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The Principle of Subsidiarity and the Environment in the European Union: Keeping the Balance of Federalism

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The Principle of Subsidiarity and the Environment in the European Union: Keeping the Balance of Federalism

Koen Lenaerts

Abstract

Part I of this Article traces the emergence of the principle of subsidiarity in the Community legal order, with some special reference to the environment. Part II analyzes the three paragraphs of Article 3b, again with particular emphasis on the environment. This Article concludes that “subsidiarity” will not stand in the way of the further development of Community environmental policy along the lines that it has been following so far.

ARTICLES

THE PRINCIPLE OF SUBSIDIARITY AND THE ENVIRONMENT IN THE EUROPEAN UNION: KEEPING THE BALANCE OF FEDERALISM

*Koen Lenaerts**

CONTENTS

Introduction.....	846
I. The Emergence of the Principle of Subsidiarity: From a Sound Management Rule to an Express Guarantee of the Proximity of Government.....	852
A. The "New Approach" to Harmonization of National Laws	856
B. The Environmental Policy of the Community ...	858
II. The Balance of Power: Legal Basis, Subsidiarity, and Proportionality	865
A. Legal Basis: Definition of the Community Power to Act	865
B. Subsidiarity: Assessment of the Need for Community Action	875
C. Proportionality: Determination of the Nature and Intensity of Community Action	882
Conclusion	893

INTRODUCTION

The significant amendments to the Treaty Establishing the European Economic Community ("Treaty of Rome"),¹ most recently codified in the Treaty on European Union ("TEU"),² sig-

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1. Treaty Establishing the European Economic Community, Mar. 25, 1957, 1973 Gr. Brit. T.S. No. 1 (Cmd.5179-II), 298 U.N.T.S. 3 (1958), *as amended by* Single European Act, O.J. L 169/1 (1987), [1987] 2 C.M.L.R. 741 [hereinafter SEA], *in* Treaties Establishing the European Communities (EC Off'l Pub. Office, 1987) [hereinafter EEC Treaty].

2. Treaty on European Union, Feb. 7, 1992, O.J. C 224/01 (1992), [1992] 1 C.M.L.R. 719, *reprinted in* 31 I.L.M. 247 (1992) [hereinafter TEU]. The changes to the

nify "a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen."³ This statement, in the second paragraph of Article A, reflects the delicate balancing act performed by the drafters of the TEU. On the one hand, *integration* was to be deepened, in particular, through an unprecedented extension of the powers conferred upon the European Community (or "Union").⁴ On the other hand, the confidence of the Member States, as well as of their subnational authorities and citizens, was to be maintained through the solemn guarantee of

EEC Treaty, *supra* note 1, made by the TEU, *supra*, were incorporated into the Treaty Establishing the European Community, Feb. 7, 1992, [1992] 1 C.M.L.R. 573 [hereinafter EC Treaty].

3. TEU, *supra* note 2, art. A, ¶ 2.

4. Besides introducing a "common foreign and security policy," *id.* art. J, and provisions on "[c]o-operation in the fields of justice and home affairs," *id.* art. K, the TEU extended the powers of the "European Community" (the word "Economic" was understandably deleted from the original EEC Treaty title, *see* EC Treaty, *supra* note 2) to aspects of the following fields:

- 1) citizenship of the Union, *id.* arts. 8-8e;
- 2) a common visa policy, *id.* art. 100c;
- 3) economic and monetary policy (leading to introduction of single currency), *id.* arts. 2, 3a, 102a-109m;
- 4) education, *id.* art. 126;
- 5) culture, *id.* art. 128;
- 6) public health, *id.* art. 129;
- 7) consumer protection, *id.* art. 129a;
- 8) trans-European networks (in areas of transport, telecommunications, and energy infrastructures), *id.* arts. 129b-129d;
- 9) industry, *id.* art. 130;
- 10) development cooperation, *id.* arts. 130u-130y;
- 11) social policy matters covered by the Protocol on Social Policy, TEU, *supra* note 2, Protocol on Social Policy. The Protocol, annexed by the TEU to the EC Treaty, forms, in accordance with Article 239 of the EC Treaty, "an integral part [of the EC Treaty]." EC Treaty, *supra* note 2, art. 239. The same applies to an agreement within the protocol. *See* TEU, *supra* note 2, Agreement on Social Policy Concluded between the Member States of the European Community with the Exception of the United Kingdom of Great Britain and Northern Ireland.

In addition, the scope of some pre-existing Community powers has been widened through the TEU, *inter alia*, in the areas of: a) vocational training, EEC Treaty, *supra* note 1, art. 128, *as replaced by* EC Treaty, *supra* note 2, art. 127; b) economic and social cohesion, SEA, *supra* note 1, arts. 130a-130e, *amending* EEC Treaty, *supra* note 1, *as replaced by* EC Treaty, *supra* note 2; c) research and technological development, SEA, *supra* note 1, arts. 130f-130p, *amending* EEC Treaty, *supra* note 1, *as replaced by* EC Treaty, *supra* note 2; and d) the environment, SEA, *supra* note 1, arts. 130r-130t, *amending* EEC Treaty, *supra* note 1, *as replaced by* EC Treaty, *supra* note 2.

the *proximity* of government. In other words, integration was not to lead to undue centralization.

The question then became whether, and to what extent, centralization was necessary for integration to work, without threatening the proximity of government. Article B⁵ of the TEU, refers, in this respect, to a precise test. It subjects the pursuit of all of the objectives of the Union - i.e., the objectives to be pursued through the European Communities (the "main pillar" of the Union), the common foreign and security policy (the "second pillar"), and the cooperation in the fields of justice and home affairs (the "third pillar") - to the duty of "respecting" the principle of subsidiarity, as defined in Article 3b of the EC Treaty. Thus, Article 3b is called upon to arbitrate the tension between integration and proximity in all matters dealt with by the Union and its Member States, although only justiciable in the European Court of Justice, within the scope of application of the EC Treaty, and in relation to the powers of the European Community.⁶ The relevant part of Article 3b, contained in paragraph 2, reads as follows:

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.⁷

The first paragraph of Article 3b states that "[t]he Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein"⁸ (the *legal basis* requirement). The third paragraph declares that "[a]ny action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty"⁹ (the *proportionality* requirement). As can be seen, all three paragraphs of Article 3b aim at containing the actions of the Community. The first paragraph refers to the division of powers between the Community and the Member States, in which the latter remain the ordinary bearers

5. TEU, *supra* note 2, art. B.

6. *See id.* art. L.

7. EC Treaty, *supra* note 2, art. 3b, ¶ 2.

8. *Id.* ¶ 1.

9. *Id.* ¶ 3.

of sovereignty, and hence of public authority, while the Community has only the powers entrusted to it in the Treaty.¹⁰ The two other paragraphs place limitations on the exercise of the powers held by the Community, meaning that the Community cannot fully exercise the powers conferred upon it (i.e., as long as it does not act *ultra vires*). The principles of subsidiarity and proportionality operate as limits to be observed *intra vires* when the Community undertakes an action authorized under one of the enumerated powers.

