the respect for the rule of law in their own interventions. Courts do know that the legitimacy of their institutional position is determined by the way in which they conform their decisions to law. In this regard, the legitimacy of courts is not politically but functionally based.

This not only applies to the fact that courts should avoid, as far as possible, to take decisions on questions of policy, but also to the way that judgements are pronounced. Even in the presence of "hard cases", it must seem that courts are applying and interpreting the law. That is, courts use and must use the logic of legal reasoning in order that their judgements, even in extreme cases, be safeguarded from accusations that they are *ultra vires.*

To further clarify this argument, it is useful to refer to and compare the works of Hart (1961/1994) and Dworkin (1977)[62]. Hart starts from the premise that any legal system is incomplete. Therefore judges are asked to make judgements even when the law is uncertain as regards a given question. In this situation, Hart asserts that judges have the choice to either refer the question to other instances or to give a judgement. If a court chooses this second avenue, it must realize that it is making policy, that is going beyond its normal competence. This is why, even if Hart does not exclude this possibility, he establishes a series of constraints upon a court that does this. In particular, that courts must "act as a conscientious legislator that would be legislating according to his own beliefs and values" (Hart, 1994).

In turn, Dworkin starts from Hart's contrary assumption. For Dworkin, legal systems are complete systems. Therefore, the very possibility of courts making policy is in itself

[62]For a summary of this debate note Hart's 1994 edition of Hart's (1961): The Concept of Law, and in particular the postscript at page 272.

negated. Accordingly, in those cases that Dworkin qualifies as hard cases, that is, those cases in which the law is unclear, the court must read in the underlying principles that underpin the law in question. Courts do not therefore make law, they simply apply principles that lay behind any law. In order to arrive at the principles that support law, judges must use all legal tools at their disposal.

My position is somewhere between both authors. Although both theories are far from reconcilable, there are aspects of them at which jointure is conceivable. My point of departure is closer to that of Hart than that of Dworkin, in the sense that, when confronted with the possibility of making policy, courts should have a very restrained view of their role as policy-makers. However, if a court cannot avoid giving a judgement, the tools that it should use to give an answer are those that Dworkin suggests. The court should, rather than putting itself in the place of a conscientious legislature, as Hart argues, try to use deductive reasoning (and derive solutions from legal principles) to solve the issue at hand[63].

This thesis' views in connection with the position that the Community Courts should adopt as regards subsidiarity is therefore influenced by this normative understanding of the judicial role. Thus subsidiarity is doubly unsuited for a review by the ECJ. First, because it requires the resolution of a highly political matter (who should do what). And second, because the criteria subsidiarity seems to point to do not allow the ECJ to derive principles and reason in a juridical-deductive way (Dehousse, 1993). Furthermore, there is an important difference between the Community and national contexts, that makes the whole problem more acute for the Community judiciary. The Community structure, as has been explored throughout this thesis from different perspectives, has serious legitimacy problems that do not exist (at least

[63]For a contrasting view, note Shapiro (1981:7). Shapiro states that courts make and should make policy in their judgements.

so clearly) in the context of democratic states. In a context like that of the Community, with its significant legitimacy deficits, the ECJ has to be even more careful about the way it understands its institutional role. Therefore the ECJ should be keen to stay within the strict boundaries of the legal realm when intervening. And it is important that, if it wishes to avoid charges that it is "running wild[64]", the ECJ continues to protect its rulings in this way.

To conclude, the assessment of subsidiarity involves, in the last resort, a political judgement that can hardly be encapsulated within the bounds of legal reasoning. As opposed to other questions of competence, in which the ECJ is asked to interpret a superior norm of law, it is asked to judge, when applying subsidiarity, on the *opportunity* of a given Community intervention. Judgements of the opportunity of public interventions are essentially political judgements, and the ECJ should not substitute its own judgement for the judgement of the Community political actors. In addition to this, the subsidiarity principle does not establish legal criteria with which the reasoning of the Court could be sheltered. Due to both reasons, the ECJ would therefore be wise to follow a cautious approach as regards the enforcement of subsidiarity. Happily enough this is the trend that Community judiciary seems to be presently adopting in relation to subsidiarity. I now turn therefore to an examination of the judicial application of the principle.

C. The Case Law on Subsidiarity.

At present, the Community Courts have had the opportunity to take a position as

[64]For a thorough criticism of the ECJ's activism note Rasmussen (1986) and Rasmussen (1988).

regards the judicial enforcement of subsidiarity on four occasions[65]. The first two cases in which the Community judiciary was confronted with the application of subsidiarity (cases *Tremblay* and *SPO*) raised relatively unrelevant issues as regards the subsidiarity principle. More important in this regard are the *Bosman* and, above all, the *Working Time Directive* cases. Therefore the following survey will mainly focus on them.

Tremblay[66] is, chronologically speaking, the first case in which the Community Courts (on this occasion, the Court of First Instance) had the opportunity to interpret and enforce the subsidiarity principle[67]. However, *Tremblay* concerns a relatively minor issue from the perspective of the subsidiarity principle, for two reasons. First, the issue concerned

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[65]The following analysis is mainly based on research done using the ECJ MINIDOC database. This database was consulted on two occasions: firstly, on 1 December 1995; and second, on 10 June 1996. The outcomes of both consultations have been cross-checked and further complemented with ulterior research. Only the most relevant aspects of the outcome of this research have been included in the analysis that follows. Therefore, besides the cases which are analyzed in the following lines, one should take into account, for informative purposes, the fact that other actions brought before the Community judiciary have employed subsidiarity as an argument. Note the following: 1) Action brought by Ireland against the Commission on 18 August 1992 (Case C-342/92) OJEC C 246/11 of 24 September 1992; 2) Reference for a preliminary ruling by the Tribunal de Commerce, Avesnes sur Helpe in the case of Sàrl Bab Le Club 7 (Case C-54/93) OJEC C 88/10 of 30 March 1993; 3) Reference for a preliminary ruling by the Judge-Commisaire at the Tribunal de Commerce, Troyes, in the proceedings for the winding-up of Le Dryat Sàrl (Case C-104/93) OJEC C 114/15 of 24 April 1993; 4) Reference for a preliminary ruling by the Judge Commissaire of the Tribunal de Commerce, Saint Omer, in the receivership proceedings involving La Pyramide Sàrl (Case C-378/93) OJEC C 243/8 of 7 September 1993; 5) Action brought by the Federal Republic of Germany against the European Parliament and the Council (Case C-233/94) OJEC C 275/20 of 1 October 1994. The four first actions were either declared inadmissible by the Court or removed from the Court's register. The latter case is still pending before the ECJ. Note, however, the scarcity of cases in which a question of subsidiarity has been raised. This data shall be evaluated later in this work.

Note also the following cases in which the principle of subsidiarity was mentioned in the opinions of the advocate generals but not within the rulings of the Court: 1) Joint cases C-430/93 and C-431/93 of 14 December 1995, *Jeroen van Schijndel and Johannes Nicolaas Cornelis van Veen v. Stichting Pensioenfonds voor Fysiotherapeuten* (not yet published). Opinion of Advocate General Jacobs of 15 June 1995, point n° 27; 2) Case C-192/94 of 7 March 1996, *El Corte Inglés S.A. v. Cristina Blázquez Rivero* (not yet published). Opinion of Advocate General Lenz of 7 December 1995, point n° 27; 3) Case C-209/94 of 15 February 1996, *Buralux S.A., Satrod S.A., Ourry S.A. v. Council of the European Union* (not yet published). Opinion of Advocate General Lenz of 23 November 1995, point n° 83. I am grateful to the services of the European Court of Justice for help in conducting this research.

[66]Case T-5/93 *Roger Tremblay, Françoise Lucazeau and Harry Kestenberg v. Commission of the European Communities*, [1995] ECR II-0185.

[67]Note for comments Feral (1996:224).

the powers of implementation granted to the Commission under the competition rules of the Treaty, and not policy-making (legislative) powers. And second, the principle of subsidiarity was invoked by the applicants in order to ask that the Commission be further involved in the case, rather than to impede its intervention[68].

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[68]First, the background of the case is copyright law in the field of music. Music copyright is managed by societies of authors in each Member State. For example, SACEM (Société des Auteurs, Compositeurs et Editeurs de Musique) is the society that manages copyright in the field of music in France, the Member State in which the facts of the case arose. As regards the structure of the copyright industry, the societies that manage copyright in the various Member States share the market themselves by concluding reciprocal representation agreements under which copyright societies are prohibited from dealing directly with users based on the territory of another Member State. Further, users have to pay a sum calculated as a percentage of the turnover of the Sociétés des Auteurs (royalties). In addition, societies sometimes refuse to allow the use of their foreign repertoire alone, the user being required to acquire the entire repertoire, both national and foreign. All three characteristics of the industry were present in the case at hand.

Second, the facts in *Tremblay* were the following. Firstly, between 1979 and 1988, the Commission received numerous applications under article 3.2° of Council regulation n° 17. The complaints emanated from groups of discotheque operators and individual operators, and asked the Commission to stop SACEM from infringing articles 85 and 86 of the EC Treaty. In particular, the complaints lodged before the Commission alleged, in brief, the following: 1) that the copyright market was partitioned by the agreements between the various Member State societies, thereby impeding the direct access by users of one Member State to the music repertoire of another Member State; 2) that the royalty of 8.25% of turnover charged by SACEM (the French society managing copyright) was excessive in comparison with the royalties paid by discotheques in other Member States; this rate was considered abusive and discriminatory by the complainants, since it was claimed that this rate was not used to pay the management societies but that it accrued exclusively to SACEM; 3) that SACEM refused to allow use of its foreign repertoire alone, every user being required to acquire its entire repertoire, both French and foreign. The Court interpreted the first allegation as based on article 85.1° of the EC Treaty and the second and the third as based on article 86 of the EC Treaty.

Third, in response to the complaints, the Commission started investigations under article 11 of Regulation n° 17. However, the investigations were suspended following requests for preliminary rulings submitted to the Court of Justice between December 1987 and August 1988, by: 1) the Cour d'Appel de Aix-en-Provence, 2) the Cour d'Appel de Poitiers and 3) the Tribunal de Grande Instance de Poitiers. These preliminary rulings concerned questions related to the same issues that were under examination in *Tremblay*. Subsequently, the Court of Justice ruled that: 1) article 85 of the EC Treaty must be interpreted as prohibiting any concerted practice by national copyright management societies of the Member States having as its object or effect the refusal by each society to grant direct access to its repertoire to users established in another Member State; and 2) that article 86 of the EC Treaty must be interpreted as meaning that a national copyright management society holding a dominant position imposes unfair trading conditions where the royalties which it charges to discotheques are appreciably higher than those charged in other Member States, the rates being compared on a consistent basis. That would not be the case if the copyright management society in question were able to justify such a difference by reference to objective, relevant dissimilarities between copyright management in the Member State concerned and copyright management in other Member States.

Fourth, following these judgements, the Commission resumed its investigations, with a view to establishing a consistent basis in order to compare the different Member State copyright societies' royalties. The result of this enquiry was a Commission report of 7 November 1991. In its report the Commission established that the tariffs charged by SACEM differed considerably from those charged in other Member States, with the exception of Italy. Further, the Commission stated that SACEM had not been able to give a convincing justification of these differences.

Fifth, on 20 January 1992, the applicants formally requested the Commission under article 175 of the EC Treaty to define its position concerning their complaints. The Commission responded by letter of 20 February

More in particular, the Court's ruling is connected with the principle of subsidiarity in the following way. Firstly, the applicants submitted that the Commission had committed a manifest error of appraisal in invoking the principle of subsidiarity as one of the arguments used to reject their complaints before the Commission. In turn, the Commission argued that "in response of the applicants' argument that the position taken by the Commission amounts to inappropriate recourse to the principle of subsidiarity, the Commission emphasizes that the course followed represents not the abandonment of all and any official action but rather a choice, as between the competent authorities, of those which are best placed to deal with the issues involved[69]". Secondly, the Court answered that "it is apparent from (...) the contested decision that the Commission based its rejection of the applicants' complaints not on the principle of subsidiarity but solely on the grounds of lack of a sufficient Community interest[70]".

Critically, the Court's answer is deceptive since it refused to enter into analysis of the principle of subsidiarity on the basis of a weak legal ground. To be sure, the principle of

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1992. In this letter, it responded that "having regard to the principles of subsidiarity and decentralisation, and in view of the fact that, ... there is no Community interest involved" an intervention by the Commission was not necessary. Further, the Commission confirmed its position in a letter of 12 November 1992 in which the applicants were notified that their complaints had been definitively rejected. As a consequence, the applicants brought an action for annulment of the Commission rejection decision before the Court of First Instance in January 1993.

Sixth, the arguments of the parties and the findings of the Court were the following. Firstly, the parties of the process asked the Court for the annulment of the Commission decision on four grounds: 1) lack of sufficient reasoning of the Commission decision, and therefore violation of article 190 of the EC Treaty; 2) violation of various principles of Community law; 3) misuse of power; and 4) error of law and error of appraisal. Secondly, the Court rejected all the parties' arguments, except the first. Thus the Court decided that the decision of the Commission had not properly stated the reasons for which the Commission had rejected the first allegation of the parties, that is, the allegation concerning violation of article 85 of the EC Treaty due to the agreements between the copyright societies according to which direct access to the repertoire in one Member State by the users of another Member State was prohibited. The Court found however no contradiction in the Commission statement of reasons as regards the rest of the allegations concerning violation of article 86 of the EC Treaty. As a consequence, the Court annulled the Commission decision for violation of article 190 of the EC Treaty but only as regarded the first allegation made by the parties.

[69]Para. 13.

[70]Para. 61.

subsidiarity was used in the Commission's letters of rejection as an argument distinct from that of lack of Community interest in order not to give suit to the parties' complaints. From a legal standpoint, the Court found it safer to analyze whether the Commission had committed an error of appraisal as regards the existence or not of a Community interest, than to enter the more dangerous field of the examination of whether the Commission had correctly assessed the principle of subsidiarity. This would have required to answer difficult questions as regards the content of the principle and the criteria for its implementation. Be it as it may, the *Tremblay* case offers a good first illustration of the reluctance of the Community Courts to ground their decisions on the subsidiarity principle.

The *SPO*[71] case is the second occasion on which the Courts (again, the Court of First Instance) had the chance to enforce the subsidiarity principle[72]. *SPO* bears some resemblance to *Tremblay*. It concerns the Commission's powers of implementation under the EC Treaty rules of competition[73]. It also regards a Commission decision adopted under regulation n°

[71]Case T-29/92 *Vereniging van Samenwerkende Prijsregelende Organisaties in de Bouwnijverheid and others v. Commission of the European Communities* [1995] ECR II-0289.

[72]Note for comments Feral (1996:225).

[73]The context of *SPO* is the Netherlands building market. In 1952, a number of associations of contractors in Netherlands formed sectoral or regional groups. Their aim was to draw up rules for the members of the groups in order to organize competition in the country's building market. In 1963, those associations joined together and set up the SPO, whose object was, according to its statutes, to "promote and administer orderly competition, to prevent improper conduct in price tendering and to promote the formation of economically justified prices". To this end, SPO has set, from its inception, rules providing for institutionalized regulation of prices and competition. SPO is also empowered to impose fines on its members whenever they breach their obligations under these rules. To have an idea of the impact of SPO rules on the Dutch building market it is important to bear in mind that more than 28 associations, representing 4000 construction undertakings established in the Netherlands, were members of SPO at the time in which the facts of the case arose. In addition to this, the dutch government declared most of the rules that had been enacted by SPO legally binding in December 1986.

The facts in *SPO* were the following. Firstly, in August 1985, the Commission initiated proceedings for information and inspection of SPO. After a number of investigations and exchanges with SPO, the Commission decided to initiate a procedure against that association in November 1989. Accordingly, SPO requested an exemption from the Commission under Article 85.3° of the EC Treaty. Secondly, as a result of the Commission investigations, it was found that the statutes of SPO plus most of the rules enacted by it, constituted infringements of Article 85.1° of the EC Treaty. Subsequently, the Commission adopted a decision under

17. However, as opposed to *Tremblay*, in *SPO* the Commission decision established the infringement by SPO (a Dutch building consortium) of Article 85 of the EC Treaty and ordered it to pay a fine. As regards the subsidiarity principle, the main interest of *SPO* concerns the extent to which Article 3b2° of the TEU is considered by the Court to have retroactive effect. The bearing of the case on subsidiarity is therefore the following.

Firstly, the applicants submitted that, by reason of their experience of the Dutch building market, the Dutch authorities were much better placed than the Commission to apply competition law to the rules at issue. Further, they reminded the Court of the justiciability of the subsidiarity principle. In addition, the applicants argued that the fact that the Commission decision was taken before the entry into force of the Treaty of Maastricht was not sufficient to declare the principle unapplicable since "according to the Commission itself, the principle

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regulation n° 17, on 5 February 1992. In its decision, the Commission 1) urged SPO to bring the infringements found to an end; 2) rejected accordingly the application for exemption made by SPO; and 3) imposed a fine of ECU 22.498.000 on SPO and on its 28 member associations. Thirdly, the Commission notified SPO of its decision on 12 February 1992. However, a passage of the Commission decision was missing. Further, the addresses of various associations of undertaking members of SPO were incorrect. After noticing these flaws, the Commission sent another notification to SPO on 26 February 1992. The text of that decision included the missing passage and the errors regarding the addresses were rectified. Fourthly, after receiving the second notification, SPO and its 28 member associations brought an action before the Court of First Instance in which it was claimed, first, that the Commission decision should be declared non-existent and, in the alternative, that the Court should annul it.

The arguments of the parties and the Court's findings were the following. Regarding the first claim (that the Court should declare the non-existence of the Commission decision), the parties in the case advanced two main arguments: 1) that the Commission had violated the principle of inalterability of Community acts, due to the differences between the first and the second notification; and 2) that the Commission had violated the rules on the use of language, since the college of Commissioners had not adopted the contested decision in Dutch. Both arguments were rejected by the Court of First Instance for lack of sufficient evidence. Regarding the second claim (that the Court annulled the Commission decision), the parties made the following allegations: 1) that the Commission had violated article 85.1° of the EC Treaty, since (i) it had incorrectly defined the relevant market, (ii) it had misapprehended the scope of the rules at issue and (iii) it had wrongly considered that they appreciably affected trade between Member States; 2) the second plea was that the Commission had infringed article 85.3° of the Treaty, since (i) the Commission had failed to take account of the particular characteristics of the building industry in the Netherlands and had reversed the burden of proof, (ii) the Commission had misunderstood the scope of the rules at issue and (iii) the Commission had infringed the principles of proportionality and subsidiarity by refusing to grant the requested exemption; 3) the third plea alleged the infringement of a number of articles of Regulation n° 17; 4) finally, the fourth plea regarded the Commission's breach of Article 190 of the EC Treaty.

After a lengthy appraisal of the different arguments alleged by the parties, the Court of First Instance rejected all of them. Accordingly, the Court declared the application inadmissible and ordered SPO to pay the costs.

existed by implication before being expressly incorporated in the second paragraph of Article 3b of the EC Treaty[74]". Secondly, the Court established, following the reasoning of the Commission[75], that the second paragraph of Article 3b2° had not yet entered into force when the decision of the Commission was adopted[76]. Further, it established that, contrary to the applicants' allegations, the principle of subsidiarity did not constitute, before the entry into force of the Maastricht Treaty, a Community legal principle "by reference to which the legality of Community acts should be reviewed[77]". It was therefore through the lack of endowment of retroactive effect to Article 3b2° of the EC Treaty that the Court of First Instance again avoided to enforce and interpret subsidiarity.

Case C-415/93, *Bosman*[78], is of more importance as regards the Court's stance regarding the enforcement of subsidiarity. The *Bosman* ruling brings the case law of the Court of Justice to the heart of the EC Treaty provisions regarding free movement, and in particular, of Article 48. Article 48 is the Treaty clause that provides for the free movement of workers within the Community. In *Bosman*, the Court of Justice established that Article 48 must be understood as impeding the application of rules, laid down by sporting associations, that regard the payment of transfer fees and the limitation of the number of nationals of other

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[74]Para. 324.

[75]Para. 326.

[76]Para. 330.

[77]Para. 331.

[78]Case C-415/93 of 15 December 1995, *Union Royale Belge des Sociétés de Football Association ASBL v Jean Marc Bosman; Royal Club Liégois SA v Jean Marc Bosman, SA d'Economie Mixte Sportive de L'Union Sportive du Littoral de Dunkerque, Union Royale Belge des Sociétés de Football Association ASBL, Union des Associations Européennes de Football; Union des Associations Européennes de Football v Jean-Marc Bosman,* (not yet published). Note for comments Weatherill (1996).

Member States that may be fielded in matches organized by these sporting associations[79].

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[79]The context of the *Bosman* case is sport, and more in particular football. The ruling must therefore be analyzed from the perspective of the structure of the football industry. In this connection, it is important to note that football is practised as an organised sport in clubs that belong to national associations. In turn, national associations belong to the FIFA (Fédération International de Football Association). Further, FIFA is split into confederations for each continent. The confederation for Europe is UEFA (Union Européenne de Football Association). Both FIFA and UEFA are located in Switzerland and therefore governed by Swiss law.

FIFA and UEFA regulate the transfer of footballers among clubs and the number of nationals that a club may field in a European competition match. Transfer rules had been further developed by the Belgian national football association rulings. Leaving details aside, the crux of the matter is that, according to the rules applied at the time of the ruling, a football player was prevented from, once his contract with a club was terminated, concluding a new contract with a different club, unless the latter entity (the "buying" club) paid a "transfer fee" to the former (the "selling" club). That meant, in substance, that, as opposed to other professional categories, footballers were not free to go to the marketplace and sell their labour according to the normal assumptions of contract and labour law.

The matter of the rules concerning the number of foreigners that could be fielded by a club in a match was settled by UEFA regulations. In turn, UEFA regulations were the product of a compromise reached between the Commission and this organisation in 1991. In particular, restrictions on nationality followed the "3+2" model. Accordingly, clubs could field three foreign players plus two assimilated players. Assimilated players were those who have played in the country of the relevant association for an uninterrupted period of five years, including three years as junior. This rule was enforced within the European club competitions organised by UEFA.

Bosman brought an action against his old club. He asked the national court to declare that the transfer rules did not apply to him. He also asked for interlocutory measures designed to order RC Liège and the Belgian football association to refrain from impeding his engagement. After a series of backs and goes, the matter finally reached the Court of Justice in October 1993. Following an EC Treaty Article 177 procedure, the Cour d'Appel de Liège asked the ECJ a series of questions regarding, in essence, the compatibility of the transfer and nationality football provisions with Articles 48, 85 and 86 of the Treaty of Rome.

