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COMMISSION REPORT TO THE EUROPEAN COUNCIL ON THE ADAPTATION OF COMMUNITY LEGISLATION TO THE SUBSIDIARITY PRINCIPLE

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I. The subsidiarity principle following the entry into force of the Treaty on European Union

1. Subsidiarity principle

The subsidiarity principle embodied in the Maastricht Treaty is assuming its full importance as the Community stands on the threshold of becoming a European Union endowed with new powers in areas such as currency, foreign policy and even defence.

It is one matter to develop balanced policies in clearly-defined areas, as the Community has always endeavoured to do, but quite another to define levels of responsibility between the Union and the Member States with regard to the range of twenty or so activities now open to Community intervention (see Articles 3 and 3a of the Treaty).

The aim of the subsidiarity principle is to see to it that decisions are taken as close as possible to the citizen, a constant watch being kept to ensure that action taken at Community level is justified in the light of the means available to national, regional or local authorities.

The practical effect of the Maastricht Treaty is to require the Community to demonstrate that there is a legitimate need for each new initiative.

Three questions must be answered in each case.

- What is the Community dimension of the problem?
- What is the most effective solution, given the means available to the Community and to Member States?
- What is the real added value of common action compared with isolated action by the Member States?

To this demonstration of the need-for-action, the Treaty adds the requirement that each proposal, whether in an area of exclusive or shared competence, must respect the principle of proportionality. The intensity of the action should leave the Member States all possible room for manoeuvre in its implementation. Subsidiarity requires Community legislation to be limited to what is essential.

There are two aspects to the subsidiarity principle: decentralization, but also a corollary function of integration, where effectiveness demands that a problem be solved in a common framework.

The main aim of the subsidiarity principle, therefore, is to improve the quality of Community action.

2. Scope of the subsidiarity principle

Subsidiarity is first and foremost a political principle, a sort of rule of reason. Its function is not to distribute powers. That is a matter for the constituent authorities - the authors of the Treaty. The aim of the subsidiarity principle is, rather, to regulate the exercise of powers and to justify their use in a particular case.

The Treaty on European Union simply makes a distinction between exclusive and shared competence without specifying the limits. In the new areas, the Treaty carefully establishes case by case a dividing line between matters that may be covered by Community measures in a given area and matters that must be left to the Member States (for example, there is to be no harmonization on health, culture, education or training).

Application of the subsidiarity principle has the following consequences:

- Community competence is not the rule but rather an exception to national competence; in other words, the Community must have powers specifically conferred on it;

- far from having the effect of freezing Community action, the dynamic of the subsidiarity principle should make it possible to expand it if required, or limit or even abandon it when action at Community level is no longer warranted;

- the regulatory role of subsidiarity, for which need-for-action is the criterion, applies to shared competence only; it cannot be used as a pretext for challenging measures in areas such as the internal market where the Community has a clearly defined and undeniable obligation to act.

The full effect of the subsidiarity principle depends on consideration by the Community's institutions of a number of questions of substance raised by the Commission in its Communication of 27 October 1992 (SEC(92)1990):

- What degree of constraint is to be applied for the implementation of shared powers?

- What are the limits on legislative action compared with non-binding means of action? In particular, what are the respective places of the directive or regulation in the absence of full recognition of the principle of mutual confidence?

- What is the role of subsidiarity in the management and control of implementation?

The declaration and interinstitutional agreement initialled by Parliament, the Council and the Commission on 29 October 1993 make it clear that all three institutions must respect the subsidiarity principle.

The interinstitutional agreement will make it possible to incorporate the subsidiarity principle more fully into the decision-making process. But subsidiarity cannot be reduced to a set of procedural rules; it is primarily a state of mind which, to be given substance, presupposes a political answer to the fundamental questions which application of the principle will undoubtedly raise once the Treaty on European Union enters into force.

II. Undertakings given by the Commission with regard to application of the subsidiarity principle

Besides participating in the interinstitutional agreement, the broad lines of which were set out in its Communication of 27 October 1992 (SEC(92)1990), the Commission has given three undertakings, in particular at the Edinburgh European Council, with regard to application of the subsidiarity principle:

- justification included in legislative proposals,
- withdrawal or revision of pending proposals,
- review of existing legislation.

1. Justification included in legislative proposals

Pending entry into force of the Treaty on European Union, the Commission has instructed its departments to provide detailed justification for all new legislative proposals, whether for regulations, directives or decisions.