Because the second and third paragraphs of Article 3b have similar functions, both setting limits *intra vires* on the exercise of Community powers, it is difficult to sharply distinguish between subsidiarity and proportionality. This difficulty is aggravated by the fact that the second paragraph, which applies to the non-exclusive powers of the Community,¹¹ determines not only the

10. A reference to this basic rule is found in Article 4(1) of the EC Treaty: "[t]he tasks entrusted to the Community shall be carried out by the following institutions: a European Parliament, a Council, a Commission, a Court of Justice, a Court of Auditors. Each institution shall act within the limits of the powers conferred upon it by this Treaty." *Id.* art. 4(1).

11. The introductory words of the second paragraph of Article 3b limit the application of the principle of subsidiarity to the "areas which do not fall within [the] exclusive competence" of the Community. *Id.* art. 3b, ¶ 2. The application of the principle of subsidiarity to areas which fall within the "exclusive competence" of the Community would be meaningless, because "the existence of such competence arising from a Treaty provision excludes any competence on the part of Member States which is concurrent with that of the Community." See Opinion 2/91, [1993] E.C.R. I-1061, I-1076, ¶ 8, [1993] 3 C.M.L.R. 800, 815. In other words, the Community should not respect the principle of subsidiarity as a limit *intra vires* set to the exercise of its powers in order to leave unaffected the residual powers of the Member States on the basis of possibly achieving the objectives of the proposed Community action in a sufficient manner, since such residual powers no longer exist as a result of the Treaty provision stating the Community's competence. The latter has been affirmed by the Court of Justice with respect to Article 113 of the EC Treaty. See Opinion 1/75, [1975] E.C.R. 1355, [1976] 1 C.M.L.R. 85; *Donckerwolcke v. Procureur de la République* (Preliminary Ruling), Case 41/76, [1976] E.C.R. 1921, 1937, ¶ 32, [1977] 2 C.M.L.R. 535, 552. It has also been affirmed with respect to Article 102 of the Act of Accession of 1972. See *Commission v. United Kingdom*, Case 804/79, [1981] E.C.R. 1045, 1072-73, ¶¶ 17, 18, [1982] 1 C.M.L.R. 543, 570. However, when the exclusive nature of the Community's competence does not flow from the provisions of the Treaty but depends "on the scope of the measures which have been adopted by the Community institutions for the application of those provisions and which are of such a kind as to deprive the Member States of an area of competence which they were able to exercise previously on a transitional basis," the principle of subsidiarity applies to determine "the scope of the measures [to be] adopted by the Community institutions." Opinion 2/91, [1993] E.C.R. at I-1077, ¶ 9, [1993] 3 C.M.L.R. at 816. The principle will then be able to perform its function of shielding the Member States' residual powers against preemption by Community ac-

conditions that must be met "in accordance with the principle of subsidiarity" for the Community to be able to take *some* action under one of its powers ("only if"), but also indicates the permissible *extent* of such action ("and in so far as"). This latter aspect of the second paragraph obviously covers an element of proportionality whose proper object it is, according to the third paragraph, to keep the exercise of *all* Community powers (exclusive and non-exclusive powers) within reasonable bounds. Further analysis will show how this aspect of proportionality, incorporated into the principle of subsidiarity, is to be related to the general principle of proportionality, stated in the third paragraph of Article 3b.

At this stage, it is sufficient to emphasize that the principle of subsidiarity does not reorganize the division of powers between the Community and the Member States. The status of these relations continues to flow solely from the several Treaty articles conferring specific or non-specific powers¹² upon the Community (the first paragraph of Article 3b merely confirms the *acquis communautaire* on this point). Compliance with the principle of subsidiarity was, nevertheless, intended to have some lateral impact on the dividing line between the actual Community powers and the residual powers of the Member States.¹³ This is why "subsidiarity" has been developed as a "prin-

tion. It is indeed only when the exclusive nature of the Community's competence flows from the constitution itself that Member States lose their residual powers, and thus, any interest in defending such powers, either through the operation of the principle of subsidiarity or otherwise.

12. The specific powers of the Community are referred to in the first paragraph of Article 3b as "the powers conferred upon [the Community] by this Treaty" and cover the various subject-matters dealt with throughout the EC Treaty. See EC Treaty, *supra* note 2, art. 3b. The non-specific powers of the Community must be related to "the objectives assigned to [the Community]" and are governed by the conditions set forth in Article 235 of the EC Treaty. *Id.*; see *id.* art. 235.

13. This is due to the non-exclusive nature of almost all Community powers, as derived from several Treaty provisions. Such powers can become "exclusive" to the extent they are exercised. See Opinion 2/91, [1993] E.C.R. at I-1077, ¶ 9, [1993] 3 C.M.L.R. at 816. This is nothing else than preemption of the residual powers of the Member States by Community action. See M. Waelbroeck, *The Emergent Doctrine of Community Pre-emption-Consent and Re-delegation*, in II COURTS AND FREE MARKETS: PERSPECTIVES FROM THE UNITED STATES AND EUROPE 548, 570 (Terrance Sandalow & Eric Stein, eds. 1982); E.D. Cross, *Pre-emption of Member State Law in the European Economic Community: A Framework for Analysis*, 29 C.M.L. REV. 447 (1992).

ciple"¹⁴ of the European Community, with a pace (and a visibility), parallel to the recognition of the new, non-exclusive Community powers (through successive Treaty amendments), especially when the exercise of these powers is to take place on the basis of a qualified majority vote within the Council combined with an increased co-legislative role for the European Parliament.¹⁵

Consequently, Member States lose the right to veto Community action under the new powers and feel the need to insert an expressly protective clause into the European Community Treaty ("EC Treaty").¹⁶ The principle of subsidiarity constitutes, for them, a judicially enforceable mechanism of self-defense against what they perceive as the risk of excessive use of non-exclusive Community powers, preempting their own residual powers in ar-

14. Article 3b belongs to "Part One" of the EC Treaty, entitled "Principles." See EC Treaty, *supra* note 2, arts. 1-7c.

15. The SEA introduced an article that addressed cooperation between the Council and the Parliament. SEA, *supra* note 1, art. 149, amending EEC Treaty, *supra* note 1, as replaced by EC Treaty, *supra* note 2, art. 189c. This gave the Parliament the right to a real dialogue with the Commission and the Council, which included the possibility to weigh on the outcome of the decision-making through the proposal of amendments to the Council's draft decision ("common position"). After acceptance by the Commission, the amendments could be enacted into law by the Council, acting by a qualified majority. The TEU strengthened the role of the Parliament even further through the introduction of the so-called "co-decision" between the Council and the Parliament. This provides for extensive concertation between these two institutions through a "Conciliation Committee." The Parliament has the right, in case of persistent disagreement, to reject the proposed act "by an absolute majority of its component members." EC Treaty, *supra* note 2, art. 189b(2), ¶ 3(c). After the TEU, Article 189c of the EC Treaty ("cooperation") applies, *inter alia*, to: transport, *id.* art. 75; several aspects of the economic and monetary policy, *id.* arts. 102a-109m; vocational training, *id.* art. 127(4); some aspects of the establishment and development of trans-European networks, *id.* art. 129d, ¶ 3; implementing decisions relating to the European Regional Development Fund, *id.* art. 130e; some aspects of the policy on research and technological development, *id.* art. 130o, ¶ 2; the environment (in general), *id.* art. 130s(1); and development cooperation, *id.* art. 130w(1). Whereas, Article 189b of the EC Treaty ("co-decision") applies, *inter alia*, to: freedom of establishment, *id.* art. 54(2); the mutual recognition of diplomas, certificates, and other evidence of formal qualifications, *id.* art. 57(1)-(2); the internal market, *id.* art. 100a(1); education, *id.* art. 126(4), para. 1; public health, *id.* art. 129(4), para. 1; consumer protection, art. 129a(2); some aspects of the establishment and development of trans-European networks, *id.* art. 129d, ¶ 1; and "general action programmes setting out priority objectives to be attained" in the area of the environment, *id.* art. 130s(3).