The reasoning of the Court took the following steps. As regards the question related to the transfer fees, the Court started by examining the extent to which the applicable rules on transfer fees were contrary to Article 48 of the EC Treaty. Firstly, the Court asserted that provisions restricting the freedom of a national from one Member State to access the market of another Member State constitututed an obstacle to the freedom of movement of persons guaranteed, in Article 48 of the EC Treaty. According to the Court, Article 48 was violated even in the absence of discrimination on nationality grounds. Secondly, the Court went on to examine whether the rules in question could be justified by "pressing reasons of public interest". In particular, the Court considered the arguments of the Belgian football association, the UEFA, the French and the Italian governments, according to which the transfer rules were justified by the "need to maintain a financial and competitive balance between clubs and to support the search for talent and the training of young players". The Court accepted that these aims were legitimate, although it established that the rules through which they were implemented could not escape a proportionality assessment. Thirdly, the Court considered, following the Opinion of Advocate General Lenz, that there existed other means by which these aims could "be achieved at least as efficiently" and at the same time would not impede the freedom of movement of workers. Therefore the rules in question were judged not proportionate to their aims. Consequently, the Court arrived at the conclusion that Article 48 "precludes the application of rules laid down by sporting associations, under which a professional footballer who is a national of one Member State may not, on the expiry of his contract with a club, be employed by a club of another Member State unless the latter club has paid to the former club a transfer, training or development fee". Finally, the Court concluded that there was no need to assess the rules in question from the perspective of Articles 85 and 86 of the EC Treaty, since the rules under examination "are contrary to Article 48".

Regarding the rules related to the number of foreign players that may be fielded in a European competition match (the "3+2" rule), the Court also started by analyzing the matter from the angle of Article 48 of the EC Treaty. The path undertaken by the Court was similar to that in the examination of the compatibility of the transfer system with Article 48. Firstly, the Court established that Article 48 prohibited rules of sporting associations which restrict the number of nationals from other Member States who may take part in football matches. Further, the Court decided that the fact that those rules referred not to the employment of players but

The judgement of the Court refers to the principle of subsidiarity in paragraphs 72 and 81 of the ruling. In paragraph 72, the Court alludes to the arguments adduced by the German government against the applicability of Article 48 to the rules laid down by sporting associations. In particular, it argued that sporting associations enjoyed freedom of association and autonomy under German law. It therefore concluded that the principle of subsidiarity, taken as a general principle, should be interpreted as meaning that "intervention by public, and in particular, by Community authorities, must be confined to what is strictly necessary[80]" in this area.

The reference of the German government to the subsidiarity principle may be understood as an attempt to impede any kind of intervention in the field of football regulation on the part of Community organs -a ruling by the Court included. In this connection, the ECJ answered that "... the principle of subsidiarity, as interpreted by the German government to the effect that intervention by public authorities, and in particular Community authorities, in the area in question must be confined to what is strictly necessary, cannot lead to a situation in which the freedom of private associations to adopt sporting rules restricts the exercise of

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to the extent to which these clubs may field them was irrelevant, in so far as participation of players in matches was the primary aim of a football player's professional activity. Secondly, the Court searched for possible justifications of the limitation rules on nationality. In particular, the Belgian football association, UEFA, the German, French, and the Italian governments had argued that those rules were justified on non-economic grounds. They argued that 1) those clauses served to maintain the traditional link between each club and its country; 2) they were necessary in order to create a sufficient pool of national players to provide the national teams with top players to field in all team positions; 3) they helped to maintain a competitive balance between clubs by preventing the richest clubs from appropriating the services of the best players. Thirdly, the Court dismissed all three arguments, saying that the implementation of nationality clauses would deprive Article 48 from its practical effect. Consequently, the Court concluded that Article 48 of the EC Treaty "precludes the application of rules laid down by sporting associations under which, in matches in competitions which they organize, football clubs may field only a limited number of professional players who are nationals from Member States". Similar to its previous analysis, and for the same reasons previously stated, the Court found it not necessary to undertake an analysis of the nationality provisions from the viewpoint of Articles 85 and 86 of the EC Treaty.

[80]Para. 72.

rights conferred on individuals by the Treaty[81]". The Court is therefore saying that it also takes into account the principle of subsidiarity as a criterion to restrict its own action but that in the case at hand its intervention against football regulations is justified due to the violation of individual rights which arises from the application of those regulations. In other words, according to the Court, Community intervention in this field -be it in the form of a Court ruling- is therefore justified in order to protect the rights of the free movement of individuals.

To be sure, and similar to the rest of the cases that I have examined up to now, the *Bosman* case is also atypical as regards the enforcement of subsidiarity for the reason that it concerns a matter of negative, rather than positive, integration; and negative integration does not seem to be the most appropriate field for application of the principle (Scharpf, 1995:30). Nevertheless, one possible interpretation of the Court's ruling would be to say that the Court is using the eventual violation of individual rights which are derived from the four freedoms enshrined in the Treaty as a standard or criterion for the application of the subsidiarity principle. Therefore, whenever national norms or, as in the *Bosman* case, national practices accepted by national authorities, violate individual rights derived from the free movement rules of the Treaties, there will be no question of applying subsidiarity. Community intervention, be it in the form of a ruling by the Court, or in the form of a legislative measure, will be therefore deemed legitimate in such cases.

As a result, the Court's decision in *Bosman* comes very close to the interpretation given by the Commission as regards the subsidiarity principle[82]. In this respect, I may remind the reader that the Commission understood that the extent of the application of

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[81]Para. 81.

[82]Note Communication of the Commission of the European Communities to the Council and the European Parliament on the Principle of Subsidiarity, SEC(90) 1990 final of 27 October 1992. Note my comments on the Commission's Communication in point C of section II of this Chapter.

subsidiarity ended once faced with the "imperatives of free movement". *Bosman* seems to confirm this stance, although the Court adds to the Commission's position by requiring that an individual right derived from the Treaty provisions on free movement be actually at stake. Although, at present, it is risky to state with certainty what the Court's future stance will be as regards the relationship between the four freedoms of the Treaty and subsidiarity, it may be concluded that *Bosman* establishes an important first restriction on the scope of application of the subsidiarity principle.

However, in purely theoretical terms, the standard "violation of individual rights derived from the four freedoms" could be used both to uphold or declare void Community intervention. The *Bosman* case would be an example in which the Court uses this standard in the enforcement of subsidiarity in order to uphold Community intervention. Imagine, nevertheless, a case in which the Council decided, by a majority vote (under Article 100 a of the EC Treaty), to consecrate, at Community level, the football association norms that were contested in the *Bosman* case. This would imply a *de iure* violation of the individual rights which are derived from the four freedoms of the Treaty. The Court could employ this argument in order to declare the Community measure void. However, this possibility is very theoretical: it is difficult to imagine that Member States would use the instruments offered to them by the Treaties in order to consecrate such restrictive measures; and, if this happened, the Court would have difficulty annulling a measure adopted by a majority of the Member States, even if this were contrary to the free movement rules of the Treaty. The prove of this is in the Court's case law *ex* Article 173 of the EC Treaty, in which the Court has very rarely annulled measures adopted by a majority in the Council (Weiler, 1991a). Thus the major finding submitted above: *Bosman* very probably implies a first step towards the judicial limitation of the scope of application of the subsidiarity principle.

The *Working Time Directive* case[83] is of greater interest as regards the judicial enforcement of subsidiarity, since the issue raised in this case concerns a typical subsidiarity problem[84]. The thrust of the case is as follows.

The Council enacted, in November 1993 (thus immediately after the coming into force of the Maastricht Treaty) directive 93/104[85] "concerning certain aspects of the organization of working time". In particular, the directive established, in the first place, minimum periods of daily rest, weekly rest, annual leave, breaks and maximum weekly working time. In the second place, it regulated certain aspects of night work, shift work and patterns of work. During the Council negotiation of this directive, the U.K. attempted to water down many of its provisions. In fact, the directive provided, at its final reading, for an important degree of "flexibility". Thus, for instance, Article 5, one of its most controversial provisions, established Sunday as the day on which the minimum 24 hour weekly rest period should take place. However, the same provision indicated, in its second sentence, that Sundays should be considered a weekly rest period "in principle". Most importantly, Article 17 included a number of derogations from the most important directive provisions, that Member States could implement subject to certain conditions. Such conditions were in turn stated in broad terms[86]. In the same line, Article 18 of the directive laid down various periods for the transposition

[83]Case C-84/94, *United Kingdom of Great Britain and Northern Ireland v Council of the European Union*, 12 November 1996 (not yet published).

[84]For a thorough analysis of Community labour law and subsidiarity vid. Bercusson (1994).

[85]Directive 93/104 of 23 November 1993, OJEC L 307/18 of 13 December 1993.

[86]Note, for instance, Article 17.1° of the directive, which allows Member States to derogate from Articles 3, 4, 5, 6,8 or 16 when the duration of the working time is (i) not measured and/or (ii) when it can be determined by the workers themselves.

of the directive into national law[87].

Yet the U.K. opposed the adoption of the final text of the directive. It argued that the directive "was a measure concerned with job creation" rather than with health and safety objectives, and that it fell "into the Community social policy field". In short, for the U.K. government, the measure "threatened the whole of the U.K.'s opt out from the Community Social Charter" (Edwards, 1996:14). In the absence of a veto right (Article 118a providing for a qualified majority for the adoption of decisions), the U.K. finally abstained from voting, in order to clearly express its position that the measure belonged to the sphere of the Social Charter, in which decisions were to be taken at 11 at the moment of the adoption of the directive. Predictably, the U.K. brought an action for the annulment of the directive immediately after its adoption by the Council.

In its action, the U.K. asked the Court to declare the whole directive void. It requested, alternatively, the annulment of Article 4[88]; Article 5 first sentence[89]; Article 5, second sentence[90]; Article 6.2°[91]; and Article 7[92]. The arguments alleged by the applicant were four-fold: 1) Use of the incorrect legal basis; 2) breach of the principle of proportionality; 3)

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[87]For instance, although the general rule was that the directive had to be transposed by November 1996, Article 18.1°.b.ii established that, as regards Article 7 (paid annual leave), Member States could made use of a transitional period of three more years to be counted from this date.

[88]Article 4 of the directive sets out the principle that when the working day is longer than six hours, every worker is entitled to a rest break. However, the directive expressly establishes that the details of the rest break regulation (including its duration and the terms upon which it is granted) are left to the Member States.

[89]Article 5 of the directive establishes that the minimum period of rest per week to which any worker is entitled is 24 hours, plus 11 hours of daily rest, to which Article 3 of the directive refers.

[90]This article establishes Sunday as the day on which weekly rest periods should take place, "in principle".

[91]Article 6.2° sets the maximum working time average (48 hours) per week.

[92]Article 7 establishes the right according to which all workers are entitled to receive an annual paid leave of at least four weeks.

misuse of power; and 4) infringement of essential procedural requirements. All these arguments were rejected by the Court, save the argument concerning the failure of the Council to sufficiently explain the choice of Sunday as weekly rest day. Accordingly, the ECJ dismissed the U.K.'s application, although it annulled the second sentence of Article 5 of the directive[93].

The connection of the case with the principle of subsidiarity is the following. First, the U.K. invoked the principle of subsidiarity as a standard for the interpretation of Article 118a

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[93]In particular, the U.K.'s argumentation and the ECJ's main grounds of law were the following:
1) Use of incorrect legal basis: According to the U.K., Article 118a of the EC Treaty should be strictly interpreted, since it constitutes an exception to Article 100. Further, the U.K. argued that both the aim and the content of the directive were concerned not with the protection of workers' health and safety but, rather, with job creation. Both arguments were rejected by the Court, which argued that there was no indication in the Treaty in favour of a strict interpretation of Article 118a (rather, the contrary was true) and that both the aim and the content of the measure showed clearly the connection between the directive and Article 118a.
2) Breach of the principle of proportionality: In particular, the U.K. employed the following four more concrete arguments: a) not all proposed measures may be regarded as "minimum requirements", some of them implying instead maximum levels of protection; the ECJ rejected this argument, arguing that the expression "minimum requirements" is not equivalent to regulation at the level of the "lowest common denominator". Instead, the Court argued, Article 118a imposes a high level of protection in this area; b) the same objective could have been achieved using less restrictive measures; the ECJ answered this argument by saying that the measures adopted were both suitable for the objective of the directive and that the means employed by the directive did not exceed what was necessary to achieve that objective (the directive providing wide margins of flexibility, as has been shown previously); c) the adoption of the directive was not justified according to available scientific research; to which the ECJ answered that Article 190 of the TEU does not require the Council to justify any point of fact or law of the measures it adopts; d) finally, the U.K. argued that the Council measure violated the principle of subsidiarity (see my remarks in the text).
3) The third argument employed by U.K. was that the Council had misused its powers. In its judgement, the ECJ stated that its case law defined "misuse of powers" as "the adoption by a Community institution of a measure with the exclusive or main purpose of achieving an end other than that stated or evading a procedure specifically prescribed by the Treaty for dealing with the circumstances of the case" (par. 69), and that it was apparent that the applicant had failed to establish that this had been the case.
4) The last argument employed by the U.K. was that essential procedural requirements were infringed. In particular, the U.K. claimed that the Council measure was inadequately reasoned or, in the alternative, defectively reasoned. Both arguments were rejected by the Court, on the ground that, save the second sentence of Article 5, the Council had sufficiently reasoned the need for the measure (note my remarks in the text regarding subsidiarity).

Though my aim here can not be that of analyzing all aspects of this judgement, the Court's decision is striking for its deficient legal technique. Most of the U.K.'s arguments are reviewed by the Court under the plea of "incorrect legal basis", and then again under the rest of the headings, which, *prima facie*, seriously compromises the clarity of the Court's judgement. This is particularly paradoxical if taking into account the general relevance of the case at hand. Some clues for the interpretation of the Court's decision may be found in the Opinion of Advocate General Léger of 12 March 1996.

of the TEU. For the applicant, the Council failed to fully consider and adequately demonstrate whether there were transnational aspects which could not be satisfactorily regulated at national level. It also failed, according to the U.K., to demonstrate that Community action would provide clear benefits compared with action at national level. Second, and in the framework of its plea regarding the breach of the proportionality principle, the U.K. argued that "a measure will be proportionate only if it is consistent with the subsidiarity principle[94]". In this connection, the U.K. maintained that the Community directive breached the principle of proportionality since the Council had not sufficiently demonstrated that the objective of the directive could be better achieved at Community rather than at national level. Finally, and in the framework of the fourth plea (infringement of essential procedural requirements), the U.K. argued, without directly invoking subsidiarity, that the preamble of the directive "did not explain why Community action was necessary[95]". Interestingly enough, the U.K. explicitly remarked, in its application to the Court, that it did not "rely upon subsidiarity as a separate plea[96]". This, as Advocate Léger remarks[97], introduced some confusion as regards the use that the U.K. made of the principle of subsidiarity in order to uphold its action. Therefore I shall further elaborate here the U.K.'s argumentation on the basis of subsidiarity before entering into an analysis of the Court's response to the points raised by the U.K. in this regard.

As may be induced from the judgement of the Court, the U.K. used the principle of

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[94]Para. 54.

[95]Para. 72.

[96]Para. 46.

[97]Note Opinion of Advocate Léger on the *Working Time Directive* case, delivered on 12 March 1996, at page I-25 (point 124).

subsidiarity both as a substantive and a procedural argument. Materially speaking, the U.K. argued, in essence, that the Council had not complied with the principle of subsidiarity taken as a substantive standard against which the need for its action should have been measured. This amounts to saying that subsidiarity had been disregarded when the Council assessed the need for adopting directive 93/104. The first and the second U.K. references to subsidiarity, referred to above, may be understood from this perspective. Procedurally speaking, the U.K. indirectly complained that the preamble of the directive had not indicated, or at least not sufficiently, why Community action had been considered necessary according to the subsidiarity principle. In fact, there is not a single reference to subsidiarity in the preamble of the directive. The indirect U.K.'s allusion to subsidiarity in the framework of the plea of "breach of procedural requirements" may be understood from this perspective.

Notwithstanding the merits of this reconstruction of the U.K.'s argumentation on the basis of subsidiarity, what is striking at the outset is the timid references to the principle made by the U.K.. One has the impression that the credit given by the applicant to subsidiarity as an argument capable of succeeding in the legal arena was considerably low. This is manifestly paradoxical, if taking into account, as has been seen in a previous section of this chapter, that the U.K. government fought, at times bitterly, for the introduction of subsidiarity as a legal principle in order to make it enforceable by the Community judiciary. Given that the U.K. employed subsidiarity as a low profile argument in the *Working Time Directive* case, it is no surprise that the Court rejected, without entering into an indepth analysis, all the U.K.'s subsidiarity arguments. I analyze below the Court's stance as regards subsidiarity in this case.

To start with, it is important to note at the outset the structure of the Court's judgement. The Court starts its argumentation by making some general considerations about

the scope of Article 118a. This seems logical, considering that the thrust of the British argumentation relied on a particular interpretation of Article 118 a. Yet to put an end to its interpretation of the scope of Article 118 a, the Court introduced, in a rather slippery way, the following sentence:

"Finally, it is to be remembered that it is not the function of the Court to review the expediency of measures adopted by the legislature. The review exercised under Article 173 must be limited to the legality of the disputed measure". (Para. 23).

Though the introduction of this sentence at this stage of the reasoning of the Court is clearly misleading (since unconnected with its previous reasoning on the scope of Article 118a), its full meaning is more apparent when connected with the Court's later approach towards subsidiarity. It is submitted that the Court's response to U.K.'s subsidiarity argumentation will be essentially based on the general principle set by the ECJ in the previous statement.

More in particular, the Court contended, as regards U.K.'s argument that the Council had breached the principle of subsidiarity in considering the need for the given Community measure, that "once the Council has found it necessary to improve the existing level of protection as regards the health and safety of workers and to harmonize the conditions in this area (...) achievement of that objective through the imposition of minimum requirements necessarily presupposes Community wide action[98]". Further, as regards U.K.'s reference to subsidiarity in the framework of the breach of the proportionality principle plea, the ECJ

[98]Para. 47.

merely reiterated the previous argument[99]. Finally, as regards the U.K.'s argument that the preamble of the directive had failed to include the reasons why the Council considered Community action necessary, the Court stated, in the first place, that the preamble of the directive "clearly shows that the measures introduced are intended to harmonize the protection of the health and safety of workers[100]" and, in the second place, it established that under Article 190 of the TEU "the authority is not required to go into every point of fact and law[101]".

The Court's subsidiarity doctrine resulting from the *Working Time Directive* case may be therefore summarized in the following way. First, as regards the enforcement of subsidiarity as a material principle against which the ECJ may check the way in which the Community legislature has considered that a given Community intervention is necessary, the Court is plain and clear: it will not enter into a domain which belongs to the "expediency of the Community legislature". In other words, this confirms that for the Court, subsidiarity is above all a matter of political consideration whose resolution excludes its own intervention. Second, as regards the enforcement of the principle as a procedural device, the Court seems to adopt, in the case at hand, a relaxed approach; though, to be sure, the U.K. reference to subsidiarity in this framework was only indirect, the Court seems to be content if the Community legislature indicates, in the preamble of directives, the general reasons that justify the need for a given measure.

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[99]Note para. 55 of the ruling: "The argument of non-compliance with the principle of subsidiarity can be rejected at the outset. It is said that the Community legislature has not established that aims of the directive would be better served at Community level than at national level. But that argument, as so formulated, really concerns the need for Community action, which has already been examined in para. 47 of this ruling".

[100]Para. 75.

[101]Para. 74.

Critically, this second strand of the judgement is the weakest aspect in the Court's reasoning regarding subsidiarity. It is submitted that the Court lost a good chance in this case to, firstly, start clarifying the procedural content of the principle, and, secondly, adopt a stricter approach as regards the only possible way (procedural) through which subsidiarity could be enforced before the Community judiciary. Furthermore, there is a mismatch in the judgement between the reasoning of the Court as regarded the directive's ban on work on Sundays (the Court annulling this part of the directive since the legislature did not reason sufficiently why Sundays had been preferred) and its reasoning as regarded the need to indicate in the preamble of the directive why the Community legislature decided that action was necessary. Thus, though the Court states that the reasoning of the Community legislature as regards the banning of work on Sundays is insufficient, it does not explain why, and, above all, it does not explain why in one case the reasoning of the preamble is considered to be sufficient and in the other not[102]. In other words, the Court does not develop any criteria through which one could measure what may be considered to be a "sufficient" reasoning. This imbalance is further highlighted if it is taken into account that Article 5 (second sentence) of the directive was drafted in very flexible terms, which implies that the Member States were not necessarily bound to designate Sundays as the weekly rest day. The impact of Article 5 (second sentence) in the Member States' sovereignty was therefore almost irrelevant.

These criticisms of the Court's approach to a procedural use of subsidiarity may be only qualified, and the deficiency in the reasoning of the Court to a certain extent explained, if it is taken into account that the U.K. did not employ "procedural subsidiarity" as a hard argument. In fact, the argument in connection with the U.K.'s "timidity", so to speak, in alleging breach of subsidiarity in its action, is even clearer in the framework of a procedural

[102]Compare paragraphs 37 and 81 and ff. of the Court's ruling.

employment of the principle. Why the U.K. did not allege, for example, that in the preamble of the directive there is not a single express reference to the principle of subsidiarity is a mystery the resolution of which would need more than thorough legal analysis. In many respects, this is the most paradoxical aspect of the case at issue. If put together with the *Bosman* case, in which the German government made a reference to subsidiarity but only "as a general principle", it could even be affirmed that we are witnessing a visible trend in which, as opposed to what was expected, those Community actors who fought for the introduction of the principle in the Community legal system show to be, at the last resort, reluctant as to the possibilities of subsidiarity to succeed before the Community judiciary. If this trend is confirmed in successive cases, the "subsidiarity paradox" will need to be explained[103].

Finally, even if the approach adopted by the Court as regards procedural subsidiarity may be subject to criticism, the *Working Time Directive* case allows it to show a more general argument made in an earlier point, which is that the procedural avenue for the judicial enforcement of subsidiarity may not lead, after all, too far away[104]. Thus, as already suggested, in most of the cases, the procedural requirements of subsidiarity will be easily attained. Put in different terms, from a procedural perspective, it will be easy for the Court to argue that a given measure complies with the subsidiarity principle, save the exceptional cases in which it is plainly apparent that the Community legislature has committed a manifest error or has misused its powers. In short, to insist on a proceduralized version of subsidiarity as the only way to save the judicial enforcement of the principle will be, in practice, no great achievement, as the case at issue seems to demonstrate.

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[103]To anticipate explanations of this paradox at this stage of development of the ECJ case law on subsidiarity would be simply to fall into "political-judicial fiction". My aim, at least at the moment, is simply to note the existence of this apparent puzzle.

[104]Note my remarks in point A of this section.