For some months now the explanatory memorandum has included detailed answers to a series of questions relating to the subsidiarity criteria (in the broad sense, including the principle of proportionality as set out in Article 3b of the Treaty and the conclusions of the Edinburgh European Council). The questions are as follows:

(a) What are the aims of the proposed action in terms of the Community's obligations?
(b) Does the proposed measure fall within the Community's exclusive competence or is competence shared with the Member States?
(c) What is the Community dimension of the problem (in other words, how many Member States are involved and what solution has been applied to date)?
(d) What is the most effective solution, given the means available to the Community and to Member States?
(e) What is the specific added value of the proposed Community action and the cost of failing to act?
(f) What means of action are available to the Community (recommendation, financial support, regulation, mutual recognition etc.)?
(g) Are uniform rules necessary, or would it be sufficient to adopt a directive laying down general objectives and leaving implementation to Member States?

Questions (c), (d) and (e) are not examined in the case of exclusive competence. When drawing the line between exclusive and shared competence, the Commission refers to the criteria outlined in its Communication of 27 October 1992.

Each proposal also includes a recital referring to the subsidiarity principle and taking account of the main elements of the answers given in the explanatory memorandum.

As indicated in its Communication of 27 October 1992 to Parliament and the Council, the Commission believes that, in the interests of openness, explanatory memoranda should be published with proposals in the Official Journal in future. National parliaments, ordinary citizens and interested parties would thus be aware of the detailed justification for the initiative in terms of subsidiarity, and could make their views known before the proposal was adopted. It might also be useful in certain cases to publish an assessment of the proposal's impact on business in general and small businesses in particular.

Detailed examination of the subsidiarity principle has already led to a reduction in the number of proposals put forward by the Commission in 1993 compared with previous years. Its legislative programme for 1993 was drawn up and discussed with Parliament in the light of the subsidiarity principle and contains fewer proposals than earlier programmes. At the Copenhagen European Council the Commission distributed a list of specific cases in which it had decided not to legislate or alternatively to reduce the intensity of its proposals. In future it will notify not only the Council and Parliament but also all interested parties (by publishing a notice in the C series of the Official Journal) of its reasons for not following up a proposal initially included in its legislative programme.

In addition, the Commission, as recorded in the conclusions of the Edinburgh Council, has declined to accept requests made by the Council at informal meetings that it should make proposals for directives. In the same vein, in order to avoid duplication, it has opposed Council resolutions asking it to draw up legislative proposals.

Lastly, several Commission proposals, notably those on deposit guarantees, animal welfare and foodstuffs, are being discussed in the Council and Coreper in terms of subsidiarity.

2. Withdrawal or revision of proposals

The Commission informed the Edinburgh European Council of its intention to withdraw or revise some twenty proposals which were not fully justified in terms of subsidiarity, with reference either to the need-for-action or the intensity criteria.

On 15 September 1993 Parliament adopted a resolution requesting that most of the proposals scheduled for withdrawal be retained.

The Commission has also begun a revision, based on a number of general principles, designed to simplify the proposals listed in the Edinburgh conclusions: takeover bids, common definition of the concept of Community shipowner, comparative advertising, labelling of footwear, liability of suppliers of services, protection of natural persons in relation to data processed via digital telecommunications networks.

Parliament has also given its opinion on proposals for revision, asking for the retention of texts that the Commission had quoted as examples of the revision of existing legislation.

The Commission has studied Parliament's 15 September resolution carefully and has made the withdrawals it felt were necessary. It is now revising the proposals requiring simplification.

The Commission may well announce the withdrawal of other proposals whose pertinence and utility have been challenged or which have been overloaded with detail in the course of the legislative process. It should be noted that in 1993 the Commission has withdrawn some 150 proposals which were technically outdated or politically obsolete.

3. Review of existing legislation

In Lisbon in June 1992 the European Council asked the Commission to draw up an overall report on the review of certain Community rules with a view to adapting them to the subsidiarity principle. In response to this request the Commission transmitted a memorandum to the Edinburgh European Council setting out the initial results of the review of existing legislation and giving a number of examples. In this way the Commission identified several families of existing rules and regulations for which it intends to propose a revision in 1993.

III. Work on the revision of existing legislation

It should be borne in mind that the Commission's work on the revision of Community legislation represents a second stage in an operation to simplify legislation. The first stage resulted from Community harmonization itself which, generally speaking, led to the abolition of a multitude of national instruments and rules and the elimination of decades of red-tape accumulated by the Member States.

A shining example was the introduction of a single administrative document which eliminated a thousand different forms at a stroke. This administrative document was itself abolished with the introduction of the temporary VAT arrangements on 1 January 1993.