16. See Koen Lenaerts & Patrick van Ypersele, *Le principe de subsidiarité et son contexte: étude de l'article 3B du traité CE*, 30 CAHIERS DE DROIT EUROPÉEN 3, 3-7 (1994); George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 332 (1994) (focusing on Part I).

eas covered by Community action.¹⁷ In this sense, the principle of subsidiarity serves as a substitute for the political safeguards protecting the Member States' residual powers, which have largely become obsolete.

Part I of this Article traces the emergence of the principle of subsidiarity in the Community legal order, with some special reference to the environment. Part II analyzes the three paragraphs of Article 3b, again with particular emphasis on the environment. This Article concludes that "subsidiarity" will not stand in the way of the further development of Community environmental policy along the lines that it has been following so far.

I. *THE EMERGENCE OF THE PRINCIPLE OF SUBSIDIARITY:
FROM A SOUND MANAGEMENT RULE TO AN
EXPRESS GUARANTEE OF THE PROXIMITY
OF GOVERNMENT*

The expression, "principle of subsidiarity," was introduced for the first time into the EC Treaty by the TEU. This does not mean, however, that the plain "common-sense"¹⁸ idea that government should be no more centralized than is strictly necessary for it to achieve the objectives assigned to its powers did not exist at earlier stages.¹⁹ Indeed, the Treaty of Rome, in its 1957 original version, incorporated this idea when shaping the legislative, executive, and judicial powers of the Community.

First, the "directive" must be used in several cases where the

17. Cf. John A. Usher, *Maastricht and English Law*, 14 *STATUTE L. REV.* 28, 38-40 (1993).

18. See Communication on the principle of subsidiarity, adopted by the Commission on 27 October 1992, for transmission to the Council and Parliament. 25 *E.C. BULL.*, no. 10, at 116 (1992).

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

Id. at 118.

19. See J. Mertens de Wilmars, *Du bon usage de la subsidiarité*, 2 *REVUE DU MARCHÉ UNIQUE EUROPÉEN* 193 (1992); P.J.G. Kapteyn, *Community Law and the Principle of Subsidiarity*, 2 *REVUE DES AFFAIRES EUROPÉENNES* 35, at 38-39 (1991). But see A.G. Toth, *The Principle of Subsidiarity in the Maastricht Treaty*, 29 *COMMON MKT. L. REV.*, 1079, 1080-86 (1992).

impact of Community *legislation* on sensitive aspects of national law (resting, at times, on a long standing tradition) is potentially great. Such cases include the harmonization of national laws that "directly affect the establishment or functioning of the common market"²⁰ or "the mutual recognition of diplomas, certificates and other evidence of formal qualifications."²¹ As is well known, "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."²² It is also well known, however, that Member States often did not play the game of the directive, especially in a setting of unanimous voting within the Council, when they used their veto right in order to obtain a perfectly detailed text.²³ As a result, the objective of the Community legislation, drafted in general terms, to be complemented by further policy choices made at the national (or sub-national) level to achieve the outcome stated in that legislation, has repeatedly been frustrated. At the heart of this phenomenon lies the distrust of Member States, *vis-à-vis* one another, due to the fact that they may not implement the directive with the same faithfulness. Consequently, some Member States will bear the costs of implementation (political, economic, social, environmental, etc.), to a far greater extent than others.²⁴

In contrast, some directives were deliberately kept rather vague, making it extremely difficult to monitor their correct implementation. Thus, according to some commentators, many of the pre-SEA directives on the environment, based on Articles 100 or 235 of the EEC Treaty, both of which require unanimous voting within the Council, have passed the obstacle of the veto

20. EC Treaty, *supra* note 2, art. 100.

21. *Id.* art. 57(1).

22. *Id.* art. 189, ¶ 3.

23. In its 1992 Communication, *supra* note 18, the Commission noted:

In practice, of course, the distinction between directive and regulation has become blurred Be that as it may, the directive no longer enjoys any preference over the regulation and, when it is used, it is generally as detailed as a regulation and leaves hardly any margin of manoeuvre for transposal.

25 E.C. BULL., *supra* note 18, at 116, 123(2)(3).

24. The Commission referred to "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." Commission Report to the European Council on the Adaptation of Community Legislation to the Subsidiarity Principle, COM (93) 545, at 7 (Nov. 1993) [hereinafter Commission Report to the European Council].

right held by each Member State because of the "important implementation gaps."²⁵ Although all of this may leave the impression that directives run the risk of regulating either too much or too little, the fact remains that, conceptually, the directive is a legislative instrument intended to avoid unnecessary regulatory density at the Community level.

Second, the *execution* of Community law is, to an important extent, entrusted to the Member States. The first sentence of the first paragraph of Article 5 of the Treaty of Rome states as one of the "principles" of the European Community that "Member States shall take all appropriate measures, whether general or particular, to ensure fulfillment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community."²⁶ In accordance with this provision, the system of *administration communautaire indirecte* has been generally applied in the most diverse fields of legislation, where the Community leaves it to the national administrations to implement and enforce its regulatory schemes.²⁷ From the beginning, the environment has been one of these fields.

Third, there is the decentralization of the judiciary, with Article 177 of the Treaty of Rome organizing the procedure of requests from national courts to the Court of Justice for preliminary rulings on the interpretation of Community law or on the validity of acts of Community institutions. The mainstream judicial enforcement of Community law, if need be, against Member State authorities,²⁸ thus takes place in the national courts, while the role of the Court of Justice is limited to what is necessary to guarantee the effectiveness and uniform application of that law.²⁹ The system essentially relies on the initiative of private parties and the authority of national courts. The Court of Justice

25. Richard B. Stewart, *Environmental Law in the United States and the European Community: Spillovers, Cooperation, Rivalry, Institutions*, U. CHI. LEGAL F. 41, 48-49 (1992).

26. EC Treaty, *supra* note 2, art. 5, ¶ 1 (substantially unchanged from EEC Treaty, *supra* note 1). See generally John T. Lang, *Community Constitutional Law: Article 5 of the EEC Treaty*, 27 COMMON MKT. L. REV. 645 (1990).

27. For more details, see Koen Lenaerts, *Regulating the Regulatory Process: 'Delegation of Powers' in the European Community*, 18 EUR. L. REV. 23, 27-33 (1993).

28. EC Treaty, *supra* note 2, art. 177 (substantially unchanged from EEC Treaty, *supra* note 1); see René Joliet, *L'article 177 du traité CEE et le renvoi préjudiciel*, 31 RIVISTA DI DIRITTO EUROPEO 591, at 597 (1991).