Can any conclusions be derived from the analysis of the Court's case law on subsidiarity? At this stage of its evolution it is risky to arrive at bold conclusions. However, some general trends seem already visible. Firstly, it seems that the Court has adopted a very cautious approach as regards the judicial implementation of the principle. This is demonstrated, first and foremost, by the Court's conclusions in the *Working Time Directive* case, but not only. Another indication of such a prudent approach is given in the *SPO* case, in which the Court of First Instance declared that Article 3b2° had no retroactive effect. Both Courts seem therefore to be aware of the risks involved in the judicial enforcement of subsidiarity. Secondly, it seems that the introduction of subsidiarity has not resulted in further overload of the work of the Court(s): four cases in which subsidiarity has been invoked, of which only one may be categorised as a "hard case", in approximately 3 years[105], is not a large figure in this regard. Rather the contrary seems paradoxical, as has been suggested above.

[105]To which must be added the five actions, in which subsidiarity was invoked, which have been brought before the Court since the coming into force of the Maastricht Treaty. These actions were not considered by the Court.

IV-. THE IMPLEMENTATION OF THE SUBSIDIARITY PRINCIPLE BY THE POLITICAL ACTORS OF THE COMMUNITY; IN PARTICULAR, BY THE COMMISSION.

Are there alternatives to the judicial application of the principle of subsidiarity? It seems obvious that the ECJ is not the only Community institution bound to enforce subsidiarity. Article 3b2° must be respected by all Community organs, both judicial and political. The Council, the European Parliament and the European Commission, are also responsible for the implementation of the principle. The implementation of subsidiarity by the Community political organs and, above all, by the Commission, which plays a fundamental role in Community policy-making due to the quasi monopoly it enjoys on proposals for Community intervention, may constitute therefore an alternative to the judicial enforcement of the principle. However, as shall be demonstrated in the following discussion, subsidiarity may be a difficult concept to handle also for the Community political organs. Again, the thrust of my argument comprises both functional and normative elements. However, a clearer comprehension requires that its exposition be disentangled. Reference to present Community practice shall also be made, in order to show some of the more general points.

A. The Functional Issue.

The first problem posed by the implementation of the subsidiarity principle by the Community political actors, and notably, by the Commission[106], is of a functional character.

[106]The remarks that follow are made thinking in the European Commission. Some of them could be, however, applied to the rest of the Community "political" actors.

That is, it is at least questionable whether the principle of subsidiarity (or the criteria into which it has been translated) can operate as an effective safeguard of Member States' sovereignty.

A rapid examination of the main criteria in which subsidiarity has been developed by the Community political institutions raises serious doubts in this respect. Take, for example, the criteria employed by the European Council[107] (which, theoretically, is the institution in which subsidiarity should have been interpreted most favourably for the protection of Member State autonomy). Briefly stated, these criteria are the following: 1) the exercise of Community powers is justified when the issue has a transboundary dimension; 2) the exercise of powers by the Community is justified when the issue produces market distortions.

It has been forcefully argued by Golub (Golub, 1996) that these criteria could well serve the purpose of drawing the line between Community and Member State action. To justify his position, Golub takes a number of examples from the area of environmental protection. Firstly, as regards the first criterion, Golub states that many areas of environmental regulation do not have a significant transboundary element. For instance, he argues, there is nothing inherently transboundary in noisy products. Further, as regards waste disposal, he states that laws regulating the amounts of disposable waste, establishing high levels of recycling or prohibiting certain methods of domestic disposal, constitute restrictions of essentially national practices which by themselves have no clear adverse effects on neighbouring states. Another example is given by the Community regulations on environmental impact assessment. According to Golub, the environmental implications of

[107]Note point C of section II of this chapter, and notably, the "Overall Assessment on the Subsidiarity Principle" of the Conclusions of the Presidency of the European Council of Edinburgh of 1992 (Bull. EC 12-1992).

building highways, refineries, large agricultural installations and suburban housing projects are local, or possibly regional, certainly not transnational, except in cases where projects are sited on a national border. A final example is given by the area of flora and fauna protection, which, according to Golub, offers the clearest case of EU laws regulating what are basically national matters. For instance, though many bird species migrate, the majority of the species targeted by the birds directive are non-migratory. Furthermore, appeals for EU competence based on the migratory character of species are, according to him, clearly absurd.

Secondly, according to the criterion of market distortion, Golub argues that Community intervention in the field of process regulation could be blocked by arguing that, in the long run, competitive strategies based on ecological dumping have negative effects for those Member States that employ them[108]. Therefore the implication is that the distortion that the lack of Community process regulation would produce for those Member States that have national process regulations, would be compensated, in the long run, by the negative economic effects that countries playing with ecological dumping would suffer. Since Member States using ecological dumping strategies would also have a price to pay, this could be used by them as an argument against the Community argument based on the grounds of market distortions.

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[108]Golub draws his argument from the recent Commission attempts to convince Member States with lower process regulation standards of the benefits, in the long run, of implementing high process regulation standards. High process standards confer, according to the Commission "in the long term, competitive advantages on firms by encouraging them to use resources more efficiently, promoting their positive public image, forcing them to develop more flexible production methods and providing "first mover" advantages by creating incentives for them to produce and sell technologically innovative remedies for environmental harms". The implication of this stance of the Commission is, according to Golub, "to make ...previous justifications for EU action totally untenable- if the Commission is correct, then pollution havens are a misnomer because lax environmental standards actually entail economic competitive disadvantages. States which allow lax standards do not attract foreign investment...instead, these states are merely pursuing unwise policies which will undermine their long-term industrial competitiveness. The foolhardy decision to do this does not distort the market in their favour and does not justify harmonisation process standards at the EU level. Thus, under the subsidiarity principle, there might be no legitimate reason to set EU standards for national production processes..." (Golub, 1996:16). Note also Commission communication on industrial competitiveness and environmental protection, SEC(92)1986.

Though provocative, it is submitted that Golub's argumentation fails to address the core of the matter. It is obvious that one could find good reasons to justify, on the grounds of the transboundary criterium, that Community action in the areas which Golub discusses is unnecessary. But the contrary also holds true. For instance, even if it is true that there is no transboundary noise element in certain kinds of products, the point is that product regulation may create market distortions. From this perspective, the need of a Community action as regards noise protection could be justified on market distortion grounds. The question that Golub seems to neglect is that both aspects (environmental protection and market aspects) go many times hand in hand. Even from a strict pollution perspective, though it holds true that there is no inherent transboundary noise element in some kinds of products, such as lawnmowers, a different conclusion could be reached if one thinks of aircrafts. This proves, contrary to what Golub asserts, that some products do have noise effects which are inherently transboundary, at least potentially. For those cases Community intervention could be justified by relying on the inherent potential transboundary element that is present in some products. The mechanical application of the "transboundary element" criterion could lead to the paradoxical outcome that many products that are not presently regulated by Community law, since their national regulations basically coincide, would probably have to fall within the Community sphere. Further, as regards waste regulation, Community intervention is focused, in the majority of cases, on waste norms regarding dangerous substances and on their transport. Accidents that may be caused as a consequence of the use and transport of waste coming from dangerous substances may have a direct transboundary effect since its exact geographical dimension may be difficult to ascertain *ex ante*, as history shows[109]. In

[109]Note for instance the Seveso accident. In 1976 important quantities of a toxic dust called "dioxin" escaped from an Italian factory placed at Seveso, near Milan (Italy) (Haigh, 1987:257). Subsequently, a toxic cloud was formed that would finally contaminate a vast zone of approximately 1,807 hectares (Di Giovine, 1979:38). Given

addition, the environmental implications of building highways, refineries, etc, may be also transboundary, as the direct correlation between the destruction of forests and industrialisation and global warming demonstrates. Finally, even a superficial familiarity with biology (like my own) is sufficient to know the significant consequences that the protection of certain animal species -independently of whether they are migratory or not- or the protection of certain natural habitats may have to preserve the global ecosystem.

A similar reflection could be made as regards the market distortion criterion. Even if in the long term those Member States that have implemented ecological dumping strategies may suffer negative effects, the fact is that these strategies produce, at least in the short and medium terms, market distortions for Member States that implement high process standards. This could be used, and has been traditionally used, as one of the "hard arguments" for justifying Community intervention in the environmental field -hard since difficult to contradict in market distortion terms.

To sum up, the previous excursus shows that, according to the criteria that the European Council has developed to translate subsidiarity into substantive terms, one could always find reasons to justify the need for Community action without resorting to the absurd or the ridiculous. Further, if the criteria that are discussed by Golub were followed, the probable effect is that Community would have complementary arguments on which Community action could be justified. As noticed above, this would imply, strikingly enough, that subsidiarity, instead of serving the purpose of limiting Community intervention, would

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the fact that accidents of the kind were not rare -note, for instance, the accidents of Flixbourg, in the U.K. (1974); Beck, in the Netherlands (1975); and Velbert, in Germany (1979)- and the difficulties to know *a priori* their transboundary dimension, Member States reacted and adopted directive 82/501 of 24 June 1982 OJEC L 230/1 of 5 August 1982, known as the "Seveso" or "Post-Seveso" directive.

support it in most cases.

The difficulty that is involved in the search for parameters whereby the Member States' autonomy can be protected from Community intervention is not consubstantial only to the political circumstances in which subsidiarity was defined in the Community context. The proof of this is given by the 1993 CEPR (Centre for Economic Policy Research) Annual Report on subsidiarity. The purpose of this report was to join together a number of independent economists in order to define substantial criteria through which the principle of subsidiarity could be translated, and to produce recommendations as regards the best level at which some particular policies, ranging from environmental protection to competition, should be developed. The outcome of this research is not very encouraging as regards the protection of Member State autonomy, as the final conclusions of the report show:

> *"Our illustrations of the subsidiarity principle... have produced recommendations that were highly dependent on the circumstances of the particular case. In many regulatory areas -with the notable exception of drinking water regulation- we see significant merit in centralized or partially centralized policies, and in many respects the Community's current practices are well thought out".* (CEPR, 1993:158)

Defining the best regulatory level with the purpose of protecting lower levels' autonomy is problematic not only in the Community context or in a given discipline. In this connection, Scharpf reports the effort that was made during the 60's and the 70's by the public choice school to develop criteria through which a division of tasks among levels of government in federal settings could be made operative. Even if the authors that undertook this path had a strong preference for decentralized policy-making, the outcome was,

paradoxically enough, the development of criteria that opened up new avenues for increased federal intervention. Therefore the focus of public choice theories changed, from attempting to define the best level of government with a marked bias for decentralization, to the "identification of those situations in which decentralized decision making would produce sub-optimal outcomes as seen from the perspective of a more inclusive collectivity" (Scharpf, 1978:61).

What accounts, then, for this difficulty in developing material, objective, and universal criteria to block centralised intervention and to justify the exercise of power by the lower levels of government? The main difficulty in this regard seems to lie in the interdependent and complex nature of the current regulatory issues. The functional connection between areas, and within areas, between levels, makes the task of establishing clear dividing lines among the different layers of power increasingly difficult. Even in areas in which there is a strong case for national, or even regional or local regulation, such as regulation of television or books, it could be argued that since they may also be treated as services or products, there should be at least some involvement on the part of the central authorities, in order to ensure their free circulation (Dehousse, 1992:221). All this casts serious doubts, from a functional perspective, on the effectiveness of strategies based on the implementation of material principles for the purpose of protecting the autonomy of lower levels of government.

B. The Normative Issue.

The main charge against the principle of subsidiarity is, the preceding lines notwithstanding, not functional, but normative. To start with, subsidiarity does not constitute

a problem of competence. It is rather a problem of political opportunity. Even if technical analysis may help in the making of political decisions, there will always be political questions that scientific analysis will not be able to answer. Rather than masking answers to political questions as if they were scientific, political dilemmas should find political responses (Dehousse et al., 1996). Let us further examine how this aspect may compromise the implementation of the principle by the Community political actors, notably, by the Commission.

Firstly, it is necessary to ask what question underlies Article 3b2° of the TEU. A reading of this provisions shows that the main question which subsidiarity is called upon to answer is not whether or not the Community has formal competence to act. This is, instead, determined by the first paragraph of the same article: the principle of attribution of competences solves that question. The Community has therefore formal competence to act when this is explicitly established by the Treaties[110]. The question underlying subsidiarity is, rather, of a normative - evaluative - political - kind: should the Community adopt a particular measure?

Secondly, in answer to this question, Article 3b2° establishes a particular path. The Community political organs, above all the Commission, should undertake a comparative analysis of the costs and benefits that Community and Member State intervention aiming at the achievement of a particular Community objective would produce. This is, as was said in a previous point[111], not an easy task. However, the important point to be underlined here is that even if this kind of analysis were possible to be achieved, there will always be a mismatch between the answer that is given -which is essentially descriptive- and the question

[110]Though not only: note Article 235 of the TEU.

[111]Note my remarks in point A of section III.

that was posed -which is essentially normative. The question will then always remain: faced with the available technical or scientific evidence, should the Community act?

One of the examples used by Golub may serve to further clarify this point. Where the Community is considering, according to the philosophy of subsidiarity, whether it should act or not to protect certain natural habitats, it is not simply considering whether it has the competence to do so or not. This will be determined by the Treaty environmental provisions. More profoundly, it is considering whether it is opportune to undertake a determined action in the field of environmental protection. In this regard, scientific evidence showing that, for example, a Community action would be effective enough in order to achieve one of the objectives of the Treaty -the protection of the environment through the reduction of global warming, for example- is necessary, but will not solve the political question of whether policy makers consider that such action is opportune. The political discussion of the overall consequences of the proposed action will play, in the end, a decisive role in this regard. In this connection, what matters will be, essentially, how this political debate is structured.

This challenge for subsidiarity is the most obvious. But there is a second, more profound, normative charge against the principle of subsidiarity. To approach the question of whether the Community should undertake a particular action as if this were a mere technical matter is problematic, since it gives policy-makers the opportunity to disguise the degree of discretion that is always present in any political decision. As a result, political accountability may be reduced, since what are essentially questions of policy choice will appear to the public as minor technical decisions.

Discussing on the USA case of delegation of power to regulatory agencies, Martin Shapiro recounts that the legitimacy of American independent agencies has been traditionally

founded in the scientific and technical knowledge upon which their assessments of the need and the intensity of regulation of the areas that fell under their jurisdiction were based. However, from the beginning of the 80's, the number of court cases against these agencies' decisions started to grow since it was increasingly evident that they were making, in the end, fundamental policy decisions. The American courts had therefore to develop criteria such as the "frontiers of science" doctrine to allow a certain margin of political manoeuvre in the decisions of the regulatory agencies. This demonstrated that, irrespective of what was believed in the New Deal era, in which the U.S.A. witnessed an impressive development of regulatory agencies and of their activities, technical aspects of a given decision were profoundly interconnected with policy (Shapiro, 1996b).

Shapiro's story is evidently distant from the problem that is being treated here. However, the case of the American regulatory agencies serves to illustrate not only the more general point made above -the inherent limits of the strategies used to treat what are basically political questions as scientific problems. It serves also to illustrate that a technical approach of questions of policy tends, in the end, to veil the degree of policy discretion that is inherent in policy makers whose claim to authority is based in scientific expertise. This is particularly true as regards a vague concept such as subsidiarity, which could be easily manipulated by the Community political institutions -as well as by the Community judiciary- in order to advance their own policy preferences.

In short, the preceding discussion shows that solutions to the political problem of whether there is a need for a given Community measure, or, alternatively, whether Member State action will suffice to attain a Community objective, should be therefore given within the framework of the political system of the Community and using political safeguards of a

procedural and institutional nature (Dehousse, 1993:21-27). Treating this question as if it were a mere technical issue is not only misconceived, but it entails also the risk of being manipulated by policy-makers.

C. The Practice of Subsidiarity.

Points A and B of this section may be summarized in the following way: firstly, due to the functional difficulties that are involved in the establishment of material criteria addressed to protect effectively Member State sovereignty, the principle of subsidiarity is deemed to produce little impact for the purposes for which it was introduced into the constitutional order of the Community; and secondly, the principle of subsidiarity offers ample margins for manipulation.

In this point I shall offer empirical evidence upholding the previous findings. Thus a discussion of recent Community practice as regards the implementation of the principle by the European Commission will allow me to state that the introduction of subsidiarity has produced, overall, only limited results from the perspective of the protection of the Member States' autonomy. Further, it will also allow me to illustrate the potential for manipulation that the principle has.

Therefore three different kinds of data shall be analyzed below for this purpose. Firstly, the number of proposals that the Commission has produced since the entering into force of the Maastricht Treaty shall be examined. I shall also compare these data with data for previous years, in which the principle did not form a part of the Community constitutional system, in order that any variation may be checked. Secondly, I shall analyze the data related

to the recent Commission action dealing with the withdrawal of its proposals as a consequence of the application of the principle of subsidiarity. And finally I shall analyze the data related to the recent Commission proposals for the withdrawal of existing legislation which also, according to the Commission, constitutes an example of subsidiarity in flux.

1) Number of Commission proposals since the entry into force of the Maastricht Treaty.

Table I: Number of Commission proposals from the entry in force of the Maastricht Treaty (& comparison)(1).

YEAR	N° OF PROPOSALS
1990	185
1991	111
1992	89
1993	75
1994	51
1995	52*

(1) Source: Report on the Operation of the Treaty on European Union[112], Annex n° 9.

* Forecast by the Commission work programme for 1995[113].

Table I shows a tendency towards a steady decrease in the number of proposals that the Commission has made since the entry into force of the Maastricht Treaty. The figure is

[112]SEC(95) 731 final of 10 May 1995.

[113]COM(95) 26 final.

of some significance if it is taken into account that in five years the number of proposals has been reduced by 133. This means a rhythm of reduction of approximately 26-27 proposals per year. This would indicate, at least as a preliminary conclusion, that at the level of proposals in the policy making process, subsidiarity is being systematically implemented, as the Commission contends.

However, the fact is that quantitative parameters say little about the ways in which the principle is being applied. Understanding how subsidiarity is being currently implemented would allow one to establish whether, and the extent to which, the application of subsidiarity is the immediate cause of the results presented above. It would also allow one to discard other possible causal explanations of the apparent trend of Commission retrenchment.

The following example may serve as a useful illustration of the ways in which the Commission is currently implementing the principle of subsidiarity. It shall be shown that the impact of subsidiarity on Commission decisions about the need for Community legislation is less than that which the Commission presently declares it to be.

This conclusion is therefore well illustrated by the recent Commission proposal for an Article 100a directive "on Common Rules for the Development of Community Postal Services and the Improvement of Quality of Service[114]". The proposed measure aims at the liberalisation of the Member States' postal markets and at the establishment of some regulatory measures for the sector.

Apart from the political sensitivity that any Community intervention in public monopolies produces in Member States, the postal example would lack relevance if the Commission were proposing a minimal Community involvement in the matter. However, the

[114]Commission proposal for a European Parliament and Council directive on common rules for the development of Community postal services and the improvement of quality service, 95/C 322/10 COM(95) 227 final-95/0221(COD), OJEC n° C 322/22 of 2 December 1995.

Commission proposal goes considerably beyond that. Besides the liberalisation measures that are proposed[115], the directive establishes important regulatory aspects such as the splitting of the commercial and regulatory functions of the national monopoly, not only for cross-border mail but, as is obvious, for the whole of its activities. Further, though the Commission establishes, in Article 16 of the directive, a division of tasks between the Community and the Member States as regards the setting of quality standards (the setting of quality standards for national mail for Member States; the setting of quality standards for cross-border mail for the Community), it is submitted that this division is more apparent than real. It would be illusory to think that once the Community standards were implemented by the Member States they would follow different standards depending on the origin of the item. The final result would be the uniformisation of standards according to the standard set at Community level. In short, both aspects show the significant impact of the proposed Commission measure upon Member States' autonomy.

Aware of the sensitivity of the postal case, the Commission added a subsidiarity

[115]As far as liberalisation is concerned, the directive aims at a smooth and gradual narrowing of national monopolies. In particular, Article 8 of the directive establishes two separate regimes, one for the letter segment and the other for incoming cross-border mail and direct mail. As far as the first is concerned, the directive says that the collection, sorting, transport and delivery (outward and inward activities) of items of domestic correspondence may be reserved to the Member States "to the extent necessary to ensure the maintenance of the universal service". The same Article limits the possibility of removing this market segment from competition through establishing a combined weight and price criteria (350 gr. and five times the public tariff of an item of correspondence in the first weight step). This means that those items of domestic correspondence weighing more than 350 gr., or costing more than five times the tariff of the first weight step, shall be collected, sorted, transported and delivered under conditions of free competition. Second, the directive establishes a sunsetting mechanism in the third proviso of Article 8 *juncto* Article 23. According to both Articles, the Commission will (if applicable) propose a reviewal to the European Parliament and the Council of the extent of the reserved area (as far as the letter segment is concerned) in the first half of the year 2000 at the latest. In this re-examination process it will be assisted by a "review" body composed of five independent experts appointed by the Commission.

Concerning incoming cross-border mail and direct mail, the directive establishes, in its Article 8 para. 2, that only the distribution of it may be reserved until the end of the year 2000 in so far as this is necessary for the financial equilibrium of the universal service provider. The same paragraph establishes a review mechanism by which the Commission shall decide, on 30 of June 1998 at the latest, on the convenience of maintaining the reservation of those services after 31 December 2000.

assessment of its proposal to the text of the directive. In its explanatory memorandum, the Commission examines four points: 1) the objectives of the action envisaged; 2) the Community dimension of the problem; 3) the need for Community action; and 4) the potential benefits of a directive. Only points 1 and 2 deal directly with subsidiarity, since they entail the "effects" and "dimension" criteria. Points 3 and 4 regard, more precisely, the proportionality principle. I shall therefore concentrate exclusively on the first two points.

As regards the first point, the Commission states that "the principal objective of the action envisaged is to guarantee in the whole European Union the long term provision of a good quality universal service at affordable prices, accessible to all, for which financing is assured and durable. In particular, the alignment of conditions governing the supply of postal services and the removal of legal and technical barriers to cross-border trade are obligations which are incumbent on the Community in order to attain the internal market". In short, the argument is that there is a need for Community action not only based on the merits as such of regulating the postal sector, but above all because of the effects that the operation of postal services could have upon the achievement of the single market. This connection between both aspects is clearer as regards cross-border mail: inefficient cross-border mail services would have a directly negative impact upon economic cross-border transactions. This seems clear, unless the cross-border segment of postal activity were relatively insignificant in terms of volume of mail.

That is the question that the Commission answers in its analysis in point two. As regards the Community dimension of the problem, the Commission establishes that "postal traffic in the Community involves 80 billion items per year; some 3 billion of which are associated with intra-Community trade". The words of the Commission offer some ground for confusion. One could be tempted to think, while reading the latter sentence, that the

Community dimension of the problem is in fact important since the volume of Community traffic is 80 billion items per year, of which 3 billion consist more precisely of mail for trade purposes. In fact what the Commission wishes to say is clearer if one takes into account the Green Paper on Posts. The figure of 80 billion represents the number of mail items that circulate within the Member States -and not mail that circulates across the Community. Instead, the figure of 3 billion represents cross-border mail. According to Commission data, established in the Green Paper on Posts, the truth of the matter is that cross-border mail amounts to 4% only of the total volume of mail. This constitutes, indeed, a relatively small figure to establish a "Community dimension" of the problem. Furthermore, the Community dimension is even less significant if it is taken into account that much of the cross-border mail traffic is express mail, and that express mail has already been liberalised, if not *de iure*, *de facto*[116], in most Member States[117].