The present review of existing Community legislation is an enormous task. Commission departments have scrutinized the families of rules and regulations for compliance with two of the subsidiarity criteria:

- What rules and regulations in areas of shared competence no longer pass the need-for-action test, on account of doubts about either the effectiveness, or the value added of action at Community level compared with action at national level?

- What rules and regulations in areas of shared competence fail the proportionality test (a) because they go into excessive detail, or (b) because they could be couched in a flexible type of instrument, such as a recommendation, code of conduct, agreements between the two sides of industry, mutual recognition, etc. rather than a binding legal instrument?

1. Precautions to be taken

A number of precautions were agreed for the purpose of this exercise:

- the acquis communautaire should not be called into question, i.e. under the pretext of revision, the debate should not be reopened in the Council and Parliament on the fundamental principles of Community policies, or on particular points of an instrument considered essential by one or other Member State;

- priority should be given to the review of old legislation; experience has shown that it is more easily revised than more recent instruments; as a rule, the Commission does not intend to propose amendments to legislation adopted within the past two years;

- the review should be limited to rules and regulations of a legislative nature applicable to firms and individuals; it should not extend to areas in which major changes are under consideration (e.g. cohesion).

2. Main considerations

The Commission has grouped the legislation to be revised under three headings.

(a) Rules and regulations to be recast

This involves modernizing and reordering all legislation with sufficient maturity to make it possible to distinguish the essential from the secondary in its operation. The accumulation of successive texts - not always consistent - to cover the entire sector necessitates the inclusion in a single instrument of general principles and important specific rules, particularly with regard to certainty as to the law and individual rights, and reduction of implementing rules to a single procedure. One example of this is the Customs Code adopted by the Council last year. The Commission is considering a similar recasting in the case of pharmaceutical products and the right of residence, for example. A clear distinction should be made between this and the customary legislative or declaratory consolidation exercise.

(b) Rules and regulations to be simplified

Recasting apart, experience has shown that simplification could prove necessary in the case of certain regulations since they contain excessive detail which could be covered by a national or regional instrument, or indeed by an international agreement. This is true in the case of the families of existing rules and regulations referred to in the Edinburgh conclusions. The Commission is planning to begin transmitting proposals for simplification of these rules and regulations to the Council. It has also identified other rules and regulations to be simplified e.g. takeover bids, indirect taxation, common organization of agricultural markets, etc.

(c) Rules and regulations to be repealed

Certain regulations should be repealed either because they are included in a recasting or because they have been superseded by the development of other techniques such as the "new approach" or mutual recognition.

3. Conditions for the success of the exercise

Care must be taken that revision does not develop into a free-for-all, in which the various parties, with no regard for consistency, would propose the revision or repeal of legislation for reasons of expediency.

The Commission would therefore draw the Council's attention to a number of general conditions on which the success of the revision exercise depends.

- however committed the Member States may be, attempts to simplify rules and regulations which do not satisfy the proportionality criterion run the risk of encountering resistance from national administrations which, because of a mutual lack of confidence, are anxious to obtain the most detailed regulations possible; the elimination of rules and regulations which do not meet the need-for-action criterion is proving even more difficult in the absence of an answer to the fundamental questions raised by subsidiarity, and particularly a consensus on areas of exclusive competence;

- an agreement on recasting with the Council and Parliament, along the lines of the agreement on consolidation which is in preparation, to ensure that examination of Commission proposals does not reopen discussions on points of substance going beyond the subsidiarity exercise or generate a plethora of amendments;

- the possibility of the Community actually exercising its external powers - in other words the Council accepting that the Community is competent to negotiate and conclude international agreements - where the Commission refrains from introducing internal legislation that would duplicate an international agreement;

- giving more weight to the principle of mutual confidence between Member States in areas which are from the health point of view sensitive, such as consumer protection and plant health inspections. The delegations which are most in favour of subsidiarity at a political level are often those which call for detailed harmonization at a legal level;

- a better use of the delegation of implementing powers to the Commission.

The Commission is still convinced that the real answer to the problem of complex rules lies in the introduction of a hierarchy of Community norms to be examined, as required by the Maastricht Treaty, at the 1996 Intergovernmental Conference.

The Commission also believes that once legislation has been revised it should be subjected to a new principle of legislative drafting to ensure that amending texts do not proliferate once again. In future, as is already the case in certain areas (e.g. directive on the liberalization of capital movements), any amendment (or addition) to a Council regulation must be included in a proposal for a single instrument containing the new provisions and the provisions retained and repealing the old text, it being understood that discussion would be confined to the new provisions. The effects of such a reform would be to:

- put an end to the coexistence of successive regulations calling for a codification exercise which is overtaken before long;

- stabilize the volume of permanent legislation, thanks to the combined effect of a 25% reduction as a result of the proposed repeal of certain instruments, and a smaller number of new proposals.