29. See Koen Lenaerts, *Form and Substance of the Preliminary Rulings Procedure*, in LIBER AMICORUM H.G. SCHERMERS 355-80 (Deirdre Curtin & Ton Heukels eds., forthcoming 1994).

has consistently developed that system since it held in its 1963 judgment of *Van Gend en Loos v. Nederlandse Administratie der Belastingen*³⁰ that "the vigilance of individuals concerned to protect their rights amounts to an effective supervision in addition to the supervision entrusted by Articles 169 and 170 to the diligence of the Commission and of the Member States."³¹

The Court advanced this approach most forcefully in 1991, in *Francovich v. Italy*,³² where it determined that each Member State must create an action for damages against itself when the Member State does not fulfill its obligation to implement a directive correctly, thereby harming the interests of private parties who would have drawn rights from the directive had it been correctly implemented.³³ In fact, the ruling contains a general principle of Member States' liability for harm caused by their infringement of Community law (that is, other than the non-implementation or incorrect implementation of directives) under conditions to be specified in future Court decisions.³⁴ It seems likely that future actions for damages in the environmental field will help significantly in elaborating these conditions. This is es-

30. *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, Case 26/62, [1963] E.C.R. 1, [1963] C.M.L.R. 105.

31. *Id.* at 13, [1963] C.M.L.R. at 130.

32. *Francovich v. Italy*, Joined Cases C-6/90 and C-9/90, [1991] E.C.R. I-5357, [1993] 2 C.M.L.R. 66.

33. *Id.*

34. Cases now pending before the Court are:

(a) *Regina v. Secretary of State for Transport ex parte Factortame and others*, Case C-48/93 [hereinafter *Factortame III*]. In this case, the High Court of England and Wales asks the Court of Justice whether the United Kingdom is liable, under Community law, for the harm caused to private parties as a result of the infringement of Articles 5, 7, 52, and 221 of the EEC Treaty. See *Regina v. Secretary of State for Transport ex parte Factortame, Ltd. (No. 2)*, Case C-221/89, [1991] E.C.R. I-3905, [1991] 3 C.M.L.R. 589, [hereinafter *Factortame II*]; *Commission v. United Kingdom*, Case C-246/89, [1991] E.C.R. I-4585, [1991] 3 C.M.L.R. 706; and

(b) *Brasserie du Pêcheur S.A. v. Federal Republic of Germany* represented by the Minister of Health, Case C-46/93. In this case, a German court asked the Court of Justice whether the Federal Republic of Germany is liable, under Community law, for the harm caused to a French brewery, prevented for years from selling beer in Germany as a consequence of the "Reinheitsgebot," which the Court held to be contrary to Article 30 of the Treaty of Rome in its judgment. See *Commission v. Germany*, Case 178/84, [1987] E.C.R. 1227, [1988] 1 C.M.L.R. 780. In both of these cases, the "fault" of the Member State consists of a breach of directly effective provisions of the Treaty. The Court of Justice will have to indicate to what extent the conditions applying to State liability, under Community law, in case of non-implementation or incorrect implementation of a directive, can be transposed to this less specific kind of infringement of Community law by Member States.

pecially so because, as Part II illustrates, liability actions may be a proportional means of monitoring and enforcing the implementation of European environmental law without having to create an overcentralized, Community-wide bureaucracy.

Substantive Community policies were also affected by the principle of subsidiarity before the principle was expressly incorporated in the EC Treaty. Subsidiarity then operated as a mediating concept between integration and proximity. It could require more integration, when that appeared necessary for efficiency, or more proximity, when increased centralized regulation would not help achieve objectives more efficiently. Examples include: (a) the so-called "new approach" to harmonization of national laws, and (b) Community environmental policy.

A. *The "New Approach" to Harmonization of National Laws*

Regarding harmonization of national laws, the Community, through its political processes, sought for almost three decades to create uniform legislation based on Article 100 of the Rome Treaty. It exhausted itself, however, by considering the smallest details of the subjects at issue. The output was wholly unsatisfactory, with the greatest obstacles to the common market remaining because some Member States were unhappy with the necessary compromises.

In 1979, in *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein* ("*Cassis de Dijon*"),³⁵ the Court of Justice paved the way to a more realistic approach. It launched the concept of mutual recognition by Member States of each other's laws, even where their content differs. Member States are thus, in principle, required to authorize, in their territory, the marketing of goods and services lawfully introduced into the market of another Member State.³⁶ An exception is granted where a Member State's own national provisions, containing specific marketing conditions for such goods and services (conditions which apply equally to domestic and out-of-state goods and services), "may be

35. *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein*, Case 120/78, [1979] E.C.R. 649, [1979] 3 C.M.L.R. 494 [hereinafter *Cassis de Dijon*].

36. The basic parallel between goods and services rests on another judgment of the Court. See *Criminal Proceeding against Alfred John Webb*, Case 279/80, [1981] E.C.R. 3305, [1982] 1 C.M.L.R. 719.

recognized as being necessary in order to satisfy mandatory requirements.³⁷ The protection of the environment is such a mandatory requirement.³⁸ Thus, the Court accepted as compatible with the free movement of goods Denmark's deposit-and-return system for empty beer and soft drink containers, because this obligation "is an indispensable element of a system intended to ensure the re-use of containers and therefore appears necessary to achieve the [mandatory requirement of environmental protection]."³⁹ Therefore, the restrictions that it imposes on the free movement of goods could not be regarded as disproportionate.⁴⁰

Building upon the Court's jurisprudence, the Commission's 1985 White Paper⁴¹ on the internal market advocated a new approach to harmonization through Community legislation. Harmonization concerns only the base-level requirements for goods and services to be marketable everywhere in the Community. Beyond that, Member States are obliged to accept differences among their national laws and to consider these laws equivalent, if not in their actual substance, at the very least, in their actual

37. *Cassis de Dijon*, [1979] E.C.R. at 662, ¶ 8, [1979] 3 C.M.L.R. at 508-09. Such "mandatory requirements" relate "in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer." *Id.* In the field of the freedom to provide services, the application of professional rules could be added to the list. See *Ministère Public v. Van Wesemael and Follachio*, Joined Cases 110/78 and 111/78, [1979] E.C.R. 35, [1979] 3 C.M.L.R. 87. In addition, the elimination of possible abuse in the provision of manpower. *Webb*, [1981] E.C.R. at 3325, ¶¶ 17-19, [1982] 1 C.M.L.R. at 719.

38. *Commission v. Denmark*, Case 302/86, [1988] E.C.R. 4607, 4630, ¶ 9, [1989] 1 C.M.L.R. 619, 631.

39. *Id.* at 4630, ¶ 13, [1989] 1 C.M.L.R. at 631. However, the Danish legislation distinguished between "approved containers" that can be returned to any retailer of beverages and "non-approved containers" that can be returned only to the retailer who sold the beverages. The first category of returnable containers could be used without any limitation. The quantity of beer and soft drinks marketed by a single producer in the second category of containers was, however, limited to 3,000 hectoliters a year. The Court found that this latter aspect of the Danish legislation was not necessary to achieve the mandatory requirement of protection of the environment. See *id.* at 4631-32, ¶¶ 18-22, [1989] 1 C.M.L.R. at 631-32; Ludwig Krämer, *Environmental Protection and Article 30 EEC Treaty*, 30 COMMON MKT. L. REV., 111, 120-27 (1993).