What are the conclusions that can be extracted from the postal case in connection to my general argument? The Commission proposal for a directive on postal services shows that the assessment of the need for a specific action according to a number of material criteria that implement the subsidiarity principle is more formal than substantive. If the Commission were

[116]Note in this sense point 16 of the preamble of the proposed directive.

[117]Note Commission Green Paper on the development of the Single Market for Postal Services, COM(91) 476 final of 11 June 1992, at page 110. The figures are the following: domestic mail amounts to 93% of the volume; intra-Community cross-border mail amounts to 4% of the volume; extra-Community cross-border mail amounts to 3% of the volume. There are no figures as regards the volume of cross-border mail that may be placed in the express mail category. However, if the fact is taken into account that private operators are concentrated in the cream-skimming area of the market, which is express cross-border mail (both intra and extra Community), and that they control 4% of the total mail market in terms of volume, one can easily come to the conclusion that the part of Community cross-border mail that belongs to the category of express mail, being therefore already liberalised, must be of significance. This implies that the part of cross-border mail which is not yet liberalised is almost irrelevant in terms of volume of mail. Notice that the significance of cross-border mail serves as the basis for the Commission to uphold, on the grounds of subsidiarity, the need for a Community action in this area.

really grounding the need for its proposals on those criteria, it would not have proposed a directive on postal services, or, at least, it would have proposed a much less intensive measure, due to the scarce Community relevance of the case in issue. In short, the postal case illustrates the loose link that exists between the application of subsidiarity and the reduction of the number of Commission proposals in recent years. Therefore, other causes that could explain this decrease should be examined, such as the impact that the termination of the Single Market programme has had on the Community rhythm of regulatory intervention. Be it as it may, what is certain is that simple relations of causality between the application of the subsidiarity principle and the reduction in Community intervention should be reviewed on the basis of the evidence here presented.

Finally, the postal example is also a good example from a different perspective. It shows how easily subsidiarity may be employed by the Commission in order to justify, on the basis of the principle, the Commission's own preferences. Interpreting subsidiarity as "market distortion" criterion, it was easy for this actor to manipulate the available data as regards the Community volume of mail. In this way, the need for Community intervention in the postal sector was further justified. In other terms, the Commission found in subsidiarity a good argument to present Community intervention in this particular area as something necessary. In short, it may be submitted that the postal case only anticipates what, in my view, will be the most common use of the principle by the Community organs (notably by the Commission). As shall be examined later[118], only when the Commission's own preferences are against Community intervention, or when the Commission wishes to mask its failure to make one proposal pass, will this actor employ the principle for its originary purpose.

[118]Note my examination of the "alcohol content in blood" proposal of directive, *infra*.

2) Number of proposals withdrawn by the Commission.

Table II: Number of proposals withdrawn by the Commission since the entry into force of the Maastricht Treaty (1).

YEAR	N° OF PROPOSALS WITHDRAWN
1993	9
1994	2
1995	(not yet presented by Commission)

(1): Source: Commission report on the application of the subsidiarity principle for 1994[119].

The number of proposals that the Commission has withdrawn as a consequence of the implementation of the subsidiarity principle is relatively low, as is shown in Table II. Further, there is some evidence indicating that the Commission is, in general, suggesting the withdrawal of those proposals that have little chance of being adopted by the Council and the European Parliament. A good example of this kind is given by the proposal for a directive "on maximum permitted blood alcohol concentration for vehicle drivers", whose withdrawal is being considered by the Commission at present[120].

The legislative story of this proposal may be briefly recounted. The Commission made its first proposal for a directive at the end of 1988[121]. This proposal was one of the Commission's responses to a Council invitation, made in 1984, to submit proposals in the

[119]COM(94) 533 final of 25 November 1994.

[120]Note Commission report to the European Council on the application of the subsidiarity principle for 1994, cited *supra*, at page 16.

[121]Note COM(88) 707 final, of 12 December 1988. OJEC C 25/9 of 31 January 1989.

field of road safety protection[122]. The original Commission proposal fixed the maximum level of alcohol in blood for drivers of vehicles at 0'50 mg. of alcohol per ml. of blood. This standard was to be implemented as from 1 January 1993.

After the European Parliament and the Economic and Social Committee were consulted, the Commission modified its proposal, in 1990, to include the amendments made by the European Parliament. In particular, the Commission modified its original text to fix an earlier date for the implementation of the directive, on 1 January 1991. The proposal was then immediately submitted to the Council for approval.

The Commission proposal has been dormant before the Council since its last modification of 1990. The main reason for this seems to be that the majority of the Member State legislations establish higher maximum levels (over 0'8 mg. of alcohol per ml. of blood) than the one proposed by the Commission[123]. Therefore the chances that the present proposal will be adopted are scant, which may explain the rationale underlying the Commission's decision to consider withdrawing it.

Therefore the "alcohol content in blood" proposal of directive case illustrates, again, the scant impact that subsidiarity is having. But it also gives further evidence of a point that was illustrated above[124], but in the contrary direction. That is, it illustrates that is more convenient for the Commission to argue that the withdrawal of a proposal for legislation is due to subsidiarity than to acknowledge its failure to persuade the Council to adopt a certain

[122]Note Council resolution of 19 December 1984, OJEC C 341/1 of 21 December 1984.

[123]Note in this sense the Opinion of the Economic and Social Committee on the proposal for a Council directive relating to the maximum permitted blood alcohol concentration for vehicle drivers, OJEC C 159/54 of 26 June 1989, at point 2.1.

[124]Note my remarks in the postal case, *supra.*

proposal. Subsidiarity is the perfect alibi in this regard. It comes to the rescue of the Commission for those cases in which the adoption of legislation proposed by this actor meets a strong opposition in the Council. In short, this example gives another indication of the potential for manipulation that subsidiarity has.

3) Number of legislative acts which the Commission has recommended repealing.

Table III: Number of Community legislative acts in force which the Commission has recommended repealing (1).

AREA	N° OF ITEMS PROPOSED FOR REPEAL
Customs	over 177 regulations/directives.
Right of Residence	over 10 directives
Pharmaceutical Products	over 20 directives
Agriculture	undetermined*
Foodstuffs	undetermined*
Equipment	over 50 directives
Professional qualifications	undetermined*
Environment	over five directives
Freedom of establishment	undetermined*

(1): Source: Commission report to the European Council on the adaptation of Community legislation to the subsidiarity principle for 1993[125].

*The Commission does not specify in its report the exact number of items at issue.

It seems that the number of legislative acts which the Commission has proposed

[125]COM(93) 545 final of 24 November 1993.

repealing is considerably high. However, the Commission's approach must be interpreted in the framework of the action that it has taken to simplify and clarify overall Community legislation. Many proposals for repeal are due to the fact that the acts concerned overlap or contradict other Community provisions in force[126]. The repeal of other acts, which are dispersed in a web of different dispositions, is proposed in order to make possible their consolidation and codification in unified texts[127]. But the exercise of Community competences in the areas that are reviewed by the Commission is not called into question (moreover, many of the areas reviewed are sectors in which, according to the Commission, the Community has exclusive competence). Therefore the evidence shown in table III must be understood as inspired by other Community principles, and notably the principle of transparency, rather than arising from a reflection grounded on the subsidiarity principle[128].

To sum up, the evidence here presented illustrates the apparently minor impact that the introduction of the subsidiarity principle has had on the protection of the Member States' autonomy. First, the reduction in Commission proposals is rather the result of other causes, amongst which the termination of the 1992 programme, and others, may rank highly. Second, the withdrawal by the Commission of some of its proposals is, on many occasions, the consequence of political factors, such as Member State opposition to their adoption. Third,

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[126]Note in this sense the Commission proposals in the area of animal welfare, at page 18 of the Commission report to the European Council on the adaptation of Community legislation to the subsidiarity principle for 1993, cited *supra*.

[127]Note in this sense the two texts that the Council and the Commission have recently adopted to recast more than 100 Community legally binding acts in the area of customs, reported in the Commission report to the European Council on the adaptation of Community legislation to the subsidiarity principle for 1993, cited *supra*, at 10.

[128]This is acknowledged by the Commission itself: "The Commission's report to the Brussels European Council in December 1993 contains an extensive programme of revision and simplification which goes well beyond mere compliance with the subsidiarity principle". Note Commission report to the European Council on the application of the subsidiarity principle for 1994, cited *supra*, at 17.

the Commission proposals for withdrawal of existing legislation seem to be inspired by transparency reasons rather than by the subsidiarity principle. In short, the evidence here presented confirms my view as to the effectiveness of subsidiarity to stop undesired Community forays.

Finally, some of the examples taken from the present Community practice illustrate the normative issues that subsidiarity may raise. Thus the case of the proposal of a directive on postal services, which has been examined above, is a clear example of how the Community institutions may easily manipulate subsidiarity in order to mask what is essentially a question of policy choice. Further, the example of the "alcohol content in blood" proposal for a directive serves to illustrate that subsidiarity may be adduced as comfortable shelter of what is, in reality, a Commission failure to make advance one of its proposals. In conclusion, such examples are particularly illuminating of the potential for manipulation which is involved in subsidiarity.

V-. CONCLUSIONS: THE "VIRTUOUS" THESIS, THE "DEMONIC" THESIS, AND THE VALUE OF SUBSIDIARITY.

The remarks of this Chapter may be now connected with the most prominent present approaches as regards the role that the principle of subsidiarity may play in the Community constitutional architecture. I made a reference to such approaches in the introduction to this chapter.

Firstly, my discussion has shown the inherent limits of what has been called "the virtuous" thesis on subsidiarity. The implementation of the principle of subsidiarity seems to be adding little to the instruments already in use to protect Member State sovereignty. This is demonstrated empirically by the data on the implementation of the principle by the European Commission. As regards the Community judiciary, the scarcity of cases that have arisen prevents one reaching firm conclusions. However, (and pending at least another hard subsidiarity case before the ECJ), it already seems safe to state that the Community judiciary has adopted a very cautious approach as regards the application of the principle. If this stance were confirmed, the impact of subsidiarity as a legal principle will also be of reduced dimensions.

The minor impact that, as these data show, the introduction of the principle of subsidiarity within the Community seems to have had, at least up to now, may be explained according to a number of factors of a functional and a normative character. Functionally speaking, it seems difficult to translate the binding lines of Article 3b2° of the EC Treaty into either legal terms or into technical-scientific criteria effective enough to protect the Member States' sovereignty. From a normative perspective, the implementation of the principle of subsidiarity also gives rise to problems, since the question which the principle is called to

answer is, at the last resort, of a political rather than of a legal or technical nature. Furthermore, the principle of subsidiarity is a vague concept which may be easily manipulated by Community institutions in order to hide, under the mask of technical or scientific discourse, what are, in reality, policy decisions, which may in turn result in serious problems of political accountability. To sum up, the potential for manipulation inherent in subsidiarity, together with the other functional and normative issues raised by the principle, cast serious doubt on the role that subsidiarity will and should play in the Community constitutional architecture.

Secondly, to criticize subsidiarity does not entail embracing what has been labelled as the "demonic" subsidiarity thesis. The empirical data used in this chapter may be also adduced in this connection. To start with, they show that the reduction in the present pace of Community intervention may not be connected with a systematic implementation of subsidiarity. Rather, other factors, such as political factors, or the termination of the 1992 program, may be ranked highly as explanation why the Community is presently reducing its legislative activity. Further, the case law on subsidiarity shows that it may not be talked of the arrival of a flow of cases before the Community judiciary as a consequence of subsidiarity -rather the contrary is true. This outcome is paradoxical: given the importance that most of the Member States gave to the legal underpinning of the principle, how can the infrequent use of subsidiarity by Member States in cases before the ECJ be explained?

Therefore it seems that subsidiarity is presently having little impact on the protection of the Member States' sovereignty and that its implementation is not introducing wide degrees of complexity into the Community's political and legal sub-systems. This does not mean, however, that subsidiarity is totally irrelevant. It is submitted that the principle has played, and

will play, an important role at a symbolic level. I shall conclude my remarks elaborating this point further.

Subsidiarity may be understood to have some value as a symbol. It is a symbol, in the first place, of the existence of a new issue in the relations between the Community and the Member States. Before the Maastricht Treaty, the question of the establishment of limits on the growth of the Community's powers was not really considered to be an issue. This was a consequence of the lack of awareness of the impact that Community integration was having upon Member States' autonomy. Further, the effects of the SEA, which are known today, were not as yet visible. The introduction of subsidiarity symbolizes, therefore, the fact that the process of unstoppable growth of Community intervention has moved to the head of the list of the Member States' present discomforts as regards the Community.

Subsidiarity constitutes, in second place, a political symbol addressed to those Community actors who expressed serious concern about the dimensions that Community intervention was taking on. By introducing subsidiarity the Community takes note of all these concerns, and sends to those actors an unequivocal message to the effect that something will be done in this respect. In fact, even if the evidence given in this chapter points to the lack of a connection between the application of the principle and the present situation of apparent regulatory retrenchment in the Community, it is obvious that the introduction of subsidiarity has produced a change of culture as regards the way in which reflection on the need for Community action is now approached in Brussels (Scharpf, 1994:223).

However, symbols (understood in the sense of political messages sent to actors concerned by a particular issue), just like other images, rely on a minimum substantive content for their reproduction and reconstruction (Bourdieu, 1991:111 and 118). Therefore, if they are

not accompanied by significant political changes, their legitimacy may easily decay. To put it differently: symbols are necessary but not sufficient responses to peremptory social demands. This is why it is submitted that although subsidiarity should be retained in future reforms of the Treaties, the adoption of effective solutions to the problem of how to safeguard the Member States' autonomy as regards Community intervention cannot be postponed any longer.

CHAPTER V: ALTERNATIVES TO THE SUBSIDIARITY PRINCIPLE: POLITICAL SAFEGUARDS AS A REMEDY FOR THE COMMUNITY'S FEDERAL DEFICIT.

I-. INTRODUCTION.

The thrust of the argument that has been developed in the previous Chapter could be summarized by saying that legal critiques of the principle of subsidiarity should be reoriented in order to tackle the problems that are derived from the dualistic logic which the principle relies on. On the one hand, the attempts, through subsidiarity, to split spheres of government will be, in an evermore complex and interdependent world, bound to fail, at least in the overwhelming majority of cases. The language of efficiency, which is used by Article 3b2° of the Maastricht Treaty, is ill-adapted to solve legitimacy problems of a federal nature, since these pose basic questions of a political -rather than technical- kind. On the other hand, subsidiarity rests on the vision that a divide should be established between the spheres of Community and Member State intervention. According to this logic, either Community or Member State intervention should be deemed legitimate; in other words, subsidiarity negates in itself the possibility that the distinct concerns of both the Member States and the Community may coexist at the same time.

There are two main implications that derive from this critique. Firstly, the establishment of subsidiarity cannot be seen as an adequate solution to the failure of the present political Community safeguards of Member States' sovereignty. Therefore, if present institutional and procedural devices regulating centre-periphery relations are perceived as

deficient, they should be certainly reformed in order to streamline them. Secondly, such reforms should take into account the fact that an appropriate balance ought to be struck between Member States and Community legitimate concerns. Their final aim should not be therefore the division of spheres of intervention, but rather, the accommodation of both the Community's and the Member States' (sometimes divergent) interests. This second implication attempts not only to address a functional concern, arising from the difficulty to divide spheres of government in an ever more interdependent world; it rests also on a particular vision of the Community and Member States' respective claims to integration and diversity as being equally legitimate.

In this Chapter I shall therefore attempt to point out several avenues where reform of Community institutions, procedures and tools could be conducted with a view to obtaining the accommodation -rather than the separation- of the respective interests (and thus also interventions) of the Community and Member States. It must be remarked at the onset that my aim is not to establish in detail a comprehensive set of reforms but only to depict an outline, and also to set an agenda for future research as regards eventual reforms.

Further, two supplementary considerations are necessary before entering into the substance of this Chapter. Firstly, the reforms which are examined in the following lines are analyzed taking into account the 1996 Intergovernmental Conference, which shall modify the present Community constitutional landscape[1]. At the time of writing there is much more

[1]The 1996 Intergovernmental Conference has been officially opened by the European Council of Turin of 29 March 1996 (Bull.UE 3-1996) as agreed in the European Council of Madrid of 15 and 16 December 1995 (Bull.UE 12-1995). As regards the duration of the conference, the European Council of Florence has invited Member States to end negotiations by mid 1997. Note Conclusions of the Presidency of the European Council of Florence of June 1996, reported in *Agence Europe* n° 6755 of 23 June 1996 at 9.

It is important to note that although this thesis has been handled before the reform (May 1997), its defence may take place after it. I am aware of the implications that this may entail for the following Chapter. However, I

uncertainty than clarity as regards the probable outcome of the next Intergovernmental Conference. Not even the agenda for reform seems to be well settled yet, some actors arguing for a profound revision of the Treaties while others advocating a mere updating[2]. Since many of the reforms that are proposed in the following lines entail a modification of the Treaty, it is necessary to set a determined stance as regards the scope of the 1996 IGC. I shall adopt here a radical view, and start from the assumption that the next IGC will bring about profound changes as regards the Community's future structure and processes.

The second consideration is even more topical as regards a Chapter that attempts to suggest some avenues for reform: it concerns enlargement. Again, at the time of writing it is difficult to assert with clarity what the exact number of Member States of which the Community shall be composed will be in the near future. We know however that the Community will consider the applications of two candidates six months after the end of the intergovernmental negotiations[3] and that the central and eastern European countries (CEECs[4]) plus the Baltic Republics have recently lodged applications for accession to the Community[5].

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believe that, at the very least, the following lines can be considered as a standard against which the new reform could be measured. To be sure, I am committed to make the necessary modifications of the substance of this Chapter in the light of the new reform for publication purposes.

[2]Note this ambivalence in the Reflection Group Report on the 1996 Intergovernmental Conference. While the reflection group asserts that the aim of the intergovernmental conference is not "a complete revision of the TEU, but rather a series of partial amendments", the stated objectives of the intergovernmental conference do not fall short of ambition since, according to the reflection group, these shall be "1) making Europe more relevant to its citizens; 2) making the Union work better and preparing it for enlargement; 3) giving the Union greater capacity for external action". Note Reflection Group Report, at pages 5 and 6. Note for the latest definition of the 96 IGC reform agenda the Conclusions of the Presidency of the Florence European Council, 21 and 22 of June 1996, reported in *Agence Europe* n° 6755 of 23 June 1996 at 6.

[3]This concerns Cyprus and Malta. Note Conclusions of the Presidency at the European Council of Turin, 29 March 1995 (Bull.UE 3-1996).

[4]Or PECOs, to use the French acronym.

[5]This concerns: Poland, the Czech Republic, Slovakia, Hungary, Slovenia (PECOs) and Lithuania, Latvia and Estonia (Baltic Republics). It is important to take into account that Turkey has requested, since 1986, its accession to the Community, and that its candidacy will also be taken into account in future enlargements. Note, for a comprehensive description of the economic, political and social context of the present candidates, the

Here I shall also adopt a radical view. My proposed reforms are therefore made bearing in mind a Community of 28 or 30 Member States.

Chapter V is therefore organized as follows. Section II starts by briefly reiterating the causes and issues of the process of growth of the Community's powers. On the basis of this reminder, section III suggests some possible avenues where reform of the Community's procedures and tools could be oriented. Further, section IV deals with possible reforms as regards institutions. Finally, section V gives some conclusions and ends this Chapter with a final brief excursus concerning the need for more flexibility in the Community setting.

Federal Trust Report (1996:8-15).

II-. REMINDER: CAUSES AND ISSUES OF THE PROCESS OF COMMUNITY GROWTH.

The following lines constitute a reminder of some of the ideas that were examined in preceding Chapters, and above all, of those that were listed in the second and third Chapters. In particular, I shall give a brief general account of the underlying causes of the process of Community integration and of the main issues that this process poses for centre-periphery Community relations. In the subsequent sections of this chapter the arguments that are here presented only in their essence shall be further refined.

A. Majority Bias and the Role of Supranational Institutions as Policy-Makers.

Both the implementation of the majority principle and the implementation of policy-making powers by supranational institutions (according to procedures that grant them the last decisional word) have produced legitimacy tensions as regards centre-periphery Community relations. Though the particular issues that each of them pose are not totally alike, they have nevertheless some general resemblance. The final question that is posed in this regard is whether, and the extent to which, Member State polities accept, from a social or empirical perspective, the fact of their belonging to a wider polity. As the introduction of subsidiarity seems to show, the polities of Member States are still far away from accepting the empirical fact of their belonging to a wider social reality, the European. Thus majority voting and the implementation of decision making powers by supranational institutions (according to certain kind of decisional procedures) are by this reason subject to challenge by Member States above all when they imply a shift from previously established national policy preferences.

B. Fragmentation.

The fragmentation of Community and Member State structures is an extensive phenomenon. To start with, the Member States may be pictured as fragmented rather than unitary entities. Member State fragmentation is further developed in the Community setting, since the Community is organised along functional lines. Community institutions also are rather fragmented structures. The clearest example of the kind is the European Commission, which is presently divided into a web of different Directorate Generals, departments, units, etc. But this phenomenon is not limited to this institution. Another example of the kind is provided by the Council of Ministers, at present segmented into at least 20 different sectorial Councils.

Fragmentation has fostered the growth of the Community's powers. This is so since policy-making is developed in the Community setting through a functional *continuum*: policy proposals are discussed within sectorial committees, and then approved by sectorial Councils. These "functional networks" are formed by a number of actors who are directly concerned with the same policy issues, such as Commission officials and national bureaucrats, but also field experts, interest group representatives and the like. The particular environment of *copinage technocratique* that is developed within functional networks makes the discussion of proposals and, ultimately, their adoption, easier.

C. The Commission as a Policy Entrepreneur.

Within the previous picture, the Commission plays a fundamental role as "policy entrepreneur". Thus the Commission has a primordial role in setting up functional networks.

Once functional networks are created, it performs a leading role in orienting their action. Further, it acts also as main interface among the different lower and higher functional networks. Therefore it selects those proposals, worked out within lower level networks, that may be more easily connected with the interests and objectives of higher functional networks. Then it plays a basic function in softening up, in persuading, policy communities of the interest of its proposals. In short, the Commission is an important explanatory variable of the process of Community growth, due to its role as policy entrepreneur.

D. Public Accountability is Rendered More Difficult at Community Level.

The development of functional networks at Community level has made public oversight of Community activities increasingly difficult. This trend has only been reinforced by the complexity, lack of transparency and sometimes inexistence of Community decision-making procedures. In turn, the environment of secrecy that characterises the Community decision-making process has given an incentive to national regulators to go to the Community arena and propose (and adopt) measures which would be more difficult to get through in national contexts. In short, the low profile of public accountability with regard to Community activities has been a supplementary cause of the process of Community growth.