The Commission has looked carefully at the Franco-British list sent in June. It has reached the conclusion that sixteen of the twenty-two items listed should in fact be reviewed in one form or another. Its conclusions are set out in the attached memo. The Commission will also study the memorandum sent by the German authorities on 16 November and any other contributions it may receive.

Finally, the Commission would stress that in this report it has endeavoured to take the broadest possible look at all areas of Community legislation. It believes that only this overall approach can guarantee the efectiveness of the exercise.

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The present report reflects work in progress and does not rule out the possibility of further proposals for revision or withdrawal.

I. Rules and regulations to be recast

Certain rules and regulations set out in a number of instruments need to be recast and brought together in a single instrument.

1. Customs

The Community customs code represents a recasting of around 25 Council regulations and directives, 75 Commission regulations and directives and several hundred amending regulations and directives, all adopted since 1968. The recasting exercise involved simplifying and bringing all existing legislation together in two regulations:

- a Council Regulation of 12 October 1992, containing 253 articles; and
- a Commission Regulation, adopted in June 1993, comprising 915 implementing provisions.

The subsidiarity principle has been applied, using intensity or proportionality as the criterion rather than need for action since this is an area in which the Community clearly has exclusive competence. Repetitive or excessively detailed provisions have been replaced by a set of more general provisions, reinforcing the old legislation by structuring it into a single system, without changing the substance.

Recasting not only increases transparency but also produces a clearer division of powers between the Community and the Member States and between the Council and the Commission in the customs field (particularly in the case of Community transit arrangements). This enables each institution to concentrate exclusively on its main concern: basic legislation in the case of the Council and implementing rules in the case of the Commission.

Furthermore, the two regulations will serve as a useful frame of reference for non-member countries (notably the countries of Central and Eastern Europe) wishing to step up cooperation with the Community. Lastly, by significantly reducing the plethora of separate rules and regulations, the customs code will make it easier to analyse existing legislation in the context of the accession negotiations.

2. Right of residence

The right of residence for Community nationals is governed by ten Council directives and regulations adopted between 1968 and 1990 and by a 1970 Commission regulation. Initially, only those engaged in economic activity (employees and the self-employed) were granted the right of residence. Later however this was extended to other groups (pensioners, students and others not in gainful employment). Instruments governing the right to enter and leave Member States, the right of residence, types of residence permit and who qualifies for them, the rights of family members, exemptions for reasons of public order and other such matters, all use identical phrasing or, alternatively, refer to each other.

The fact that the rules are scattered between so many pieces of legislation makes it difficult for individuals to establish what

exactly their rights are at Community level. By contrast, national rules are usually set out in a single, coherent set of legislative instruments and regulations. Given the prospect of "European citizenship" introduced by the Maastricht Treaty, some provisions should be updated to take account inter alia of the dismantling of internal frontiers. The case law of the Court of Justice should also be incorporated into legislation. The whole recasting exercise should be completed in 1994.

3. Pharmaceutical products

As part of the single market project, the Community succeeded in harmonizing all health-related aspects of human and veterinary medicines, restoring protection for innovation and making the implementation of socio-economic measures more transparent. Thanks to an ongoing process of clarification and simplification, Community pharmaceutical legislation now sets the standard internationally and has enabled the Community to launch a major international pharmaceutical harmonization initiative involving the United States and Japan.
However, the Community's pharmaceutical rules are still laid down by a highly complex patchwork of instruments relating to the various aspects of medical and social protection, such as research and development tests, procedures and requirements concerning the marketing of new products, good manufacturing practice, labelling, advertising, patents, pricing and reimbursement through social security.

The rules, published by the Official Publications Office in seven volumes and a number of languages under the title "Rules governing Medicinal Products in the European Community", comprise around 20 Council regulations and directives, eight Commission regulations and Directives, two communications (on prices and parallel imports) and 50 or so explanatory notes for manufacturers on presentation of authorization files, testing and production.

The Community will also be introducing a common marketing-authorization system involving the European Agency for the Evaluation of Medicinal Products.