40. *Denmark*, [1988] E.C.R. at 4630, ¶ 13, [1988] 1 C.M.L.R. at 631. For a similar outcome in another context, see *Commission v. France*, Case 188/84, [1986] E.C.R. 419, Common Mkt. Rep. (CCH) [1985-86] 14,285 (relating to French technical and safety standards for woodworking machines).

41. Commission of the European Communities, *Completing the Internal Market: White Paper from the Commission to the European Council*, COM (85) 310 (June 1985).

outcome.⁴²

As a result, the density of legislation at the Community level is bound to decrease, which in turn will diminish the impact of such legislation on the Member States' laws.⁴³ But the "survival" of these laws will no longer threaten the Community's main objective—the establishment of the internal market. This is achieved through interaction between the mutual recognition of national laws and *some* central legislation. Legislation in the fields of "health, safety, environmental protection and consumer protection, will take as a base a high level of protection"⁴⁴ and will be adopted by the Council acting by a qualified majority on a proposal from the Commission in "co-decision" with the European Parliament.⁴⁵

B. *The Environmental Policy of the Community*

It is in the area of the environment that the principle of subsidiarity (without being named as such) has found its first expression in the Treaty, but in terms rather different from those

42. See A. Mattera, *Subsidiarité, reconnaissance mutuelle et hiérarchie des normes européennes*, 1 REVUE DU MARCHÉ UNIQUE EUROPÉEN 7, 7-11 (1991).

43. This result is a converse consequence of the preemption mechanism. See *supra* note 15.

44. EC Treaty, *supra* note 2, art. 100a(3).

45. *Id.* art. 100a(1).

[In addition, i]f, after the adoption of a harmonisation measure by the Council acting by a qualified majority, a Member State deems it necessary to apply national provisions on grounds of major needs referred to in Article 36, or relating to protection of *the environment* or the working environment, it shall notify the Commission of these provisions.

The Commission shall confirm the provisions involved after having verified that they are not a means of arbitrary discrimination or a disguised restriction on trade between Member States.

Id. art. 100a(4) (emphasis added). In case of conflict about the application of this provision, the Commission or a Member State may bring the matter directly before the Court of Justice. See James Flynn, *How Will Article 100a(4) Work? A Comparison with Article 93*, 24 COMMON MKT. L. REV. 689 (1987). For the first time, Article 100a(4) has been used to authorize German legislation banning the use of pentachlorophenol. *Agence Europe*, No. 5748, June 12, 1992, at 13. The decision by which the Commission "confirmed" the more stringent German provisions, on the basis of Article 100a(4), was challenged in the Court of Justice by France in an action for annulment brought against the Commission pursuant to Article 173 of the EC Treaty. *France v. Commission*, Case C-41/93 (Eur. Ct. J. May 17, 1994) (not yet reported). On January 26, 1994, Advocate-General Giuseppe Tesouro delivered his opinion in the case and proposed to the Court to annul the contested decision for lack of statement of reasons in breach of Article 190 of the EC Treaty. The Court followed this opinion and, consequently, quashed the decision in a still unreported judgment. *Id.*

in the second paragraph of Article 3b. Article 130r(4) of the EEC Treaty (inserted by the SEA) reads as follows:

The Community shall take action relating to the environment to the extent to which the objectives referred to in paragraph 1 [(i) to preserve, protect and improve the quality of the environment; (ii) to contribute towards protecting human health; (iii) to ensure a prudent and rational utilization of natural resources] can be attained better at Community level than at the level of the individual Member States. Without prejudice to certain measures of a Community nature, the Member States shall finance and implement the other measures.⁴⁶

This provision was repealed by the TEU because of the general applicability of the second paragraph of the new Article 3b to all non-exclusive powers of the Community.

The "subsidiarity" test of Article 130r(4) prescribes a comparative enquiry into the efficiency of the Community and the individual Member States in attaining the objectives of European environmental policy (which the Member States must attempt to achieve in accordance with their general duty of loyalty towards the Community, as it flows from Article 5 of the Treaty of Rome). This test does not appear to be particularly protective of the prerogatives of the Member States (or of their subnational authorities); rather, it ensures that the one best placed to act, will act.⁴⁷ In that sense, the test can be seen as a more elaborate version of the criterion that, before the adoption of the SEA, Community environmental legislation had to meet under Article 235.⁴⁸ The "necessary" character of Community action was judged by the Council acting unanimously on a Commission proposal and after consulting the European Parliament, a decision-making procedure that left each Member State with a veto. Even though the Treaty had "not provided the necessary powers"

46. EEC Treaty, *supra* note 1, art. 130r(4).

47. See L.J. Brinkhorst, *Subsidiarity and European Community Environmental Policy*, EUR. ENVTL. L. REV. 16, 17-18 (1993). Cf. Wolfgang Kahl, *Möglichkeiten und Grenzen des Subsidiaritätsprinzips nach Art. 3B EG-Vertrag*, 118 ARCHIV DES ÖFFENTLICHEN RECHTS 414, 422-23 (1993).

48. EC Treaty, *supra* note 2, art. 235 ("action by the Community should prove necessary to attain") (emphasis added). The Court of Justice ruled that "Article 235 . . . does not create an obligation, but confers on the Council an option." *Commission v. Council*, Case 22/70, [1971] E.C.R. 263, 283, ¶ 95, [1971] C.M.L.R. 335, 362 [hereinafter *AETR* case]. This statement confirms the responsibility of the political process in determining the necessary character of Community action based on Article 235.

(the word "environment" appeared nowhere in the Treaty), the potential exercise of a Member State's veto right did not stand in the way of the enactment of an extensive range of water and air quality directives.⁴⁹ These directives rested on the political judgment, shared by all the Member States, that action by the Community was "necessary" to take care of environmental issues that could not be efficiently addressed by the individual Member States. Furthermore, the directive was chosen as the appropriate normative instrument, which underscored the executive powers of the Member States.⁵⁰ Thus, to a political judgment (relating to the "necessity" of Community action) corresponded political safeguards (unanimity in the Council and implementation by the Member States).

The SEA did not really upset this balance by inserting a title relating to the environment in the part of the Treaty enumerating the several specific Community powers. The political safeguards were indeed confirmed in the new Articles 130r and 130s of the EEC Treaty. First, the requirement of Council unanimity (coupled with a mere consultation of the European Parliament) continued to apply.⁵¹ However, the Council could, by unanimous vote, "define those matters on which decisions are to be taken by a qualified majority."⁵²

Second, the principle of Member State implementation of Community environmental legislation was expressly stipulated in the last sentence of Article 130r(4). Member States received no special protective clause, but rather, a sound management rule which entrusted a policy matter to that level of government best positioned to achieve recognized common objectives. It has therefore been contended that the subsidiarity provision, despite its insertion in a Treaty containing justiciable provisions, is not judicially enforceable because the criterion of "better" is too indefinite.⁵³ At the very least, it can be argued that the Court would extend to the political judgment inherent in the operation of the first sentence of Article 130r(4), the deferential attitude that it has always adopted towards the appraisal by the

49. For an overview of this legislation, see Rolf Wägenbaur, *Regulating the European Environment: The EC Experience*, U. CHI. LEGAL F. 17, 27-28 (1992).