III-. SOME AVENUES FOR REFORM I: PROCEDURES AND TOOLS.

A. Reforming Council Voting Procedures: Votes and Vetoes.

A.1. Votes: Reforming Majority Voting Mechanisms.

I examined in Chapter III of this thesis the kind of problem that arises from the implementation of majority voting in the Community system. The following is but a brief reminder of this problem.

The problem posed by the implementation of the majority principle in the Community is connected with the protection of minorities which may potentially be outvoted. The protection of minorities issue, which is present in any societal arrangement based on the democratic method, emerges with particular dramatism in the Community context, whose polity is still in process of reconstruction. Until the time has come in which the Community polity reaches further degrees of social cohesion, procedural devices regulating centre-periphery relations must be of such a quality as to give to the particular polities as much voice as is possible. This point of departure notwithstanding, it was warned against radical consensual decision-making methods (like unanimity) since they risk introducing a minoritarian bias into the system.

Two kinds of procedural mechanisms designed to alleviate the tensions produced by the majority principle exist in the Community system at present. A first safeguard regards the voting weight mechanism. The votes Member States hold in the Council are organised in such a way that smaller Member States have more weight than would be the case if a strict

population criterion were applied[6]. A second mechanism regards the threshold that is needed to adopt decisions by majority. Instead of a simple majority, the Rome Treaty requires qualified majority for most of the decisions that are not adopted by unanimity. This qualified majority is 62 votes over 87 (71% of the Council votes) (Dehousse et al, 1996:103). As has been remarked, this system cannot totally do away with the risk of a minority being outvoted, what creates tensions of a federal character.

However, some of the premises of the majority voting issue would radically change in the context of an enlarged Community. Thus in a projection made by the "Groupe Charlemagne" (Charlemagne, 1994), it has been established that if the present vote weighting and majority threshold mechanisms were maintained in a Community with 28 Member States, decisions could be adopted by a majority of Member States representing only 47% of the Community population[7]. That is, we would arrive at the absurd outcome that a minority of the Community population could overrule a majority of it if the present system was merely

[6]Thus for instance, Denmark and Portugal, which count for, respectively, 1.4% and 2.8% of the population of the European Union, hold 3.45% and 5.75% of the Council votes. By contrast, Germany, which represents 21.5% of the European Union population, holds 11.5% of the Council votes. Note Dehousse et al. (1996:103).

[7]Voting mechanics in a Community with 28 Members (Source: Charlemagne)

	Population (mill)	Number Votes
15 Member States	369,5	87
28 Member States	481	135

Qualified Majority	95
Blocking Minority	41
Minimum Population Q.M.	47%
Minimum Population Blocking M	12%

adapted to the needs of enlargement. To avoid this effect, reform of both the vote weighting system and the thresholds should be undertaken.

First, as regards voting weights, a "double majority" rule could be adopted. Decisions would be taken by a majority of Member States representing a majority of the population. This would re-establish the balance between, on the one hand, small and medium Member States (that would benefit from the first strand of the double majority rule) and, on the other, large Member States (which would benefit from the second strand of the rule)[8].

Second, once the structure of the Council was so re-balanced, a second question would be where to establish the threshold of decisions to be adopted by majority voting. Two kinds of majority could be established: a qualified majority, comporting 3/4 of Member States representing 3/4 of the population[9]; and a superqualified majority, comporting 4/5 of the Member States representing 4/5 of the population[10]. Qualified majority would become the rule, and super-qualified majority the exception. This would provide an important safeguard as regards eventual minorities in the Council. To be sure, the thresholds proposed here could undermine the efficiency of the decision-making process to a certain extent. However, this would be a necessary price to be paid. In an ever more complex, heterogeneous and diverse Community of 28 Member States with a population of 481 million, the legitimacy problems arising from the overruling of important minorities (both in terms of population and of

[8]To be sure, I am thinking in a situation in which the voting thresholds are high. Note my remarks in the following lines.

[9]In a Community of 28 Member States, with a population of roughly 481 million, this would mean that decisions would be adopted by 21 Member States representing a population of 360.75 million.

[10]In a Community of 28 Member States, with a population of roughly 481 million, this would imply that decisions would be adopted by 22.4 Member States representing 384.8 million.

number of Member States) would return with a vengeance, and this sooner than later[11].

A.2. Vetoes: the "Alarm Bell Procedure" and Unanimity.

Further guarantees of a procedural character could also be introduced at the "policy-adoption" phase. In this connection, Dehousse has correctly proposed the adoption in the Community context of the functional equivalent to the so-called "alarm bell procedure" (Dehousse, 1993:24; Dehousse et al., 1996:154). The alarm bell procedure is a mechanism currently applied in the framework of the Belgian constitution in order to protect linguistic minorities[12]. In the Community context, this procedure, which could be inserted into the Treaties, could work as follows[13].

When a minority of Member States (for example, 1/5 that represents 1/5 of the population) consider that essential national interests would be affected if a measure were adopted by the Council, it could temporarily block the adoption of the decision[14]. The

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[11]Similar mechanisms based on the "double majority" rule are proposed by the following authors: Bourlanges (1996:32) (though this author establishes the threshold at 51% of the votes and of the population); Christophersen (1996:46); Seidel (1996:77); Dehousse et al. (1996:105) (though these authors propose a threshold of 2/3 for the qualified majority and 3/4 for the super-qualified majority); Nöel (1995b:8); Schmitter (1996:13); Lipsius (1995:197); Federal Trust Report (1996:8). For alternative proposals note Robertson (1996); Vibert (1995b:39); The Bourlanges-Martin Report for the European Parliament (1995:13); Dehousse, F. (1995:31). Falkner and Nenwhich (1995:132). The Reflection Group gives an account of the main proposals currently being discussed (1995:62-63).

[12]Article 38bis of the Belgian Constitution. According to Dehousse, this procedure enables three quarters of the members of one of the linguistic groups in each chamber to prevent the adoption of a draft bill which might have a serious effect on the relations between the communities. In such a case, the procedure is suspended and the matter referred to the Council of Ministers, which comprises Flemish and French-speaking members in equal number. Note Dehousse (1993:25).

[13]I have however slightly adapted Dehousse's proposal to my purposes, in particular as regards the voting thresholds that have been established in point A.1. of this section, *supra*.

[14]In a Community of 28 Member States with a population of 481 million, 6 Member States representing 96.2 million of the population would be needed to block the measure. Note that this minority would be inferior to the minority required for the adoption of decisions by qualified majority (at least eight Member States representing more than 120 million). Note that the "alarm bell procedure" would not make sense as regards

consideration of the measure would then pass to the "General Affairs Council[15]". The "General Affairs Council" could decide either to deal with the matter itself or to send it for consideration to the European Council. If the latter choice were adopted, the European Council would decide on the matter in its next meeting. If the "General Affairs Council" decided to consider the matter itself, it would have to do this within a certain time (one month, for example). The "General Affairs Council" would formally decide according to the normal voting procedures although, in practice, there would be a non-written rule that would force it to arrive at a consensus among the different parties. If after this lapse of time the "General Affairs Council" had not reached any decision, the measure would be sent to the Council from which it came and would be adopted according to normal voting procedures[16].

As Dehousse has argued, this mechanism would offer sufficient guarantees for eventual minorities while the Community process would not be condemned to total paralysis. In particular, to recur to a more politicized organ, such as the "General Affairs Council" (or the European Council), would mean introducing considerations going beyond mere technical ones into the Community decision-making process, thereby hindering the Community "*copinage technocratique*" drive. Further, as the Belgian experience demonstrates, it is likely that Member States would not make constant use of this procedure but, they would rather be

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superqualified majority, since the majorities that are needed to adopt measures under this procedure are large enough.

[15]Note my remarks in point A.2. of section IV, *infra*, as regards the reform of the "General Affairs Council".

[16]A similar mechanism was introduced by the so-called "Ioanina Compromise". This compromise, adopted by Member States in March 1994, establishes that "when a number of Member States representing from 23 to 26 votes in the Council make clear their intention to oppose the adoption of a given proposal by qualified majority, the Council will try to adopt, within a reasonable period of time, a satisfactory solution which could be adopted by 68 votes at the least". The thresholds established by the Ioanina compromise were modified following Norway's rejection to become a Community member. Note for comments Dehousse et al. (1996:104) and Alonso García (1994:69).

reassured by the fact that Community intervention would take place under the shadow of the "alarm bell procedure"[17] (Dehousse et al., 1996:155).

Finally, and irrespective of the merits of these procedural innovations, the question remains whether unanimity should be completely discarded in a Community of 28 Member States. In my view, the answer should be in the negative. However, unanimity could be severely restricted to major constitutional decisions, such as the reform of the Treaties and the accession of new Member States. Other decisions currently adopted by unanimity, like, for example, the composition of the Commission or of the Court of Justice, could be adopted by a super-qualified majority.

B. Increased Rationalization of the Community Decision-Making Process as regards its "Policy-Formation Phase".

One striking feature of the Community policy-making process is the informality -if not the inexistence- of those procedures regulating its formative stages or, what will be here called, the "policy formation" phase. The result of this peculiar situation is that in many cases there are noticeable differences across and within regulatory areas as regards, for instance, the setting of priorities, while in other cases inconsistencies, overlaps and, finally, regulatory excesses, abound. To cite but one example, that is well documented by the literature, in the area of product harmonisation there is a clear imbalance between water and air regulation that can hardly be explained by reference to the seriousness of the relevant problems that exist in

[17]Dehousse points out that the "alarm bell procedure" has only been used in Belgium once, and this in a relatively minor incident. Therefore, the "alarm bell procedure" has had above all a dissuasive effect in the Belgian context. Note Dehousse (1993:26).

each of these sectors. Therefore, there are cases in which the Commission has proposed new regulation in areas where harmonisation was a low priority, while, conversely, it has neglected regulatory intervention in other areas which needed a high amount of harmonisation (Dehousse et al., 1992:34-35). The setting of a formalized ensemble of procedures regulating the policy-formation phase should increase rationality as regards the initial stages of the Community decisional process, thereby leading the Commission to propose regulatory intervention only in those situations in which there is really a case for it. The following lines explain in more detail some of the problems that have been referred to here and propose some ideas upon which to base the discussion about possible avenues for reform.

B.1. Enhancing "Input" Rationality: Regulating the "Demand Side".

To follow an economic metaphor, it could be argued that, in the Community decision-making process, the Commission and the Council (Member States) belong to the "supply" side: both actors are "co-producers" of Community regulation. However, and even if this view is correct from a formal standpoint, it would be more accurate to place instead the Council in the "demand side" and the Commission in the "supply side" as regards the production of Community regulation (Majone, 1994a:11). There is some evidence that seems to confirm this point. For example, according to a recent report of the French *Conseil d'Etat*, it has been established that of all proposals presented by the Commission in 1991, only 6% appeared to be "spontaneous proposals" coming from the Commission itself. Therefore the overwhelming majority of proposals were introduced under the suggestion of, mainly, Member States or other actors (Majone, 1994a:12).

In fact the Commission has denounced on repeated occasions the propensity of

Member States to "invite" the Commission to make proposals for Community regulation during informal meetings, or even through other non-official channels[18]. Even if, due to the condition of "policy entrepreneur" of the Commission, its criticisms of Member States are in part biased, they allow one nevertheless to focus on a real issue. Paradoxically enough, Member States (and other actors) acting individually or collectively are often at the source of the excesses of Community intervention.

A direct procedural remedy for this kind of problem is difficult to envisage. After all nothing could impede Member States and other actors from informally proposing that the Commission make proposals for Community intervention. The Commission would probably perceive this as an opening "policy window" through which to introduce its pet proposals. However, in particular cases, the Commission itself may be aware of the inconsistency of proposing Community legislation in a particular field. This would be above all the case if new procedures were established in order to rationalize the Commission's functioning and if its structure were modified[19]. Be it as it may, for these cases, the Commission could find institutional protection if there existed a Treaty clause in which the "demand" for proposals by the Council was regulated. For example, a Treaty provision could establish that only the European Council, during its formal meetings, would have the power to invite the Commission to make proposals on a particular subject[20]. If Commission proposals were sought through other means, the Commission could always invoke that clause in order to

[18]The latest occasion was the Communication of the Commission to the Council and the European Parliament on the Principle of Subsidiarity, SEC(92) 1990 final of 27 October 1992, at page 2.

[19]Note my remarks in point A.1 of section IV, *infra*.

[20]Article 152 of the EC Treaty establishes at present that "The Council may request the Commission... to submit to it any appropriate proposal".

refuse Member States' demands, while its institutional position would be safeguarded vis-à-vis the demanding Member State(s) since it would be strictly applying the Treaties. Moreover, this possibility would hamper the Commission argument according to which it is the Member States -and not itself- which are the source of many Community proposals for intervention.

Further, not only the Member States belong to the "demand side" of Community regulation. Often, the Commission is approached by private and public interest groups asking it to formulate proposals in a given field (Areilza, 1995b:113). To be sure, the reality is in most cases somewhat different. As has been pointed out above[21], the Commission often plays an active role in activating alliances in the private realm in order to present its proposals to Member States as reflecting "social demands". Be it as it may, the fact is that this creates a pressure in the Community system for more regulation and, at the same time, it produces a regulatory bias in favour of those interest groups which have easier access to the Community decision-making process.

To alleviate this problem, access to Community decision-making by interest groups should be formalized by establishing a number of procedures. Further, such procedures should have an open and transparent character. Therefore, present access practices could be codified and streamlined. For example, the Commission should be obliged to consult on its proposals with the widest possible spectrum of interests, in order that regulatory pressures may be counterbalanced. The consultation should be made at a very early stage and during the whole duration of the policy formation phase, and not when the Commission has already established a precise and determined regulatory strategy. In this connection, the practice of issuing Green Papers (Lipsius, 1995:197), although interesting in this regard, has a very formal character

[21]See also Chapter II of this thesis.

since when the Commission sends the Green Paper to the interested parties its position as regards a particular regulatory issue is, most of the time, already adopted. Changes are therefore unlikely, unless they fit the direction which has been adopted by the Commission.

B.2. Enhancing "Output" Rationality: towards an "Impact Assessment Procedure".

The Commission could be required to implement a general Impact Assessment Procedure (hereinafter IAP) before it makes its proposals to the Council and European Parliament.

The IAP could follow the American model. American agencies have been required to make impact assessment and cost-benefit analyses before they adopt a given rule since at least 1978, with the Carter administration (Dehousse et al., 1992:42). In particular, the main purpose of the IAP would be to oblige the Commission to make an assessment of the impact of Community regulatory measures in financial terms, both at the Community and Member State levels. That is, at Community level, the Commission should be obliged to quantify the impact of the proposed intervention on the Community budget. Further, the Commission's assessment should be subject to the "sufficient means" principle[22]. That is, the Commission should prove that the proposed intervention can be financed with the Community's available financial means, and that more Community expenditure will not be needed to this end.

At the Member State level, the "regulatory budget" model, which has been proposed by some American analysts as a means through which to create control mechanisms of

[22]See Reflection Group (1995:56) in this sense. According to its report, the principle of sufficient means "looks for consistency between the ambitions of the Union's proposal and the constraints on the Member States as provider of funds".

regulatory intervention, could provide a useful analogy for the Community system (Dehousse et al., 1992:35). The basic philosophy of the "regulatory budget" model is that the Community legislator establishes a budget constraint on the total private and public expenditure mandated by regulatory intervention. This would oblige the Commission to, firstly, calculate the financial costs that Member States (and their citizens) would have to bear as a consequence of the implementation of new Community legislation; and, secondly, it would impose upon the Commission the obligation to leave aside those proposals that would exceed the limit established by the Community legislator. Though the probable result would be a more rational use of regulatory intervention, the technical difficulties involved in the regulatory budget model should not be overlooked or, at least, should be taken into account. To start with, it would be difficult for the Community legislator to establish the financial threshold that Community legislation should not exceed. Although this decision would be essentially political, the Community legislator would heavily rely on the information that the Commission gathered in this respect, which, ultimately, could bias the whole procedure on the Community side. Second, and maybe more importantly, estimation of the costs that private individuals would have to bear in order to implement legislation may be difficult to make in a dynamic, and therefore changing, framework. With the constant and rapid change of technology, regulation that is costly today may be less costly tomorrow. And this variation of costs as a consequence of technological improvement may be difficult to anticipate by regulators.

In short, such difficulties pose challenges that should be taken into account if the avenue proposed here is finally adopted. However, it is submitted that some aspects of the regulatory budget model could be taken, like, for instance, the imposition upon the Commission of the obligation to estimate the financial costs that would be born by Member States and their citizens as a result of the adaptation of their legislation to new Community

legislation.

The IAP could also create a "regulatory clearing house" (hereinafter RCH) that would coordinate and, ultimately, control, the assessment that each D.G. makes as regards the financial impact that Member States and Community would bear as a consequence of new Community regulation. It would be also charged with the task to control the existence of other inconsistencies (such as overlapping and incoherencies across and within sectors) in the proposed Community legislation. The RCH would then report its findings to the Commission cabinet, and would recommend the rejection (or the reconsideration) of proposals if they did not comply with the IAP. To insulate the action of the regulatory clearing house from pressure from other D.Gs., the RCH would directly depend on the office of the President of the Commission.

Once again, the dangers involved in the establishment of an RCH should not be overlooked. The Commission could use it to give "a plus" of functional legitimacy to its proposals, rather than to control and inject more rationality into the policy formation phase. To be sure, the avenue of reform that is proposed here should be accompanied by more profound change, a shift in the regulatory culture that presently surrounds the Commission[23]. However, if used for the purposes for which it is conceived, the establishment of an RCH should be considered as a complementary instrument in order to determine when Community action is really necessary.

Lastly, the IAP should impose upon the Commission the obligation to publish the document containing the results of its impact assessment (this document could be contained

[23]See my remarks in the Conclusions of this Chapter.

in the preparatory memorandum that accompanies the Commission proposals[24]), and it should give wide access to all documents used by the Commission in making its impact assessment.

B.3. The Need for a "Policy Formation Act".

It is submitted that all procedures regarding the policy formation phase, which content has been reviewed here, could be codified[25] in what could be called a "Policy Formation Procedures Act". This piece of legislation would contain all those procedural obligations to which the Commission would be subject in the policy formation phase, such as, for example, the impact assessment procedures, the obligation to publish all documents regarding the impact assessment made by the Commission, those procedural requirements regarding the Commission obligation to consult the widest possible spectrum of interests, and still others. In this way some Treaty provisions, like, for instance, Article 190 of the TEU, would be rendered more explicit, and therefore their enforcement by the Court of Justice less subject to arbitrariness[26].

C. Fighting for Greater Transparency and Public Accountability.

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[24]According to the Commission, it has already implemented a policy oriented to publish explanatory memoranda accompanying its proposals. Note in this regard Commission Report to the European Council on the Application of the Subsidiarity Principle for 1994, COM(94) 533 final of 25 November 1994, at 3.

[25]The problem of codification has been recently tackled by Harlow and Shapiro. Though their line of research focuses on the codification of Community administrative practices, much of their remarks could find application as regards the "policy formation phase". Moreover, it would be important to establish a Community Administrative Procedures Act, which would run in parallel with the proposed Policy Formation Procedures Act. Both acts would mutually complement and reinforce each other, since at times the limits between rule-making and decision-making are far from clear in the Community context. Note Harlow (1996:3) and Shapiro (1996c:26).

[26]To be sure, Dgs. could establish more particular Policy Formation Acts, in order to adapt the requirements of the general Policy Formation Act to the purposes of their respective areas of regulation. Further, the general Policy Formation Act could act as *législation de substitution* as regards the more particular acts.

Lack of transparency is another characteristic feature of the Community system. The growing complexity of the decision-making procedures, the traditional secrecy in which the work of Community institutions develops as a general rule, the deficient publicity that is given to many Community activities, the unclear separation of tasks among the Community and Member States and among Community institutions are but some of the clearest manifestations of this transparency deficit. The main consequence of lack of transparency is that public oversight of Community activities is made more difficult. The Community arena has therefore been perceived by many actors as the ideal framework in which public intervention could develop outside the control of the eye of public opinion. Accordingly, deficient public oversight of Community activities, as a consequence of the lack of transparency of the Community system, has been one of the causes of the fostering of Community intervention beyond its real needs. In the lines that follow, the issues that have been raised here will be examined in more detail. Further, some avenues where reform could take place shall be also opened up.

C.1. Simpler Legislative Procedures.

The Community decisional system has been correctly described as a "procedural labyrinth" in a recent publication (Jacqué, 1994). In fact, the Community has at present no less than twenty different legislative procedures. Not only is the growing number of decisional procedures problematic; the complexity introduced by particular decisional arrangements has also fostered the traditional lack of transparency in the Community[27]. The main causes underlying the present situation are well known. The present decisional system is the product

[27]Note for example the co-decision procedure.

of successive reforms of the EC Treaty that were made on a gradual basis. Further, Member States have always been concerned to ensure that Community decisional arrangements gave sufficient protection to their interests and autonomy. As new procedures granted greater say to the European Parliament in the Community decision-making process, Member States attempted to counterbalance the Parliament's emergence on to the Community scene through the setting of an increasingly complex decisional apparatus.

The result of the growing complexity of Community decisional procedures is that it has become considerably difficult for actors external to the Community system, and, ultimately, for national polities, to identify who does what in the Community setting. Therefore at present, it is not exaggerated to say that national polities can hardly identify and scrutinize the attitude of their national governments when they act at Community level. In turn, national governments have made use of the Community's procedural labyrinth as a protection screen against public scrutiny in order to, for example, push for the implementation of measures which would be much harder to adopt at the national level. Community institutions, and in particular the European Commission, have also taken advantage of the possibilities offered by this peculiar institutional system to advance Community integration. In short, it can be argued that procedural complexity makes supervision of Community business difficult, thereby providing a further incentive for uncontrolled growth of Community intervention. It is therefore submitted that Community decisional procedures should also be simplified as a supplementary way to protect Member States' autonomy.

In this regard, the Bourlanges-Martin report for the European Parliament has made a

proposal which merits consideration[28]. This report proposes the reduction of all legislative procedures to three: 1) the assent procedure; 2) the consultation procedure; and 3) the codecision procedure. The assent procedure would be restricted, according to the report, to four items: (i) treaty revisions; (ii) international agreements; (iii) enlargement; and (iv) adjustments to own resources. In turn, the consultation procedure would be employed for matters falling in the second and third pillars (Justice and Home Affairs and CFSP). The codecision procedure would apply to the rest of the cases.

Further, the Bourlanges-Martin report advocates the need to simplify the codecision procedure along the following lines: 1) the codecision procedure would end when there is agreement between the Council and the European Parliament at the first reading stage; 2) the phase of "intention to reject" would be dropped; 3) a simplified conciliation procedure would be introduced at the end of the first reading; 4) the Commission should be given the power to propose and put to the vote in the two conciliation committee delegations a compromise between the conflicting positions[29].