In this connection recasting would increase the degree of consistency and help put the main ideas behind subsidiarity into practice by:

- clarifying - particularly with regard to authorization and withdrawal - the difference between Commission decisions based on the opinion of the Medicinal Products Agency and decisions made by the national authorities and ensuring better coordination and hence increased consistency between decisions taken at Community and national level; and

- simplifying and updating basic concepts and clarifying terminology in the various Community languages, given the importance of terminology in this particular field, and eliminating needless repetitions of definitions and procedural overlaps, thus reducing the volume of regulations by more than a third.

Its entry into force could be arranged to coincide with the setting-up of the Agency, i.e. towards the end of 1994 or the beginning of 1995.

4. Competition

Most of the rules and regulations on competition (and state aids in particular) emanate from the Commission rather than the Council and take the form of guidelines and communications. Some of the guidelines have become extremely complex as a result of successive amendments to reflect economic developments or changes in common policies. To improve effectiveness and increase transparency, the Commission therefore intends to proceed to a gradual recasting of some of these guidelines once the customary detailed discussions have been held with national governments.

With regard to aid to the regions, the Commission plans to produce a comprehensive map of regions eligible for Community aid and for national regional aids.

As to the rules applicable to firms, the Commission intends to merge and streamline Regulation 2349/84 (block exemption for patent licensing agreements) and Regulation 556/89 (block exemption for know-how licensing agreements) in the course of 1994.

5. Trade mechanisms for agricultural products

The rules covering trade mechanisms (licences, refunds, levies, guarantees, etc.) need to be made more coherent. The legislation now includes instruments as diverse as horizontal regulations adopted by the Council, regulations on common market organizations, Council and Commission implementing rules, interpretative notices, judgments of the Court of Justice, etc.

This exercise, which will take a number of years to complete, could start with a review of export refunds and make it possible to clarify the rules and spell out the responsibilities of the various Community institutions, national intervention agencies and operators.

II. Simplification of rules and regulations

A. Families of rules and regulations referred to in the conclusions of the Edinburgh European Council

In advance of the Edinburgh European Council the Commission had identified several families of rules and regulations for review and has been scrutinizing them since early 1993 with a view to simplifying them.

1. Technical standards

The conclusions of the Edinburgh European Council state: "As far as technical standards are concerned, a series of directives embodying excessively detailed specifications could be streamlined and replaced, under the new approach to harmonization, by minimum requirements to be met by products circulating freely within the Community. The directives in question relate in the main to foodstuffs (preserves, natural mineral waters, honey, coffee extracts, fruit juices). The Commission will also propose that the scope of certain directives be clarified. Although adopted under the new approach to harmonization, these texts (the low-tension and machinery directives, for instance) present problems of overlapping."

(a) Foodstuffs

Application of the subsidiarity principle to foodstuffs legislation is being considered in two phases.

In the first phase, priority is being given to the two specific aspects identified in the conclusions of the Edinburgh European Council:

- rationalization of the "vertical" directives relating to chocolate products, jams, fruit juices, honey, sugars, coffee extracts, preserved milk and mineral waters;

- potential reduction of the number of specific directives to be adopted on foodstuffs for particular nutritional purposes covered by Directive 89/398/EEC.

Commission departments have begun consideration of the measures that might be taken to simplify the "vertical" Directives, notably to avoid possible overlaps or inconsistencies with general legislation applicable to foodstuffs, and to limit the scope of the texts to essential requirements for the categories of products concerned. Consultations have begun with the Member States and the industries concerned, the Commission's objective being to present appropriate proposals in the course of 1994.

However, in the case of the natural mineral waters Directive, it appears that a different approach should be followed, since the objective here is to harmonize essential requirements with a view to protecting public health.

The Commission has also initiated consultations with Member States on the potential reduction of the number of specific directives to be adopted on foodstuffs for particular nutritional purposes and hopes to present a proposal in the matter in the autumn of 1993.

In the second phase, the Commission is considering the feasibility of preparing a general framework directive on foodstuffs legislation, which will set out the general objectives of Community policy and seek to rationalize the specific provisions relating to additives, labelling etc. The Commission has already begun wide-ranging consultations on this issue.

(b) Simplifications under the "new approach"

In connection with the proposed "CE mark" directive, the Commission presented an amendment to the "low-tension" Directive to the Council to introduce procedures for evaluating conformity and marking under the new approach, so as to bring it into line with the "machinery" Directive.

The Commission gave CEN/Cenelec a mandate to supplement or modify existing harmonized standards bearing the essential requirements of the "machinery" Directive in mind.

The aim here is to establish a coherent framework of standards, which could be deemed to guarantee compliance with the essential requirements of both the "machinery" and the "low-tension" Directives.