50. *Id.* at 20.

51. EEC Treaty, *supra* note 1, art. 130s, ¶ 1.

52. *Id.* art. 130s, ¶ 2.

53. LUDWIG KRÄMER, EEC TREATY AND ENVIRONMENTAL PROTECTION 71-77 (1990).

Council of the "necessary" character of Community action based on Article 235.⁵⁴

In short, one can say that Articles 130r to 130t in their SEA version did not upset the constitutional balance of powers laid down in Article 235. They simply expressed a clear commitment to environmental policy and provided the Community and the Member States with some substantive guidance as to the principles which should guide such policy. Although the TEU functions similarly, but in a much more elaborate manner, this is the first time that the constitutional balance of powers has also been altered. These elements will now be examined.

The TEU gives prominence to environmental considerations. Already in the seventh recital of its preamble, Member States affirm that they are "determined to promote economic and social progress for their peoples, within the context of the accomplishment of the internal market and of reinforced cohesion and environmental protection."⁵⁵ Thereafter, the TEU amends Article 2 of the EC Treaty to state that the general "task" of the Community is "to promote throughout the Community a harmonious and balanced development of economic activities, sustainable and non-inflationary growth respecting the environment."⁵⁶ Furthermore, it adds to the list of "activities of the Community" enumerated in Article 3: "(k) a policy in the sphere of the environment."⁵⁷ Finally, Articles 130r to 130t have been amended in several respects relevant to our analysis.

An attempt is made throughout Articles 130r to 130t to reconcile the tension between separate forces. On the one hand, there is a need for a uniform and global approach at the central level in order to effectively protect the environment, especially in view of the many kinds of interstate spillovers. On the other hand, there is the desire of Member States and their sub-national authorities ("regions") to preserve their residual power to react to local situations which must be dealt with in a specific way. The balance was established as follows.

54. See *Hauptzollamt Bremerhaven v. Massey-Ferguson*, Case 8/73, [1973] E.C.R. 897.

55. TEU, *supra* note 2, pmb., para. 7.

56. *Id.* art. G.

57. *Id.*

First, Article 130r(1) introduces a new formula⁵⁸ which leaves room for the responsibility of the Member States (and their subnational authorities) for the achievement of the environmental objectives listed in the Treaty. It reads: "Community policy on the environment shall contribute to pursuit of the following objectives: "[the first three objectives quoted are the same as in the SEA version of the Article, the fourth one is new] - promoting measures at international level to deal with regional or worldwide environmental problems."⁵⁹

Second, when the Community acts, it is obliged not only to "aim at a high level of protection,"⁶⁰ but also to "[take] into account the diversity of situations in the various regions of the Community."⁶¹ To that effect, "harmonisation measures . . . shall include, where appropriate, a safeguard clause allowing Member States to take provisional measures, for non-economic environmental reasons, subject to a Community inspection procedure."⁶² Furthermore, Article 130t still provides that "the protective measures adopted in common pursuant to Article 130s shall not prevent any Member State from maintaining or introducing more stringent protective measures," but it now adds that "[s]uch measures must be compatible with this Treaty [and] shall be notified to the Commission."⁶³ It thus appears that there is no preemption of the Member States' power to increase the environmental protection achieved by Community law, provided that this power is not being used in a protectionist fashion, i.e.,

58. See EC Treaty, *supra* note 2, art. 130r(1) ("Community policy on the environment shall contribute to pursuit of the following objectives: . . .").

59. *Id.*

60. The TEU extended to the "[c]ommunity policy on the environment" a requirement which, through the SEA, has already been introduced in relation to internal market legislation having an impact on environmental protection, EC Treaty, *supra* note 2, art. 100a, but was lacking in the SEA version of Articles 130r to 130t. See Dirk Vandermeersch, *The Single European Act and the Environmental Policy of the European Community*, 12 EUR. L. REV. 407 (1987); Christian Zacker, *Environmental Law of the European Economic Community: New Powers Under the Single European Act*, 14 B.C. INT'L & COMP. L. REV. 249 (1991).

61. EC Treaty, *supra* note 2, art. 130r(2).

62. *Id.*

63. *Id.* art. 130t. This requirement is parallel to that stated in the second paragraph of Article 100a(4). After the adoption of a harmonization measure relating to the internal market, a Member State may apply national provisions to protect the environment. Although this latter provision appears to be more limited than the last sentence of Article 130t, the more stringent national protective measures must in all cases be compatible with the Treaty as a whole, and not just with a specific aspect of it.

to obtain a competitive advantage over other Member States, through a closing off of the national market or otherwise. It is up to the Commission to supervise the action of the Member States in this respect.⁶⁴

Third, "without prejudice to certain measures of a Community nature, the Member States shall finance and implement the environment policy."⁶⁵ This means that implementation of Community environmental legislation by the Member States or their subnational authorities remains the rule, and direct administration by the Community itself (e.g., through the "European Environmental Agency"),⁶⁶ the exception.

Fourth, the balance of powers characterizing the decision-making process has been altered through the generalization of qualified majority voting in the Council,⁶⁷ with the exception ("by way of derogation") of the adoption of "provisions primarily of a fiscal nature; measures concerning town and country planning, land use with the exception of waste management and measures of a general nature [the exception to the exception thus reinstates the principle of qualified majority voting for these matters], and management of water resources; [and] measures significantly affecting a Member State's choice between different energy sources and the general structure of its energy supply."⁶⁸ However, the Council may, acting unanimously, define those matters belonging to these categories on which decisions will nevertheless be taken by a qualified majority.⁶⁹ The Member States thus keep their veto right for politically sensitive matters (i.e., fiscal provisions, management of water or energy re-

64. An important procedural difference, as to the supervision by the Commission, between Article 100a(4) and Article 130t is that the first of these provisions contains a fast-track procedure which authorizes "[b]y way of derogation from the procedure laid down in Articles 169 and 170, the Commission or any [M]ember-State [to] bring the matter directly before the Court of Justice if it considers that another [M]ember-State is making improper use of the powers provided for in [that] Article," EC Treaty, *supra* note 2, art. 100a(4), whereas the policing by the Commission or the other Member States of the reliance by a Member State on Article 130t can only take place in accordance with Articles 169 and 170 of the EC Treaty.

65. EC Treaty, *supra* note 2, art. 130r(4) (confirming same article in EEC Treaty).

66. Council Regulation No. 1210/90 of 7 May 1990, O.J. L 120/1 (1990) (establishing European Environment Agency and European environment information and observation network).

67. EC Treaty, *supra* note 2, arts. 130s(1), (3).

68. *Id.* art. 130s(2).

69. *Id.*

sources) or matters tending to be of great local significance (i.e., town and country planning, land use). In these matters, the European Parliament has only the right to be consulted.