C.2. More Transparency in the Functioning of the Council.

The secrecy in which the work of the Council traditionally develops has provided another incentive for increased Community intervention. The equation that has been established in the previous point holds also true for Council opacity. The secrecy in the Council's functioning has made it more difficult for national polities to control national

[28]Bourlanges-Martin report for the European Parliament (1995:Part A:15).

[29]Similar proposals have been made in this regard. Note the following: Dehousse et al. (1996:160); Lipsius (1995:201); Vibert (1995:27-35); Reflection Group report (1995:58); Federal Trust Report (1995:40).

governments acting at Community level. Therefore the result is that national governments take advantage of the special institutional conditions that exist at Community level to adopt measures that could more easily be blocked at national level. The overall result is an increase in Community intervention. Precise procedural measures should therefore be implemented to make the operation of the Council more transparent, as a means to establish a further limit on the growth of the Community's powers.

Some steps have been taken in this regard since the entry into force of the Maastricht Treaty. For instance, the Council's new internal rules of procedure establish that the votes of Member States in the Council should be published when it acts as legislator[30]. Further, the same rule applies as regards the votes of the Council in the conciliation procedure set up by Article 189b of the EC Treaty[31]. In addition to this, the Council's internal rules of procedure[32] provide for T.V. transmission of the orientation debates held in the Council on the European Council Presidency semestral working program and on the Commission annual working program.

Further procedural measures should be implemented in order to make the Council's work more transparent without, at the same time, damaging the "bargain logic" on which it is based. In fact, the Council is not only the organ of representation of Member States'

[30]Article 7.5° first paragraph of decision 93/662 of 6 December 1993, adopting the internal rules of procedure of the Council, OJEC L 304/1 of 10 December 1993.

[31]Article 7.5°, para. 2 of the internal rules of procedure of the Council. Paragraph 3 of the same provision establishes that when the Council acts within the framework of Titles V and VI of the TEU, votes will be published if this is agreed by a unanimous vote. Para. 4 of Article 7.5° establishes that for all other cases, the Council can decide to publish the votes at the request of one of its members.

[32]Article 6.1° of the internal rules of procedure of the Council.

interests. It is also the organ in which Community negotiations take place. A policy of complete transparency of the Council's work would probably result in the adoption of decisions in fora different from the Council, beyond the public eye[33] (Dehousse et al., 1996:163). The Community "*copinage technocratique*" drive would not be relaxed but reinforced in this case. This should warn us against the proposal of radical solutions as regards the Council opacity issue.

In this connection, the following measures could be implemented. First, each national delegation should be obliged to put on the Community negotiation desk a text covering its own position with regard to a given Community proposal and the declarations made in each Council meeting. This text would be sent to the press for publication (Lipsius, 1995:190). Second, Council discussions on Commission action programmes, Green Papers, etc, should also be made public through the press (Dehousse et al., 1996:164). Further improvements could be thought of, though a proper balance should always be sought between the need for more transparency and the necessary degree of discretion that should preside over the functioning of the Council[34].

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[33]For authors arguing for full transparency of Council work see Falkner and Nentwich (1995:136); Federal Trust Report (1995:37).

[34]Note the following list of public debates held by the Council from the first half of 1993 to the first half of 1995 (Source: Commission Report on the Operation of the Treaty of European Union, SEC(95) 731 final of 10 May 1995, Annex 10).

PRESIDENCY	TERM	NUMBER
1) Danish	1st half 1993	9
2) Belgian	2nd half 1993	4
3) Greek	1st half 1994	3
4) German	2nd half 1994	2
5) French	1st half 1995	4
TOTAL	22	

C.3. Inserting National Political Actors in the Community Policy Formation Phase.

Increased coordination among the Community institutions, and above all between the Commission and national political actors (such as, notably, national and regional parliaments), in the formative stages of the Community policy process, should increase public oversight upon the Community policy-making process[35]. Some interesting steps have been made in this regard since the adoption of the Maasticht Treaty. First, the European Parliament and the Commission regularly send the national parliaments the annual legislative program that is agreed by them. This practice could be extended to other national political actors, such as, for instance, regional parliaments. Second, the European Parliament has set up a computerized system (called OEIL) to which national parliaments can connect and which offers a detailed overview of the course of each proposal at each stage of legislative deliberations, whether in the Parliament or in the Council (Neunreither, 1994:310). It is submitted that this system could be extended to regional parliaments, and to the earlier formative stages of the policy-making process: national parliaments and regional parliaments would have in this way a complete view of the Community legislative process, from the earlier formation steps to the adoption phase.

Other steps could be taken in this regard. For example, a more open policy of access to documents the Commission employs in the "policy-formation" stage could be implemented in favour of national political actors and citizens in general[36]. In this connection, Weiler has

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[35]See in this regard: Vibert (1995:49-52); Bourlanges-Martin report for the European Parliament (1995 (Part B):18); Reflection Group report (1995:59).

[36]On the general point of "access to documents", note the code of conduct adopted by the Council and the Commission on 6 December 1993. It sets the principle of general access to Community documents, though subject to exceptions in order to protect public and private persons and the smooth operation of Community

recently made an interesting proposal. Weiler suggests that all documents produced by Community institutions, including those produced in the "policy-formation" phase, should be accessible via *Netscape*[37]. In this way national political actors and citizens would have direct information about the Community policy making-process in its entirety. Accordingly, transparency and accountability would be enhanced, which should result in a further check over Community intervention.

C.4. A Hierarchy of Norms?

The introduction of a new normative hierarchy into the Community has been proposed from different quarters[38] with a two-fold aim. First, a hierarchy of norms would allow the limitation of the trend towards the establishment of details in Community legislation, thereby setting a supplementary limit on the Community in order to avoid intervention beyond the limits of what is necessary. And second, it would serve the purpose of establishing a clearer distinction between the functions that are attributed to each Community actor and as regards the hierarchy among the different functions of each Community institution. Yet before analysis of both aspects, it is necessary to take a look at the basic contours that the new system would adopt.

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institutions. According to Commission data, of 260 requests addressed it up to March 1995, 53.7% have been accepted, 17.9% have been rejected and 28.4% have been treated as invalid. Note Commission report on the operation of the Treaty on European Union, SEC(95) 731 final of 10 May 1995, at 33 and Annex 13.

[37]Weiler's proposal (called "Lexcalibur simulation") is precisely available on the Internet in the following electronic address: http://www.iue.it/AEL/EP/Lex/index.html

[38]In favour of a new hierarchy of acts, see: Dehousse et al. (1996:172); Scharpf (1995:23); Federal Trust Report (1995:25); Falkner and Nentwich (1995:142); Lipsius (1995:204). Against this innovation note the following: Bourlanges-Martin Report for the European Parliament (1995:Part IB:20); Vibert (1995:27-30). The Reflection Group Report is divided on this issue (1995:70).

The Commission has recently proposed an outline of the foundations upon which the whole system would rest[39]. The present taxonomy of Community acts (directives, regulations, decisions) would disappear to give place to a hierarchy between two main acts: the framework law and the regulation. Framework laws would be used for Community legislation, whereas regulations would be employed for the implementation (execution) of Community laws. Within this system, the framework law could only contain the following aspects: general aspects of regulation; general principles; and provisions creating rights and obligations for individuals. Regulations would therefore contain all the technical details through which Community legislation would be developed. Framework laws would be adopted by the Council and the European Parliament. The execution of them would be left to the Commission (through regulations) or to the Member States (through national acts).

Regarding the first of the objectives that would be pursued by a new hierarchy of acts, authors advocating the previous system acknowledge that, in itself, a new hierarchy of acts would add little to the present normative Community system for the purpose of reducing Community over-regulation. As is known, the directive is an instrument which was originally conceived, among other things, for the establishment of the general aspects of Community regulation. Member States were charged with the execution of directives once transposed within the national sphere. However, this system has broken down. Directives have been historically employed in order to regulate at the minimum level of detail. Therefore, the introduction of a new hierarchy of acts would help to limit over-regulation only if the Court

[39]See Commission Communication on the Principle of Subsidiarity, SEC(92) 1990 final, of 27 October 1992, at 16.

committed itself to implement the new system[40]. In this regard these authors argue that, confronted with the insertion into the Treaties of a new hierarchy of acts, it is likely that the Court would ensure that it was respected by the Community legislator (Dehousse et al., 1996:174).

Independent of the merits of this proposal, the difficulties involved in its successful implementation (with the objective of reducing detail in legislation) should not be neglected. To start with, it is not certain whether the Court of Justice would be willing to control the Community legislator's adherence to the new normative hierarchy, even if confronted with its insertion within the Treaties. The least that can be said in this regard is that in the past the ECJ has not been very active in the control of the use that Community institutions have made of Community acts (Snyder, 1995:77). Even if the Court decided to get deeply involved in the control of the respect for the new hierarchy of acts by the Community legislator, it is important to note that the Court would be required to make a difficult assessment. The frontiers between what is a principle or a general aspect of legislation and what is a detail are far from being clear. Leaving aside clear and manifest violations of the hierarchy of acts system, it is probable that the Court would be accused of entering into the sphere of discretion of the Community legislator if it annulled Community measures on the basis of breach of respect for the normative hierarchy, which would run against the ECJ's own legitimacy. Finally, even assuming that the Court strictly applied the new hierarchy of acts, the Member States would never accept the fact that a whole range of technical details would be set by the Commission. Therefore if this system were implemented, we would probably be witnesses of

[40]For instance, Dehousse et al. (1996:173) state that: "L'existence d'une hiérarchie des normes conduirait le législateur à se concentrer sur les aspects politiques des problèmes, plutôt que sur les questions de détail. Pour que le système soit efficace, il faut toutefois qu'un arbitre soit investi du pouvoir de contrôler si la hiérarchie est bien respectée..."

the over-complication of the (already hyper-complex) comitology system. This would be no real achievement: over-regulation perhaps would decrease (at least in the legislative level), but this at the price of increased complexity and lack of transparency of Community decision-making[41].

Nevertheless, although it is dubious that the establishment of a new hierarchy of acts would be an effective mechanism against Community over-regulation, it could instead be implemented in order to successfully achieve the second purpose. The setting of this institutional innovation would give more clarity as regards the functions that each Community institution is called to perform and, what is more important, as regards the hierarchy among the different functions which are performed by each institution. It would thus be clarified that the Council and the European Parliament have the Community legislative function, whereas the Commission has the executive. Further, the introduction of a new normative hierarchy would clarify that the legislative function is super-imposed on the executive function. In other words, in the absence of Community laws, the Commission could not implement regulations, except in those explicit cases in which the Treaty provides this possibility[42]. This clarification would be significant in leaving definitively resolved situations in which it remains

[41]Logically, those authors proposing the introduction of a new hierarchy of acts also propose the reform of the present "comitology" system, in order that the effect here described be avoided (Note for instance Dehousse et al., (1996:170). However, there seems to be considerable reluctance on the part of most Member States to grant the Commission uncontrolled powers of execution. Note in this respect the Reflection Group Report (1995:71).

[42]A system like the Spanish "decreto legislativo" (legislative decree) and "decreto ley" (law decree) could be thought of at this regard. *Decretos legislativos* are those acts through which the government may enact provisions with rank of law. However, this possibility is circumscribed by a number of conditions, basically that delegation of legislative powers must be made by Congress through a "framework law" (ley de bases) or an "ordinary law" (ley ordinaria). *Decretos leyes* are provisional dispositions of a legislative character enacted by the national government in cases of "extraordinary and urgent" need. The enactment by the government of *decretos leyes* has to be discussed and confirmed by Congress as early as possible. Note Articles 82 and 86 of the Spanish Constitution, respectively. Note for comments Predieri (1981:218-219).

unclear what the division and hierarchy of function is among the Community institutions, such as is the case at present with Article 90.3° of the EC Treaty. Within the new system, it would be clear that the Commission could not enact any measure affecting public monopolies unless a Community law had been passed. Thus the risk of legitimacy problems arising as a consequence of inter-institutional conflicts of power in the Community could be successfully avoided[43].

C.5. A List of Competences?

The need to establish a list of competences covering those subject-matters in which Community intervention is foreclosed in the EC Treaty has been advocated by some authors as one of the most effective means through which national autonomy could be safeguarded from undue Community forays[44]. Yet before entering into the merits of this proposal, it is necessary to understand the extent to which the lack of such a mechanism is problematic as regards centre-periphery relations in the Community context.

The system of division of power in the Community setting is construed, at present, according to a "unipolar" logic (Scharpf, 1994:224). That is, only the competences or powers of the Community are reflected in the Community Treaties. In this sense, the ethos of the Community system is closer to, say, the American system rather than to the German (García

[43]Note in this regard Chapter III, *supra*, and in particular my case-study on the Commission telecommunication directives.

[44]Note in this respect: Federal Trust Report (1995:27-28); Vibert (1995:30-33); Falkner and Nentwich (1995:65); Petersmann (1995:1148). More negative towards this solution are the following: Dehousse et al. (1996:149); Dehousse (1995:89). Against it: Bourlanges-Martin Report for the European Parliament (1995 Part IA:10); Lipsius (1995:200).

de Enterría, 1995:82). As is the American constitution, the Community system is based on the primary assumption of an "enumerated powers" principle, which means that all powers which are not explicitly attributed to the Community remain within the national realms. There is accordingly no reference to the powers which are retained by Member States within the EC Treaty.

The problem with this construction is that it is much easier for the judiciary, which is the final guarantor of the necessary equilibrium that must reign in centre-periphery relations, to be permissive in interpreting the extent of central powers (Scharpf, 1994:224). This has been the case in the Community system. Thus the Court of Justice has been able to develop an extensive interpretation of Community powers in its case-law thanks, among other reasons, to the "unipolar" logic upon which the Community system is based.

This result could only be different if the Community system were construed following a "bipolar", rather than a unipolar, logic (Scharpf, 1995:33). The basis of this bipolar logic could be settled if, according to some authors, a list of Member States' competences were established within the Treaties. In that case, if an exercise of power by the Community was challenged by Member States, the Court of Justice would have to balance claims of "equal constitutional legitimacy" in the light of specific cases. In other words, the Court would have to take into consideration, in order to ascertain whether Community intervention had impinged on Member States' powers, not only Community competences but also those Member State competences that were established within the text of the Treaties. Accordingly the recognition of a bipolar constitutional order would prevent the one-sided orientation of judicial review towards the enumerated powers of the central government, which is so characteristic of federal systems based on this logic, and which has also been the case in the Community setting (Scharpf, 1994:225; 1995:33).

Further, the establishment of a list of the Member States' competences within the EC Treaty would have the merit of clarity (Dehousse et al., 1996:151). It would be clear, for Member States as well as for national polities, where exactly the limits of Community intervention would be set. In addition, the establishment of a list of competences would have an important symbolic value: it could be interpreted as a political message sent to national actors in the sense that future Community encroachments on Member States' autonomy would be seriously controlled (ibid:151). It is therefore likely that Member States would feel reassured by the introduction of such an institutional innovation[45].

Irrespective of its apparent advantages, the establishment of a list of the Member States' competences within the EC Treaty is not however unproblematic. Functionally speaking (Amato, 1995:85-86), it has not escaped the attention of even the authors that propose this solution that it is considerably difficult, in an increasingly complex and interdependent world, to draw clear lines between what can be done by the central and the lower levels of government (Scharpf, 1995:33-34). Think for example of T.V. regulation. On the one hand, it is obvious that T.V. regulation has, to some extent, an economic character due to the fact that it constitutes a service within the terms of the EC Treaty. On the other hand, it is also obvious that at least some aspects of T.V. regulation are concerned with the cultural sovereignty of Member States and their regions. Where to establish the line between what belongs to the Community and what belongs to Member States or regions? The response to this question is far from clear.

Beyond this functional problem, which is the most obvious flaw of the innovation here

[45]Note however the Reflection Group report (1995:69), which mentions Member States' overall opposition to the introduction of a "catalogue of the Union's powers" in the Treaty.

discussed, the list of competences mechanism raises another, more crucial, issue. This is the question of whether, as Scharpf suggests, the introduction of a list of competences would lead the Court really to accommodate both Community and Member State legitimate concerns in its case-law, or whether this system would lead it to construe a Community of a "watertight compartment" kind. Of course there are no clear-cut answers to this question. Both avenues could be pursued by the Community judiciary, at least theoretically. On the one hand, it could be argued that due to the growing interdependent character of modern regulation, it would be difficult for the Court to give bold rulings in favour of either the Community or Member States. The Court would rather try to accommodate the concerns of both the Community and Member States, thus initiating a new stage in its case-law. On the other hand, a glance at the Court's history seems to indicate that it has been traditionally more inclined to respect the values of integration than to balance these values with those of diversity; the supremacy principle is the clearest example in this regard. If the old simplicities on which the Court's case-law seems to rely, such as for instance the unidimensional view of the Community Treaties as an integrative constitution, were still pursued by the Court, the probable outcome would be, as regards the implementation of the "list of competences" system, a Community of watertight compartments. The difficulty of predicting the Court's reaction to a list of competences is the reason for the questionmark in the title of this point. If the ECJ followed the first avenue, the introduction of a list of competences in the Community system would be celebrated. If it pursued the second, then the remedy would be worse than the illness. Nevertheless, as it may transpire from these remarks, the success of the "list of competences" mechanism has much to do with a more fundamental issue, which is a change of legal culture within the ECJ. But this point shall be further discussed in the conclusions to this Chapter.

IV-. SOME AVENUES FOR REFORM II: INSTITUTIONS.

A. Fighting Fragmentation.

The following set of reforms which are analyzed in this section have an institutional character, in the sense that they regard the modification of the structure of the Community institutions and, notably, the European Commission and the Council. Further, they are all inspired by the same concern: the reduction of the fragmented character of Community policy-making as a means to limit Community intervention to more reasonable dimensions.

A.1. Reform of the European Commission.

The European Commission is one of the main engines of the process of Community integration. Much of the growth of the Community's powers that has taken place in recent years is explained, among other factors, by the Commission's ability to push for action at Community level. Even if this activism has produced benefits for the Community as a whole that cannot be denied, the Commission also bears an important part of the responsibility for the legitimacy problems that result from the growth of the Community's powers. In particular, it seems increasingly clear that the unlimited growth of the Commission dimension as a consequence of subsequent enlargements is at the basis of the increased dynamism it has showed (Dehousse et al, 1996:124-130; Areilza, 1995b: 61-63). This trend of activism is further reinforced by the inevitable fragmentation of the Commission that has resulted from the increase in the number of Commissioners after successive enlargements.

Therefore the Commission, rather than divided according to real functional needs, is on many occasions organised in such a way as to accommodate the demands for representation by both old and new Member States. The upshot of the matter is that while Member States fight to preserve their representation rights as regards the composition of the Commission (as a means to safeguard both their interests and autonomy), the fact is that an enlarged Commission brings more and not less Community intervention than sometimes is desirable, thereby producing legitimacy problems of which the Member States are the main victims.

Therefore, if this interpretation is sound, the Commission's activism would previsibly increase in the context of an enlarged Community, in which each Member State would have at least one Commissioner. This would amount to a Commission of no less than 28 members (33 if the present situation is maintained in which the bigger Member States have the right to two Commissioners). A reduction in the number of Commission members or, at least, the rationalisation of its internal structure, constitutes therefore the first institutional reform that should be undertaken. Two main proposals can be examined in this light.

A.1.1. First Proposal.

A first proposal is to reduce[46] the number of Commissioners to 10 or 12. The main

[46]For similar approaches, though not always inspired by the same concern that underlies my reflections, note the following literature: Dehousse et al. (1996:124-130); Lamers (1995:42-44); Martin (1995:47-52); Nöel (1995a:63-69); Nöel (1995b:9-10); Lipsius (1995:201); Dehousse, F. (1995:32); Federal Trust Report (1995:20). For different approaches note the following: Bourlanges-Martin Report for the European Parliament (1995:Part IA:12 and Part IB:13-14) (proposing to maintain the present correlation one Member State-one Commissioner); Falkner and Nentwich (1995:81) (proposing to maintain the present correlation one Member State-one Commissioner); Vibert (1995a:72-84) and Vibert (1995b:37) (proposing the dismantling of the Commission into a number of smaller agencies).

aspects of this proposal are the following[47][48]. Firstly, the Member States (the European Council) and the European Parliament would agree on a Commission President. To maintain the necessary degree of balance between both institutions, the European Council would propose a number of candidates and the European Parliament would elect one of them. The fact that the President of the Commission would be elected by the European Parliament would give an increased political legitimacy to the office. Secondly, the President of the Commission would choose his/her own cabinet. The Commission President would therefore select the members of the *college* according not to national factors but to the candidates' technical qualifications[49] and in connection with the real functional needs of the moment. However, there should be some limitation on the power of the Commission President to select the members of his/her cabinet: 1) the Commission President should not be able to select more than one national from the same Member State; 2) those Member States which were not represented in the first legislature in which the Commission was elected according to this procedure should have the right to have a Commissioner in the subsequent legislature.

Thirdly, the Commission should be confirmed by both the European Parliament and the European Council. Finally, both the Council and the European Parliament should have the

[47]Declaration n° 15 of the Maastricht Treaty establishes that Member States shall consider the reduction of the number of Commissioners in the 1996 Intergovernmental Conference.

[48]The present mechanism for the appointment of the Commission is established in Article 158 of the Rome Treaty as amended by the Maastricht Treaty. The main aspects of this mechanism are the following:
1) Member States nominate the President of the Commission. The European Parliament has to give its opinion (although it is not a legally binding opinion, the present President Santer declared that he would not have taken office had the E.P. not given its consent);
2) Member States nominate the Commissioners. The President of the Commission is consulted;
3) The President of the Commission and the Commissioners are approved by the European Parliament. Once approved, they are appointed by Member States.

[49]There are some precedents in this respect. For instance, the Executive Board of the future European Central Bank will be comprised by a President, a Vice-President, and four other members who shall be appointed from among persons of recognized standing and professional experience in monetary or banking matters (note Article 109a and 109b of the Rome Treaty as amended by the Maastricht Treaty). Note also that the EURATOM Commission, before the Treaties were merged, had only five Commissioners for six Member States.

power to censure the Commission[50]. This power should be exercised by both institutions acting on superqualified majorities[51], and should be exerted against the Commission cabinet as a whole. This would strengthen the Commission's independence as regards both the Member States and the European Parliament, and would also underline its collegiate character.

According to most of the present contributions tackling the question of the reform of the Commission, the chances that the previous proposal will be adopted are few[52]. Therefore any proposal for reform of the Commission must take into account the resistance of Member States, and above all of small Member States, to the loss of power of leverage within the Commission. It is in the light of this constrain that the following proposal is developed.

A.1.2. Second Proposal.