In all other matters relating to the Community policy on the environment, the procedure of cooperation with the European Parliament applies,⁷⁰ or even the procedure of co-decision between the Council and the European Parliament as to "general action programmes setting out priority objectives to be attained."⁷¹ The Economic and Social Committee is consulted in all cases, but the newly established Committee of the Regions does not intervene at all. However, in many Member States, sub-national authorities bear significant responsibilities in shaping and implementing environmental policy.

The risk of being outvoted in the Council was only offset by some wavering political safeguards (far less effective than the previous veto right). Some examples include: the guarantee that the diversity of situations in the various regions of the Community will be taken into account, the absence of Community preemption of the Member State power to enact more protective legislation (albeit under the supervision of the Commission), or the possibility for the Council to lay down appropriate provisions in the form of temporary derogations and/or financial support from the Cohesion Fund, if a measure based on the provisions of paragraph 1 of Article 130s (that is a measure adopted by the Council acting by a qualified majority in cooperation with the European Parliament) involves costs deemed disproportionate for the public authorities of a Member State.⁷² All of these political safeguards, whose judicial enforceability appears rather uncertain in practice, have therefore been supplemented with the general protective clause of the second paragraph of Article 3b. This paragraph is applicable to the environment, in addition to any other non-exclusive power of the Community. In accordance with the principle of subsidiarity, the Community shall take action *only if and in so far as the objectives of the proposed action* (covered by the Treaty article which serves as the legal basis to the action, *in casu* Articles 130r and 130s) *cannot be sufficiently achieved by the Member States and can therefore, by reason of the*

70. *Id.* arts. 130s, 189c.

71. *Id.* arts. 130s(3), 189b.

72. *Id.* art. 130s(5).

scale or effects of the proposed action, be better achieved by the Community. This is to be a judicially enforceable limit *intra vires* of the exercise of the Community powers relating to the environment.⁷³ As can be seen, the present formulation of the principle of subsidiarity has shifted considerably from the previous one, contained in the first sentence of Article 130r(4) of the EEC Treaty.⁷⁴

It starts out from the responsibility of the Member States to achieve the objectives of a proposed Community action (the new wording of the introductory sentence of Article 130r(1) lends support to this reading of Article 3b, second paragraph). Only if Member States, acting on an individual basis, are incapable for whatever reason (i.e., political, legal, economic, technical, etc.) to achieve "sufficiently"⁷⁵ the objectives of the proposed action, will Community action be possible, but only to the extent of the incapacity of the Member States.⁷⁶ The main object of the clause is to protect the Member States against all forms of pre-emption, by the Community, of their own residual powers, when they are able to achieve the objectives of the proposed action in a sufficient manner. The principle of subsidiarity thus aims at protecting the proximity of government.

II. THE BALANCE OF POWER: LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY

A. Legal Basis: Definition of the Community Power to Act

The first paragraph of Article 3b codifies the principle that the Community government is one of enumerated powers. Each legislative act must indicate in its preamble the Treaty provision

73. For a skeptical view about the actual judicial enforceability of this provision, see Renaud Dehousse, *The Legacy of Maastricht: Emerging Institutional Issues*, in III COLLECTED COURSES OF THE ACADEMY OF EUROPEAN LAW 187, 209-16 (1992).

74. See *supra* note 46.

75. A judgment to be exercised by the Community political process, operating under its normal rules, i.e., in the field of the environment. See EC Treaty, *supra* note 2, arts. 130s(1)-(3).

76. Compare the conclusions of the Edinburgh European Council of 11 and 12 December 1992, which state *inter alia* that "the reasons for concluding that a Community objective cannot be sufficiently achieved by the Member States but can be better achieved by the Community must be substantiated by qualitative or, wherever possible, quantitative indicators." 25 E.C. BULL., no. 12, at 15, ¶ 4 (1992).

that serves as its "legal basis."⁷⁷ The Court of Justice requires that an explicit reference to a specific Treaty provision be made "where, in its absence, the parties concerned and the Court are left uncertain as to the precise legal basis."⁷⁸ This requirement is merely a specific application of the more general requirement under the Treaty to give reasons for all acts.⁷⁹ The Treaty provision serving as the legal basis determines the balance of power between the Community and the Member States in at least three ways.

There is first the *substantive* aspect—whether the content of the legislative enactment is within the material scope of powers conferred on the Community in the Treaty provision at hand. If it is not, the Community may have trespassed upon the residual powers of the Member States, unless another Treaty provision could have supplied the necessary powers enabling the Community to act.⁸⁰ In short, the main question addressed by the legal basis concept is whether the Community possesses the powers that it seeks to exercise. There are, however, two other aspects to this concept, namely the institutional and the instrumental aspects.

The *institutional* aspect relates to the terms of the decision-making process, which differ from one Treaty provision (and thus, Community substantive power) to another. The explanation of the Community decision-making process under Articles 100a and 130s(1), (2), and (3) may serve as an illustration.⁸¹

Finally, there is the *instrumental* aspect that a treaty provision serving as the legal basis for a Community legislative act sometimes states the instrument through which the act is to be adopted.⁸² This should be seen as one more expression of the

77. Commission v. Council, Case 45/86, [1987] E.C.R. 1493, 1518-20, ¶¶ 4-9, [1988] 2 C.M.L.R. 131, 152-53.

78. *Id.* at 1520, ¶ 9, [1988] 2 C.M.L.R. at 152-53; see France v. Commission, Case C-325/91, [1993] E.C.R. I-3283, I-3311, ¶ 26.

79. EC Treaty, *supra* note 2, art. 190. For an analysis, see Martin Shapiro, *The Giving Reasons Requirement*, U. CHI. LEGAL F. 179 (1992).

80. Article 235 of the EC Treaty plays a subsidiary role in this respect. The Court remarked in Commission v. Council that "[i]t follows from the very wording of Article 235 that its use as the legal basis for a measure is justified only where no other provision of the Treaty gives the Community institutions the necessary power to adopt the measure in question." Case 45/86, [1987] E.C.R. at 1520, ¶ 13, [1988] 2 C.M.L.R. at 153.

81. See *supra* notes 70-74 and accompanying text.

82. Articles 54(2), 57, and 100 of the EC Treaty each state the mandatory use of directives. See EC Treaty, *supra* note 2, arts. 54(2), 57, 100.

compromise of divided sovereignty between the Community and the Member States. The several types of instruments defined in Article 189 of the EC Treaty (i.e., regulations, directives, and decisions) were not meant to have the same effect in the national legal order. When the relevant Treaty provision mandates the use of a specific instrument for the adoption of Community acts, the legality of such acts depends on the respect of that obligation. However, in many cases, the choice of the instrument to be used for the adoption of Community acts is left open by the Treaty,⁸³ in which case it will be considered when a decision about the content and the intensity of the proposed action is to be reached. The instruments to be used for Community action in the field of the environment have not been determined in the Treaty, under either Article 100a⁸⁴ or Article 130s.⁸⁵ They will therefore be the object of political bargaining in the decision-making process.

Since the legal basis determines the existence and the extent of Community powers, as well as the way in which they are to be exercised, the political process cannot choose it as it sees fit. The Court of Justice has indeed characterized the choice of the correct legal basis as a justiciable issue that must be solved in conformity with the Community constitution. The choice, the Court said, "must be based on objective factors which are amena-

83. *See id.* arts. 43(2), ¶ 3, 51, 126(4), 128(5), 129(4). Articles 126(4) (education), 128(5) (culture), and 129(4) (public health) deal with "new" powers.