A second proposal is to maintain the present rule of one Member State-one Commissioner (though bigger Member States would lose the right to two Commissioners). The main aspects of this proposal would be the following. Firstly, the Commission President would be elected, and the Commission cabinet confirmed, according to the rules fixed in the first proposal, examined above[53]. Secondly, the Commission would be split into four

[50]The motion of censure of the Commission before the European Parliament is regulated in Article 144 of the Rome Treaty.

[51]Note point A.1. of section III, *supra*, for the meaning of superqualified majorities.

[52]See Reflection Group Report (1995:66).

[53]The margin of manoeuvre of the Commission President to choose his/her own team would be considerably reduced under this proposal. Political and geographical reasons, more than technical ones, would inevitably play a greater role.

branches or Directorate Generals[54]. The first branch would deal with all aspects related to "economic policy" (the four freedoms, internal market and competition policy). The second branch or Directorate General would deal with "social policy" (i.e., environmental protection, consumer policy, etc). The third branch would deal with redistributive "spending" policies (basically, regional policy). Finally, the fourth branch would deal with distributive "spending" policies (R&D; CAP; etc). Secondly, thinking of a Community of 28 members, each of the Directorate Generals would be composed of 7 members from each Member State (the President of the Commission could be charged with one of the Directorate Generals). There would also be three Vice-Presidents, one for each of the remaining Directorate Generals. The three vice-presidencies would be reserved to the bigger Member States (and a rotation mechanism could be set for those big Member States that would lack a Vice-President in a first legislature).

Thirdly, decisions regarding the concrete measures to be proposed by the Commission would be taken as follows: 1) for example, if the measure came from the Directorate General "Internal Market" (thus dealing with "economic policy"), the sub-cabinet formed by the seven members of that Directorate General would decide by a simple majority on whether or not to make the proposal (in case of eight members, the Vice-President would have a quality vote); 2) the other branches would decide, afterwards, on whether or not to make the proposal (always under the same voting requirements); 3) the proposal would be adopted by the Commission as a whole in cases in which three of the four Directorate Generals approved it; 4) in the case in which two Directorate Generals approved the proposal and two rejected it,

[54]This idea draws largely on Schmitter (1996:Chapter IV), though he applies it to the Council. As regards the justification of this division, I have identified what, in my opinion, constitute the four main fields of Community intervention at present. However, divisions according to other criteria could also be conceivable. The important thing is that the number of Commission D.Gs. becomes considerably reduced.

there would be a meeting of the Commission cabinet, which would be formed by the Commission President and the three vice-presidents. The decision to finally approve the proposal would be made by simple majority, the President having a quality vote.

The benefits of this proposal are the following: 1) it maintains Member States' representation rights, which is an undeniable way to legitimize the Commission since it preserves Member States' links with it; 2) however, it makes the functioning of the Commission more rational and operative. Instead of a decision being taken by a cabinet of 28 or 30 members, which would make the Commission resemble an international conference more than a technical organ, and which would create significant transaction costs, decisions would be taken in turn by sub-cabinets in which only 7 members (or four members in the case of a tie among the Directorate Generals) at a time would discuss a given issue; 3) in terms of the control of the growth of Community intervention, the proposal is of relevance since the approval by the Commission of each proposal would be checked at least four times (five times in the case of a tie). This would be a notable improvement with regard to the present situation, in which the decision to adopt a given proposal is examined only once by the Commission cabinet. Further, it is important to note that proposals would have four sources, instead of 23 (the present number of Directorate Generals) as is currently the case. This would most likely be translated into a reduction of the number of proposals made by the Commission as a whole; 4) and finally, the collegiate character of the Commission would not be compromised, since once a given proposal is adopted by a majority of the sub-cabinets, it would become a Commission proposal (it would be understood that, as happens at present, it is the Commission as a whole which adopts the proposal).

A.1.3. Reform of the Commission's Internal Structure.

Irrespective of the model that is finally followed, reform of the internal structure of the Commission should be unavoidably undertaken. The present trend of fragmentation of Directorate Generals into an ever-growing nebula of departments, units and the like, which not always arises for functional reasons, results in the proliferation of the sources of Community regulation, and in a damaging increase in the complexity of the texts which are finally proposed by the Commission. Further, coordination among the different Directorate Generals is far from evident in the current situation, which creates unnecessary overlapping and increases confusion in texts of proposals. Without entering into too many details here, any institutional reform in this regard should result in a more unified and simplified internal Commission structure in which coordination between the different Directorates is enhanced.

A.2. Reform of the Council.

Fragmentation of the different Community institutional structures is a phenomenon that affects also the Council of Ministers. The legal fiction of Council unity which is established in the Treaties no longer corresponds to reality (Lipsius, 1995:195). To start with, involved in the preparation of the Community action we have a myriad of specialised committees that assist in the Council's work. To continue, decisions are taken in the core of specialised Councils (Majone, 1994a:5[55]), and not by the Council as a whole. Further, the "General Affairs Council" cannot perform its theoretical function of coordination of the other sectorial

[55]According to Majone, the number of specialised Councils of Ministers has grown from 14 to 21 during the period from 1984 to 1993.

Councils, since it is presently overburdened with its more specific tasks. In addition, the "General Affairs Council" lacks many times over the sufficient political weight to impose its decisions on other Councils (such as, notably, the ECOFIN). The result of this situation has been well identified by experts: it has fostered, rather than limited, the growth of the Community's powers (Dehousse, 1996:9).

The reason why Council fragmentation (and institutional fragmentation in general) brings about more Community intervention seems by now clear. The fact that Community decision-making is, in practice, structured around "functional networks", creates an adequate environment in which national experts at different levels come and discuss common concerns, in the same language, and with a high level of secrecy. In this relatively benign atmosphere, agreement may be reached more easily than at national level, in which public intervention is subject to other constraints, above all of a political character. Therefore some institutional reforms should be implemented in order that this trend towards fragmentation is counterbalanced.

First, as regards the preparatory stages of Community intervention, the COREPER's role of control of other committees should be streamlined. Several reforms have been proposed in this regard. For example, Lipsius proposes that Article 151 of the TEU could be redrafted in order to make COREPER's political weight clearer, and that the COREPER should be given the explicit power to examine all opinions, recommendations, etc, produced by the more specialised and technical committees that intervene in the Community "policy-formation" phase (Lipsius, 1995:196). However, though interesting, these proposals are either too formal or they would lead the COREPER into total paralysis. Further, they do not seem to address the core of the matter, which is that the COREPER often finds it difficult to impose its views on other committees due to its lack of political strength. This is particularly

the case as regards committees which assist the powerful ECOFIN. Therefore the political profile of the COREPER should be enhanced in order that it may be able to perform better its role of control over other committees. One possible way to achieve this aim would be to make the COREPER directly dependant on one of the Member States' departments with more political weight, such as a vice-presidency charged in particular with European Affairs[56], instead of it being dependant on the Foreign Affairs Ministry (which traditionally has a lighter political weight in Member States' governments), as is the case at present for the majority of Member States.

Second, as regards Council fragmentation, two proposals have been advanced which merit some analysis. The first proposal was formulated some years ago[57]. This proposal consists of creating a new Minister in national executives (European Affairs Minister) who would be specifically charged with the task of coordinating the work of the Council[58]. My preference is instead for a second proposal which advocates for the splitting of the General Affairs Council into two new formations: (i) the External Affairs Council, which would deal with the ensemble of Community external relations (including the CFSP); and (ii) the General Affairs Council, which would be formed by members of the national executives of a sufficient political weight (for instance, Vice-Presidents charged, in particular, with European Affairs) and would deal with the coordination of the other sectorial Councils (Dehousse et al., 1996:113[59]). This renewed formation, the "General Affairs Council", would sit in Brussels on an almost permanent basis. Each Vice-President could accompany the national delegation

[56]Note my remarks below.

[57]According to Lipsius, this proposal was formulated by President Miterrand and Kohl in November 1993, concerned by the lack of coherence in the work of the Council. Note Lipsius (1995:195).

[58]For a similar approach note Federal Trust Report (1995:10).

[59]A similar proposal seems to be supported by the Reflection Group (1995:63).

of the different sectorial Council if this was deemed opportune. Its mission would be to point to the existence of regulatory excesses, and also overlaps, inconsistencies, etc, in the various proposals discussed by the sectorial Councils. It would also have power to propose the reforms necessary to solve eventual problems. The General Affairs Council would also perform an important role as regards the "alarm bell procedure", as has been argued in a previous section[60].

[60]Note my remarks in point A.2. of section III, *supra*.

V-. CONCLUSIONS: TOWARDS MORE FLEXIBILITY.

In the previous lines I have suggested a number of avenues where the political reform of the Community could be conducted in order to further protect Member States' autonomy from Community intervention. Though these modifications should help to create the conditions for more legitimate Community intervention, it is certain that their simple implementation would not be enough for this purpose, assuming that the Community institutions keep on insisting on the creation of a "totalizing" Community normative order. In other words, the procedural reforms that are proposed here will make only sense if integrated within the wider framework of an effort on the part of the Community institutions to shift to more flexible strategies of public intervention. Otherwise they could either condemn the Community to near paralysis or be completely ineffective for the purpose of giving more legitimacy to future Community action.

Yet in order to make the system work properly, Member States should make a correlative effort to integrate Community concerns in their institutional designs and public intervention strategies. An attitude of "federal comity" towards the centre (and therefore towards the rest of the Community partners) should therefore preside over the relationship among Member States and the Community. Therefore, only if centre-periphery Community relations move towards more cooperative patterns of interaction will the legitimacy of Community intervention be further enhanced.

At the level of the Community, the move towards more flexibility might be achieved, firstly, through the introduction of a set of institutional/procedural innovations. Such innovations should be inspired by the principle according to which "no single Member State

should be constrained to participate in the ensemble of Community developments, but, conversely, no single Member State should be capable of stopping the others from taking further steps towards integration[61]". In this connection, eventual reforms could draw on the rich arsenal of techniques that have been used and that are presently used in the Community context in order to provide for more flexible intervention. Ehlermann (1995b), for example, has recently made an interesting attempt to categorize these techniques[62]. He has established three models of "differentiated integration": "multi-speed" integration[63], "variable geometry" integration[64] and "à la carte" integration[65]. Without entering here into a discussion that

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[61]This principle, upon which the whole idea of flexibility relies, has been recently recalled by Dehousse et al., (1996:22). According to these authors, "si aucun État ne peut être forcé de participer contre son gré à un effort d'intégration, il est également impensable que les plus réticents empêchent ceux qui le souhaintent d'aller de l'avant".

[62]Note also Wallace and Wallace (1995).

[63]According to Ehlermann (1995b:5), "multi-speed" integration may be defined as "the mode of differentiated integration according to which the pursuit of common objectives is driven by a core group of Member States which are both able and willing to pursue some policy areas further, the underlying assumption being that others will follow later. In other words, the multi-speed approach signifies integration in which member countries maintain the same policies and actions, not simultaneously, but at different times. The vision is positive in that, although admitting differences, the Member States maintain the same objectives which will be reached by all Members in due time". For Ehlermann (1995b:8) a primary example of conventional "multi-speed" integration is Article 7C of the TEU (old Article 8C of the SEA), which establishes the possibility to set up derogations to the implementation of provisions oriented to establish the single market. For examples of "multi-speed" integration in secondary legislation note Ehlermann (1984:1284), in the field of taxation.

[64]According to Ehlermann (1995b:5) the concept of "variable geometry" is defined as "the mode [of differentiated integration] which admits to unattainable differences within the integrative structure by allowing permanent or irreversible separation between a core of countries and lesser developed integrative units. A Europe differentiated by space goes further in institutionalising diversity than integration differentiated by time. Whereas integration differentiated by time defines and maintains common objectives and goals, integration differentiated by space takes a more negative approach in that it admits to unattainable differences within the integrative structure. Put simply, integration differentiated by space considers that European political and economic diversity makes common objectives both unrealistic and unattainable".
For Ehlermann (1995b:13), the "opting out" provisions of the EMU and, above all, of the Protocol and the Agreement on social policy are good illustrations of the concept of "variable geometry" integration.

[65]For Ehlermann (1995b:6) "à la carte" integration implies that Member States are allowed "to pick and choose, as from a menu, in which policy area they would like to participate, whilst at the same time maintaining a minimum number of common objectives. This approach is focused on matter, i.e., specific policy areas". However, Ehlerman doubts the usefulness of the differentiation between the "variable geometry" and the "à la carte" concepts, since, according to him, in both cases the decisive variable is "matter", as opposed to "time", which constitutes the decisive variable as regards the "multi-speed" concept. It seems that for Ehlermann, the "à la carte" concept would be simply a radical form of "variable geometry" integration. Radical forms of

would clearly go beyond this thesis' purposes, the important thing is simply to point out that flexibility techniques are not unknown in the Community context (although, it must be admitted, the Maastricht reform has increased the typology of such techniques as well as extending their use), and that future reforms of the Treaties should take inspiration from this important Community asset in order to exploit it to the full.

Important as these reforms may be, the way to achieve flexibility requires, above all, a different, more profound, modification that could not be implemented overnight: a change in the Community's legal and regulatory cultures. Thus from a regulatory perspective, Community institutions should attempt to implement different, more elastic regulatory techniques. In this regard the Community too, and above all the Commission, which has the primary role in the policy-formation phase, should take inspiration from the regulatory models that have been used in some of the areas subject to Community competence. For example, recently the Community has again shifted its focus to qualitative rather than quantitative standards as regards air pollution control[66] (Scharpf, 1994:235). Qualitative standards are more flexible ways of achieving the same regulatory results all over the Community, while special local or national conditions are better taken into account. To be sure, this kind of regulatory approach could, however, impose excessive costs on those Member States which traditionally rely on quantitative rather than qualitative standards (such as Germany). To avoid this effect, Community regulation should employ "functional equivalents" to regulatory techniques based on qualitative standards. This has already been done in some pieces of

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"variable geometry" mechanisms, or, if one prefers, "à la carte" mechanisms should be, according to Ehlermann, rejected. Instead I understand that some "à la carte" mechanisms could provide for a useful balance between Community and Member State concerns.

[66]A prime example in this regard was directive 80/779 "sulphur dioxide", examined in Chapter III, *supra*.

legislation for environmental protection, in which both quantitative and qualitative functionally equivalent standards have been set[67]. A further regulatory technique whose application to other fields should be considered consists of the establishment of double minimum and maximum standards (Scharpf, 1995:24). This technique has also been employed in environmental regulation[68]. Richer Member States would be committed to the higher standards, whereas poorer Member States would be committed to the lower. However, a review or "sunset" mechanism could be established in order that these lower standards are progressively raised as, for example, the level of industrialization in those Member States rises. Other examples could be thought of, and in this connection comparative analysis will provide a useful tool in order to analyze how composite systems have fulfilled the quest for flexibility; here my more modest aim is to highlight the fact that regulatory Community intervention should change its focus and move towards more flexible regulatory instruments and strategies.

Furthermore, the achievement of more flexibility should also entail, as referred to above, a change in Community legal culture. In this connection, it is submitted that the ECJ should modify the hierarchical and monistic view that it holds at present as regards the relationship between the Community and national legal orders and that, instead, it should adopt what has been identified by MacCormick as a "pluralistic" (rather than monistic) and "interactive" (rather than hierarchical) view of the relations between them (MacCormick, 1995:264). According to this renewed vision, the Court ought not to reach its interpretative judgments without regard to their potential impact on national constitutional systems.

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[67]For example directive 76/464 "dangerous substances in water", examined in Chapter III, *supra*.

[68]Directive 78/611 "lead in petrol", examined in Chapter III, *supra*.

Finally, although I am more concerned here with the modifications that should be undertaken at Community level, it is submitted that changes should also be undertaken at the Member State level. In this connection, both national regulators and national courts should adopt a similar commitment towards flexibility. Thus, for instance, national regulators should endeavour to at least take into account in the design of their policy strategies the objectives of Community integration in order to attempt to obtain mutually satisfactory regulatory solutions. Further, national courts should attempt to interpret domestic laws and constitutions with due regard to the principles and laws that are applied in the Community legal order. A process of mutual adjustment of Community and Member State concerns would come about which, in the long run, would certainly prove beneficial for both actors. A good starting point for the setting in motion of this process would be to begin to acknowledge, at a normative level, that both the Community's claims to integration and unity and the Member States' claims to diversity have an equal status of legitimacy.

GENERAL CONCLUSIONS.

Classical legal analysis of Community developments posits the values of integration as the main -if not the only- standard against which Community phenomena should be interpreted and even ontologically valued. This traditional focus has placed a serious burden on the ability of lawyers to treat scientifically those developments that apparently put into question the integrationist logic on which, in the classical perspective, the Community legal order rests. As one author has recently pointed out, these kinds of phenomena have been traditionally perceived by lawyers as mere "irrational political interferences in a legally rational constitutional scheme" which in turn owes much of its solidity to the work of the ECJ (Winscott, 1995: 300).

From this perspective, it comes as no surprise that the majority of legal analyses of the principle of subsidiarity have criticized its introduction in the Community legal order on the single -and simple- ground that the principle went against the integrationist values and logic underlying the Treaties. This thesis has attempted to show new directions where a more sustained legal critique regarding subsidiarity could be oriented. That the outcome of this research diverges from the mainstream legal critique to the principle of subsidiarity should also come as no surprise, if taking into account that the methodology and substantive views here adopted differ considerably from those adopted by most Community lawyers today. By way of conclusion, I shall summarize the most relevant findings that have emerged in the analysis of the preceding pages.

I-. The Community's Centre-Periphery Relations Viewed from the Perspective of a Social Legitimacy Discourse.

From its inception, the Community has experienced a process of unstoppable growth in its competences and powers. As regards competencial expansion, it is interesting to note how this process has come about. On many occasions, the material development of a competence preceded its formal recognition within the Treaties. The successive reforms of the Treaties, rather than creating new competences for the Community, simply rubberstamped what were already widespread realities. Many examples could be cited in order to illustrate this trend, but one could think for instance the extraordinary development in the area of environmental protection before the SEA reform finally incorporated Treaty clauses (Articles 130r to 130t) granting the Community the competence to act on its own right in this domain.

Of course the causes of this sometimes interrupted but nevertheless generalized trend towards the increase of the Community competences, even beyond the formal limits established by the Treaties, are difficult to be individualized. Rather than looking for unicausal relations, one should start by acknowledging that it is by examining the varied interaction of a complex web of different elements that one may answer the question of why Community *does in fact* integrate. Thus, to follow with the example of the development of environmental regulation before the SEA, it is obvious that functional reasons play an important role in explaining many of the developments that the Community witnessed in this area: if the objective was the creation of a market without internal frontiers, divergent Member States' product environmental regulations could hinder the achievement of such an objective. The harmonisation of the Member States' differing environmental norms was considered as legitimate since instrumental to the ultimate objective -the creation of a common European

market-; and this even in front of the absence of explicit Community powers in this area of regulation.

The question of the causes of Community integration is nevertheless further complicated if one considers other Community developments. For instance, and without leaving the environmental area, some measures concerning the protection of animals were already adopted before the SEA period, like, for example, directive 86/609, concerning "the approximation of the Member States legislations regarding the protection of animals used for experimental and other scientific purposes[1]". Obviously, the candid functional explanation that fits so well in explaining Community product environmental regulation, is instead of little help in accounting a development of the kind of directive 86/609: the achievement of the common market objective is, as is apparent, clearly unconnected with the well being of some animal species. Hence this example illustrates that to account for a complex process such as Community integration, one should attempt to steer away from one-way causal explanations. Besides functional elements, such as the need to make the common -single- market work, one should therefore consider the role played by Member States, Community supranational institutions, private and public interest groups, and, why not, national and Community politicians, as well as other elements such as global economic crises or petrol shocks, in order to account for both concrete and more general Community developments.

Within the complex picture that is depicted here, it is nevertheless possible to offer at least a more or less general framework for the analysis of Community phenomena, and therefore of the causes of Community growth. Such a framework for analysis has been recently put forward by State-fragmented models. According to these models, the analysis of Community evolution should take as its main premise that both the Member States and the

[1]OJEC L 358 of 18 December 1986.

Community are rather fragmented entities. Thus the Member States' bureaucracies are splintered into a web of departments, units, services and the like, not to speak of political institutions' fragmentation. The same leaning is also present in the Community's setting. More importantly, the Member States' and the Community's fragmentation are mutually reinforcing processes. That is, the Member States' fragmentation has fostered the Community's, and the Community's has then reinforced fragmentation of the Member States' institutions. The final picture, at the Community level, is one in which policy-making develops within structured "functional networks", which are constituted by national and Community bureaucrats of the branch, but also by almost all those directly interested in the outcome of regulation, such as the representatives of -mainly- private interests, field experts, and the like.

Community developments, even beyond the formal limits established by the Treaties, are as a general rule, more precisely explained if the State-fragmented hypothesis is embraced. Thus, to follow with the example of environmental policy, if one takes into account that Community environmental regulation is first discussed within the committees of Member States and Community experts of the branch, and that once legislation is proposed this is in turn rediscussed within the sectorial Council of Ministers in which the Ministers concerned with environmental matters sit, the most probable outcome will be that the proposed legislation will pass. In other words, and more generally, one may state that the fragmentation of the Community's institutional structures has fostered the growth of its competences. Yet to be still more precise it is necessary to consider the important role that supranational actors, and very particularly, the Commission, have played in this "game". Thus the Commission is quite successful in activating and developing the so-called "functional networks". Again, the area of environmental protection provides a good example of the kind. As is known, Community environmental action during the TEEC period followed the 1972 Paris Conference

in which the Heads of Member States and national governments called for wide Community involvement in this -and related- areas. However, the rapid development of the Community's environmental area during the TEEC period is not only the consequence of Member States Paris initiative. Instead, much of the success experienced in this field is the product of the dynamism showed by the Commission before 1972. Thus during the previous decade the Commission had developed informal contacts with the parties interested in this field of action, and mainly with environmentalist groups. Further, the Commission created a special service within D.G. IV (the Environmental and Consumer Protection Service) (Mazey and Richardson, 1992) devoted to the study of the problems that the development of the internal market could have as regards the environment. Thus when the Member States, in the aftermath of the 1972 conference, asked the Commission to make proposals on the matter the latter was ready for it, even ahead of schedule.

Irrespective of the discussion of the causes of Community integration, which is important not only because it allows to understand -and possibly predict- the process of Community growth, but also because it permitted me to make a more sustained reflection as to the specific mechanisms that could serve to protect the Member States' autonomy from Community forays[2], it is also important to stress the consequences that this process has had for the Member States' polities. Significantly, it has meant that over the years, the Community entered in areas that were each time closer to the daily life of normal citizens. The main qualitative difference between the first years of operation of the TEEC and the years previous to the SEA reform, in which Community activities witnessed a truly expansion, lays precisely there. Whereas in the first years of Community operation only certain categories of citizens were directly affected by Community integration (mainly exporters and probably Community

[2]See my remarks in point III of these General Conclusions.

law professors), in the final years of the TEEC period this no longer held true. Regular citizens, independently of the professional category to which they belonged, were increasingly affected by the environmental, consumer, worker, culture, education, etc. regulations of the EEC. In short, at the *anti-chambre* of the SEA reform it could be no longer maintained that Community integration was the single domain of a bunch of intellectuals and merchants. And the SEA period did but reinforce this trend.

In this situation in which an ever growing number of facets of the life of the Member States' polities have been increasingly affected by decisions emanating from Community institutions, the fundamental issue of *the way in which* decisions are adopted at the Community level at once jumps to mind. Two procedural arrangements have been, and still are, specially problematic at this respect: first, the adoption of decisions according to the majority principle; and second, the adoption of decisions by supranational institutions, according to procedures that grant them the final word.

Starting with the majority principle, the Treaty of Rome already provided for cases in which legislative decisions were to be adopted by majority voting. In other cases, the TEEC established the end of the transitional period (1970) as the marker in which decisions that had been previously adopted by unanimity would then pass to be adopted by resorting to vote. Altogether, the TEEC provided around 25 cases in which majority voting would be the decision-making rule. Still Member States considered that the Community social setting was not yet mature enough to embrace in full the majority principle. Thus in 1965, the famous "empty chair" crisis brought as a result the no less famous "Luxembourg compromise" of 1966, which established unanimity as the only procedural rule for the adoption of every kind of decision.

The first reaction of lawyers and political scientists was to criticize the adoption by

Member States of the Luxembourg compromise as a clear step backwards in the process of Community integration (Winscott, 1995:304). However, Weiler has corrected that view by giving a positive reading of that development. He has convincingly argued that the Luxembourg compromise was probably the most legitimating factor in the second half of the TEEC period (Weiler, 1991a). It re-equilibrated the legal and political Community sub-systems, by giving all Member States equal voice in the Community decision making process. Contrary to what most analysts foresaw at the moment of the adoption of the Luxembourg compromise, the Community experienced a certain increase in its activities during the second half of the TEEC period. To complement Weiler's findings, which mainly concern the development of the Community legal sub-system, this thesis has given empirical evidence of what happened in the legislative sub-system. Again, contrary to most expectations, consensual decision-making did not introduce more doses of *lourdeur* into Community decision-making but actually coincided with a certain acceleration of Community legislative intervention during the period following the adoption of the Luxembourg compromise. This acceleration is even more evident in the years immediately prior to the adoption of the SEA, though the probable cause of this is in the fact that a growing number of decisions were already adopted by majority voting right before the SEA reform. This change of mood anticipated, at least in a certain way, the major institutional shift that was to be introduced by the SEA reform: the switch to majority voting for the adoption of core decisions, and notably for those concerning the achievement of the internal market (Article 100a TEEC).

The embrace of the majority principle in the Community setting came to disrupt the institutional equilibrium in which the process of Community integration had rested until that moment. After the enactment of the SEA, Member States could be put in a minority by the majoritarian decision of other Member States. Once more, the case of the Community

environmental policy offers a good illustration of how Member States were able to protect their sovereignty and preferences under unanimity, and of the harmful consequences that the switch to majority voting had for them. Thus for example, one Member State, the U.K., saw how the Community environmental policy developed at least in part under Article 100a of the TEEC during the SEA period, without being able to impose on the other members of the Council its own view that the Community environmental policy should be developed solely on the basis of Article 130s, which provided for unanimity. This constrained to an important extent the U.K.'s strategy which aimed to maintain its distinctive approach to environmental protection, as it had done it during the years of the TEEC, thanks to the veto power. In short, and more generally, the previous example demonstrates that the Member States lost a fundamental safeguard of their sovereign powers during the SEA, since important aspects of the Community's intervention developed through majority voting -or under its shadow- after 1987.

Similar constrictions exist on the Member States' capacity to establish in an autonomous way their own policy preferences when the Community's supranational institutions act under the cover of procedures that grant them a greater say than the Member States themselves. Apparently the only institution that, according to the Treaties, is allowed to take decisions over the head of the Member States is the ECJ. However, the possibilities of this institution to make policy are in principle circumscribed to the respect of the rule of law (Article 164 TEU). The ECJ has, nevertheless, at times interpreted its own powers of interpretation and application of EC law in a very loose way; this has allowed the institution to reduce the Member States' sovereignty even beyond the underlying intention of the Treaties. However, although the ECJ is the most clear example of a Community institution overruling Member States, is by no means the only one. For instance, the Commission's use

of Article 90.3° of the Rome Treaty for legislative purposes in the field of telecommunications, though it may be extreme, is another good example that illustrates the more general trend that Community institutions have at times imposed their own views upon the Member States' by using -and sometimes by abusing- the procedural opportunities that were offered to them by the Treaties.

To recapitulate, it may be said that Member States have found a double source of pressure on their sovereignty which, as shall be shown later, are particularly problematic from the perspective of legitimacy. One source of legitimacy problems has been the possibility that a majority of Member States may overrule a minority of them; another has been the possibility that Community institutions may overrule, so to speak, Member States. Though the former problem may be more important than the second from a quantitative perspective (above all after the enactment of the SEA), from a qualitative perspective the latter has raised issues at least equally problematic.

Viewed from the single perspective of a social concept of legitimacy, the issue that arises from having Member States overruled, either by other Member States or by Community supranational institutions, is that it is difficult for Member States' polities to accept that important areas of their daily life will be decided according to procedures in which their voice has been considerably reduced -if not eliminated. Rightly or wrongly, the fact is that overruled polities will regard the outcome of the decision as furthering the preferences of other polities or, what gives a more bitter flavour, the particularistic interests of some *lointain* and obscure Community organ. The whole thing will only get worse if the decision regards a feature belonging to the social idiosyncrasy of that polity, and it will be perceived as the worst of things if previous policy choices have to be radically modified as a consequence of the new Community norm.

Thus in a process of integration, such as the Community, which implies above all a process of redrawing new social frontiers, procedures may be seen therefore as more than simply technical devices: they may also be viewed as playing an important role from the perspective of the social legitimacy of the new polity. However, in order for procedures to be a factor of legitimation, it is important that they have a determined quality. In my view, if procedures do not reflect the social diversity of the new polity to a more or less exact degree, then it may be said that they will fail to perform such a legitimating role. In this connection, procedures must foster the participation of all those affected by the outcomes of decisions. They should therefore attempt to create an ideal speech situation in which all affected by the outcomes of decisions may discuss possible alternatives in equal terms. Just to put it differently, they should foster consensual decision-making rather than opting for the force of the votes.

Why should procedures reflect -and protect- single polities? Two reasons have underlain my reflections with respect to this. The first is instrumental, or if one prefers, functional: the creation of a new polity without the direct participation of the old polities is a project with little chance of success. The second, however, is a more definitive one: diversity must be seen as a value in itself that deserves protection (Weiler, 1994). This, which should be true in any kind of polity, applies with more strength in a polity undergoing social redrawing, as is the Community, not least because the degree of diversity will tend to be much wider. Diversity and unity appear therefore as values worthy of protection in their own right in the Community setting. This renders the whole problem of the relations between the Member States and the Community still more acute.

To sum up, one may conclude by setting down the following findings: (i) *the growth of the Community's competences over the years has affected an increasing number of areas*

important for the daily life of European polities; (ii) *taking into account the quantitative and qualitative importance of Community intervention, the question of whether Community decision-making procedures encapsulate valid arrangements is of utmost concern*; (iii) *majority voting and decision making procedures that grant the final say to supranational institutions have created a social legitimacy problem in the Community context since they may not be considered as sufficiently protective of Member States' social diversity, at least in the present stage of the process of social redrawing of the Community polity*; (iv) *the protection of Member States social diversity must be considered as a value worthy of protection for functional but, above all, for normative reasons.*

II-. The Principle of Subsidiarity and its Critique.

In response to ever intense attacks on national sovereignties from the direction of the Community, the Member States reacted by introducing in the Treaties a set of micro and macro safeguards through the Maastricht reform. The Maastricht Treaty was not, of course, the first time that the Member States had reacted against eventual centralist drifts by establishing safeguards of such nature. Instead, it may be submitted that Maastricht was the first time in which the Member States showed a real concern for the question of setting limits to the expansion of the Community's competences. Thus at a micro level (Dehousse, 1994a), Maastricht makes wide use of a technique which was until then almost unknown in the Community: establishing in the Treaty itself an express prohibition against the enactment of Community legislation in some areas of Community interest, and above all, in newly recognised competences, such as education and vocational training[3], culture[4], and public

[3]Articles 126 and 127 TEU.

health[5]. As a macro-level safeguard, the Member States decided to introduce the principle of subsidiarity into the Community constitutional order (Dehousse, 1993).

At the very outset, the introduction of the principle of subsidiarity in the Treaties may be interpreted as reflecting that the malaise created by the growth of the Community's competences in the Member States' polities was not restricted to past Community developments in some particular areas, but that instead it was a phenomenon of widespread societal concern. However, by introducing subsidiarity in a legally binding clause[6], the Member States did not only seek to express in institutional terms their opposition to what was going on at the Community level. They also searched for solutions. Therefore, the introduction of the principle of subsidiarity must be assessed, foremost, from the perspective of whether the principle constitutes a useful tool through which the Member States' sovereignty may be effectively protected from Community forays. The main objective of this thesis has been to demonstrate that this is not and will not be the case, both for reasons of functional and normative character. Let us now examine this thesis' main findings with regard to this.

To start with, the principle of subsidiarity was encapsulated by the Maastricht Treaty in a legally binding clause, as has been remarked above. This move was by no means accidental. An analysis of the Maastricht negotiations shows that at the end the view prevailed that, if subsidiarity was to be an effective remedy, its enforcement by the ECJ would have to be made possible. The means to achieve this end was to introduce a subsidiarity provision in the legal body of the Treaty. Therefore the expectation of the dominant view among the Member States was that the judicial enforcement of the principle would be an effective

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[4]Article 128 TEU.

[5]Article 129 TEU.

[6]Article 3b2° TEU.

guarantee against the Community's encroachment of national powers.

Yet this thesis has shown that the judicial enforcement of the principle may be subject to a number of problems. I have categorised them in functional and normative problems. Firstly, as regards functional problems, I pointed out the following: (i) *it will be difficult for the ECJ to develop "legal" criteria from the wording of Article 3b2°;* (ii) *an efficiency, or to be more exact, a cost-effectiveness analysis, which seems to be the material criterion offered by Article 3b2°, will be difficult to develop by the ECJ for technical reasons and also for the reason that it will be hard for the ECJ to encapsulate such an analysis into legal discourse;* (iii) *the most promising avenue for the judicial enforcement of the principle remains in a "proceduralized" use of the principle by the ECJ: however, this may not lead us too far, since it is expected that the ECJ will not overrule Community measures unless they are clear cases of misuse of power or manifest error of appreciation*[7] (Lenaerts et Ypersele, 1994). *More importantly, a proceduralized implementation of the principle may give the ECJ the opportunity to manipulate subsidiarity, that is, to substitute the Community's legislator policy preferences for its own, since the concepts of misuse of power and manifest error of appreciation are open-ended and ambiguous, thereby giving the judiciary wide margins of manoeuvre.*

Secondly, as regards normative problems, I stressed the following: (i) *the normative premises from which my analysis starts is that, firstly, courts (all courts, but above all Community Courts for the reasons that have been examined above in point 1 of these General Conclusions), should be keen to avoid making pronouncements on questions of policy; and secondly, they should try to move within the strict boundaries of legal reasoning in their*

[7]Note in this sense the ECJ position in the *Working Time Directive* case, analyzed in Chapter IV, section III, at point C, *infra.*

judgements; (ii) *from this perspective, the principle of subsidiarity appears to be doubly unsuited for judicial enforcement;* (iii) *this is so since, firstly, subsidiarity poses above all a question of policy, or if one prefers, a political question which is the one of whether it is opportune that the Community exercises a power that has been granted to it by the Treaties in a specific circumstance. In other words, the problem that subsidiarity is meant to solve is not whether the Community has or has not competence to act in a given case, but whether, having that competence, it should act or not. The ECJ is clearly unsuited, according to my premise of departure, to solve such a highly political matter;* (iv) *secondly, and as has been remarked already, the nature of the principle makes it difficult for the ECJ to employ legal reasoning. This poses not only a functional question, but also a normative one: in order that the ECJ keep its legitimacy as an institution, it should only apply and interpret the law, and also show that it only does so. This second aspect is clearly hindered by a principle difficult to be handled in legal terms, as is the case with subsidiarity.*

To continue, it has been pointed out by some analysts that other Community institutions, and mainly the Commission, which has a major role in Community policy-making, should be involved in the implementation of the principle, and that this could be a second best solution that could overcome the difficulties that the judicial enforcement of the principle presents. In fact, from a strict legal perspective, it is obvious that all Community institutions, and therefore the Commission, are bound by Article 3b2° of the EC Treaty. Therefore this thesis has examined the grounds on which this claim rests. As has been pointed out, the implementation of subsidiarity by the Community political institutions, and mainly by the Commission (to which my analysis was primarily addressed) may also raise important issues. Again, I categorised them, for clarity of exposition, into functional and normative.

Here I offer a briefer account of this thesis' findings in this regard.

First, from a functional perspective, the implementation of the subsidiarity principle by the Commission may raise the following problems: (i) *it is difficult to design, that is, to conceive of, general and abstract principles that could serve the purpose of effectively protecting the Member States' sovereignty based on the logic of subsidiarity. Though some analysts have made interesting attempts aiming at creating such criteria, the point that I stressed is that in the majority of the cases it will be easy to argue, on the basis of such standards, that Community intervention is not absurd or illegitimate;* (ii) *a way to escape from material criteria that look at the scale or the dimension of the problem (such as the transboundary or the market distortion criteria), is to employ a cost-effectiveness analysis. This may even be more consistent with the wording of Article 3b2°. However, as recent economic analyses show, the probable outcome of this choice will be more, instead of less, central intervention. This finding only corroborates the conclusion obtained by public choice analysis in the 70's, which attempted to use analogous cost-effectiveness tests in order to protect the autonomy of lower levels of governments in federal systems, and with a similar lack of success.*

Second, from a normative perspective, the problems that the implementation by the Commission posed were the following: (i) *once more, as was remarked as regards the ECJ, subsidiarity poses above all a question of political choice, rather than of competence. In this connection, technical analysis from the Commission, though useful, will not make much headway in answering a question which only the Community legislator may and should answer: in the face of the available technical evidence, should the Community act?*; (ii) *more problematic from a normative perspective is the fact that to treat political questions as if they were mere technical ones may be used by policy-makers as a means to shelter in technical*

discourse what are in fact policy preferences, at the price of a diminution of political accountability. In other words, subsidiarity, if treated as a technical principle, may offer good opportunities to Community policy-makers for manipulation. Therefore subsidiarity could become, in the hands of the Commission, a major argument to justify the need for more Community intervention when this is in line with the Commission's choices, or, conversely, to justify its own preference against a particular action.

The previous findings may be wrapped up by concluding that the fundamental problem posed by subsidiarity lays precisely in the major strength that the principle is supposed to have: the dualistic logic on which it rests. To put it in different words, the logic of subsidiarity assumes that a clear distinction can and should be made between spheres of government. This is, in the web of a complex and increasingly interdependent world, a clearly misconceived assumption. No matter which area of regulation one may think of, it will be always difficult to trace a dividing line between the reach of Community and Member States' intervention, according to substantive principles previously stipulated in an abstract fashion.

More importantly, the implementation of this dualistic logic has as a necessary outcome that the intervention of the Community and Member States will be considered as mutually excluding. That is, theoretically speaking, a subsidiarity assessment may give only two possible results: either upholding Community intervention or hampering it (thereby indirectly supporting the Member States' intervention). Under subsidiarity only one of the Community's or the Member States'intervention may be considered legitimate at the same time and area. *A contrario*, for the principle, both Community and Member States intervention in the same time and in the same area is instead an inconceivable outcome.

This second effect of subsidiarity is its most problematic aspect. If one starts from the

premise that both the Community and the Member States' interests and expectations are equally legitimate, and that no hierarchy of values may be established between both unity and diversity claims, then subsidiarity appears as an unsuited instrument in order that both Community and national concerns may have a chance of accommodation. In short, the complex interplay between Community integration and Member States autonomy that is being witnessed today makes ill-adapted the dualistic profile of an instrument such as subsidiarity.

III-. Alternatives to the Subsidiarity Principle.

My reflections would be incomplete without at least an outline of an alternative to the principle of subsidiarity. The re-construction of such an alternative must be made taking as one's point of departure the legitimacy problems addressed in this work. Thus, as was noted before, the main issue that the process of Community growth of powers raises is that of *procedures*. Decision-making procedures are important since they establish the real conditions through which the coexistence between different polities can be made possible. However, in a process of social redrawing, of the kind represented by Community integration, procedures should have a determined quality. They should enable that all those affected by the outcome of regulations have equal chances to participate in their making. In other words, procedures should foster consensual decision-making and discourse rather than simply reflecting the force of numbers. It follows that norms implemented according to such kind of procedures would not "léser ni l'existence ni la dignité des intéressés, et ... pas non plus porter atteint aux intérets vitaux et aux sentiments de justice" of individual polities (Habermas, 1996:71).

The first and more straightforward alternative to subsidiarity consists therefore in reforming the Community decision-making procedures that are considered to be most

problematic. Above all, this applies to majority voting. However, in order to devise proposals in this regard, future developments should be taken into account, in particular, the possibility of enlargement towards Central and Eastern Europe. In a future Community of around 28 members, which was the main factual premise forming the basis of my proposals, moving to unanimity would clearly condemn the Community organs to total paralysis, thereby introducing in the Community system an untenable minoritarian bias. In this connection, a "double majority" principle, with ample voting thresholds for the adoption of majoritarian decisions, could be seen as a kind of second best solution to unanimity.

Nevertheless, I believe that unanimity should not disappear totally from the Community decisional map. Institutional decisions, such as the reform of the basic Community constitutional rules (that is, the reform of the Treaties) and the accession of new Member States, are so fundamental for single polities in the Community and for the development of a more tolerant coexistence between them that they should still be adopted according to consensual practices. Further, other procedural safeguards for regular decision-making, such as the so-called "alarm bell procedure" (Dehousse, 1993), could also serve to strike an adequate balance between the claims to unity and diversity in the Community setting.

The previous reflections aim at the reform of decision-making procedures for the purpose of making Community governance more legitimate as far as centre-periphery relations are concerned. Other procedures could be reformed in order to achieve another objective, which is to limit the Community growth of competences to more reasonable dimensions, or at least to make it more rational. For example, procedures could be developed to regulate the initial stages of the Community policy-making process, thereby preventing Member States or other groups from applying undue pressure on the Commission to make particular legislative proposals. Further, one could also think of the establishment of less -and less complex-

legislative procedures; the injection of more transparency above all in the working of the Council (though not only); the establishment of closer links between national (and possibly regional) parliaments and Community organs at all stages of the Community decision-making process. All these measures should help to increase public oversight of Community activities, with the probable result of a reduction in the Community's intervention. In the same direction goes the proposal to introduce a normative hierarchy. This should be a useful tool in further clarifying the division of powers among the Community institutions, thereby establishing another limit on the Community organs' tendency (and notably on the Commission) to produce legislation.

The same concern for setting limits to the Community's tendency towards over-regulation inspires this thesis' formulations of another possible alternative to subsidiarity, which is the reform of some of the Community's institutions, and notably the Commission and the Council. As has been demonstrated in this research, the fragmentation of the Community's structures introduces an incentive in the system for the growth of the Community's competences. For instance, a Commission of more reduced dimensions, whose internal structure was also reduced and better coordinated, should be studied under this light. Further, the reform of the structure of the COREPER and the establishment of a General Affairs Council with sufficient political weight could be also seen as a promising avenue in order to counterbalance and correct fragmentation. In short, a less fragmented Community institutional structure should bring about less, or at least more rational, Community intervention.

A final alternative to subsidiarity is flexibility. Flexibility could be implemented, for example, by making a wider use of some of the procedures and tools that are already present in the Community setting (note, only to cite the most prominent examples, derogation and

"opting outs" clauses). Proposals for such reforms could therefore be inspired by this important Community asset. However, the quest for flexibility clearly goes beyond reforms that could be enforced by legal means. It calls, above all, for a change in the Community's and the Member State's regulatory and legal cultures. Both Community and Member States policy-makers and courts should try therefore to take into account the concerns and interests of each other when designing regulation or when making judgements. As a result, a more proper balance between unity and diversity could be struck, to the mutual benefit of all concerned.

To conclude, this thesis findings' as regards the alternatives to subsidiarity could be summarized in the following more general points: (i) *solutions to the problem of whether the Community should or not act are better dealt with in the Community political process, rather than according to substantive principles such as subsidiarity*; (ii) *within the Community political process, the main source of problems from a legitimacy perspective has been the inadequacy of some kind of procedures to adequately protect the Member States' autonomy*; (iii) *accordingly, the discussion about how to establish adequate safeguards to Member States' autonomy should be mainly re-focused to a discussion about procedures*; (iv) *in particular, Community decision-making procedures should be oriented to foster consensual practices and discourse, rather than based on the force of numbers*; (v) *other alternatives to subsidiarity could be thought of: but possible proposals should always be grounded on the idea that both the Community claims for unity and the Member States' claims for diversity are equally legitimate.*

4-. Final Thoughts.

The analysis of the subsidiarity principle provides ground for some more general reflections. I shall conclude these remarks with them. To start with, the introduction of subsidiarity in the Community Treaties constitutes one example, perhaps the most definitive one, but not the only one, of the growing ambivalences that exist in the current Community constitutional structure. To be sure, ambivalences have been present since the Community's inception; however, one has to concede that today they are greater, both in number and in significance.

This apparent trend calls for explanation and conceptual systematization. In this connection, this thesis has shown that, irrespective of whether one considers subsidiarity as an effective remedy for the problems it is meant to solve, its introduction in the Community is but the most superficial expression of a real issue, which is the existence of a legitimacy problem in the Community context of a social kind regarding centre-periphery relations. In other words, developments such as subsidiarity should be taken seriously since they represent underlying societal concerns. In particular, they symbolize the fact that Community integration will not be able to go forward without recognising diversity as a value in itself in the present Community context.

Furthermore, scientific analysis should also take seriously developments of the kind of subsidiarity. A new way to think in Community phenomena that matches the changes that have been brought about above all by recent Community developments should therefore be cultivated. If the old truisms about Community integration are to be avoided, scientists should attempt to employ more sophisticated analytical apparatuses. In particular lawyers, who have traditionally been more inclined not to go beyond the examination of the technical subtleties

of the law, should endeavour to be open to other scientific universes. This thesis has shown but one way in which this avenue could be explored. Though it is not expected that lawyers at once become captivated by the new intellectual routes unveiled by this approach, it is at least hoped that this research has made a contribution in the direction of dissipating lawyers' traditional fears about the intricacies of the interdisciplinary method.

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