84. *Id.* art. 100a(1). Article 100a(1) simply refers to "the measures" to be adopted with a view to the establishment and functioning of the internal market. But, in spite of the constitutional freedom thus left to the legislative process as to the appropriate normative instrument to choose for each "measure" to be adopted, the drafters of the SEA (which inserted Article 100a into the EEC Treaty) indicated their clear preference for the directive. "In its proposals pursuant to Article 100a(1) the Commission shall give precedence to the use of the instrument of a directive if harmonization involves the amendment of legislative provisions in one or more Member States." SEA, *supra* note 1, Declaration on Article 100a of the EEC Treaty.

85. EC Treaty, *supra* note 2, art. 130s(1). Article 130s(1) states that the political process "shall decide what action is to be taken by the Community." *Id.* The first paragraph of Article 130s(2) refers to "provisions" and "measures" to be adopted, whereas the second paragraph speaks of "matters . . . on which decisions are to be taken by a qualified majority." *Id.* art. 130s(2). However, from the context it appears clearly that these "decisions" are not meant to be "decisions" within the strict meaning of Article 189 of the EC Treaty, but rather the outcome of the process of decision-making. Article 130s(3) requires the adoption of "general action programmes," and "the measures necessary for the implementation of these programmes." *Id.* art. 130s(3).

ble to judicial review."⁸⁶ But even if based on "objective factors," the task of judicial review is a sensitive, and at times, unpredictable exercise.⁸⁷ And yet, because of its institutional and instrumental aspects, the choice of legal basis is the pivot on which the balance of "federalism" (that is, the balance of power between the Community and the Member States) turns.

The stakes involved in European environmental policy may be important enough to trigger some fierce litigation on the legal basis of the action to be taken, especially when the Council disagrees with the Commission in an effort to preserve the requirement of unanimity for the adoption of Community action. The case-law obviously deals with the EC Treaty provisions in their SEA version. On June 11, 1991,⁸⁸ the Court of Justice delimited the reach of two Treaty provisions, Article 100a and Article 130s. These Articles were relied upon respectively by the Commission and the Council to serve as the legal basis for the 1989 Council Directive on procedures for harmonizing the programmes for the reduction and eventual elimination of pollution caused by waste from the titanium dioxide industry.⁸⁹

The Commission had based its proposal for the Directive on Article 100a, arguing that the act was to harmonize national laws on manufacturing conditions. This would eliminate a factor of distortion of competition in the internal market, even if the actual substance of the Directive related to environmental concerns. Since Article 100a grants the power to the Community to

86. See *Commission v. Council*, Case 45/86, [1987] E.C.R. 1493, at 1520, ¶ 11, [1988] 2 C.M.L.R. 131, 153.

87. The Court, however, does not say what "objective factors" are, but simply contrasts this criterion for choosing the correct legal basis of an act with "an institution's conviction as to the objective pursued" by the act. For a critique, see Martin Nettesheim, *Horizontale Kompetenzkonflikte in der EG*, 28 *EuR*. 243 (1993). This article explains that the conflict between two EC Treaty provisions, which could serve as the legal basis of an act, is especially complicated when both provisions define powers of the Community, not in terms of a subject-matter to be dealt with, but in terms of an (open-ended) objective to be pursued (which is the case for most Community powers). In this latter situation, the conviction as to the objective pursued by the act inevitably plays an essential role in choosing the correct legal basis. If not the conviction of the political institution that takes the decision, then at the very least, the conviction of the Court of Justice when deciding litigation concerning the political institution's conviction. Meanwhile it remains doubtful whether anything is to be gained in labelling the Court's conviction, objective factors, which are amenable to judicial review.

88. *Commission v. Council*, Case C-300/89, [1991] E.C.R. I-2867, [1993] 3 C.M.L.R. 359 [hereinafter *Titanium Dioxide*].

89. No. 89/428/EEC of 21 June 1989, O.J. L 201/56 (1989).

enact measures necessary "for the achievement of the objectives set out in Article 8a [that is, the 'internal market']," it was argued that it should be the correct legal basis for the proposed directive. The Council disputed this line of argument and altered, through a unanimous vote,⁹⁰ the proposed legal basis to Article 130s, which confers on the Community the power to take actions in the field of the environment.

The institutional aspect of these two articles is very different. Article 100a allows the Council to act by a qualified majority and requires the cooperation of the European Parliament.⁹¹ Article 130s requires the Council to act unanimously and allows the European Parliament only the right to be consulted. Thus, the substantive characterization of the proposed directive as a matter relating to the "internal market" or to the "environment" led to a very different process of decision-making to be followed.

The Commission, supported by the European Parliament, asked the Court to annul the Directive, on the ground that the Council had based it incorrectly on Article 130s, rendering the Directive unconstitutional. The Council defended the Directive as being consistent with the EC Treaty. The Court ruled in favor of the Commission, but admitted that the aim and content of the Directive revealed aspects of both internal market and environmental legislation, and therefore, should in principle have been based simultaneously on both EC Treaty articles.⁹² This solution, however, could not work in practice, because the procedures of decision-making introduced by these two articles con-

90. EEC Treaty, *supra* note 1, art. 149(1), as replaced by EC Treaty, *supra* note 2, art. 189a(1) ("Where in pursuance of this Treaty, the Council acts on a proposal from the Commission, unanimity shall be required for an act constituting an amendment to that proposal . . .").

91. After the TEU, "co-decision" between the Council and the European Parliament applies.

92. The Court specified that the "objective factors" on which the choice of the legal basis for a measure is to be based "include in particular the aim and content of the measure." *Titanium Dioxide*, [1991] E.C.R. at I-2898, ¶ 10, [1993] 3 C.M.L.R. at 383. The Court analyzed "the aim and content" of the contested directive. *Id.* at I-2898-99, ¶¶ 11-15, [1993] 3 C.M.L.R. at 383-84. Finally, the Court concluded that, in principle, a double legal basis was required. *Id.* at I-2900, ¶¶ 16-17, [1993] 3 C.M.L.R. at 384. This means that the Court considered that the Directive equally concerned action relating to the environment, EC Treaty, *supra* note 2, art. 130s, and the establishment and functioning of the internal market, *id.* art. 100a, without it being possible to indicate a hierarchy between these two aspects.

tradicted one another.⁹³ The Court then explained that in such a case preference had to be given to the legal basis that provides the European Parliament the right to cooperate in the decision-making. The object of the cooperation procedure, according to the Court, was to strengthen the part played by the European Parliament in the legislative process of the Community. This "reflects at Community level the fundamental democratic principle that the people should take part in the exercise of power through the intermediary of a representative assembly."⁹⁴ The Court then went on to explain that, from a substantive perspective, Article 100a by itself could be a sufficient legal basis for the Directive, as it obliges the Commission to take as a base, a high level of protection "in its proposals for legislative acts concerning health, safety, environmental protection, and consumer protection."⁹⁵ The drafters of Article 100a had indeed envisaged the situation in which "internal market" legislation would require harmonizing the laws of the Member States on some aspects of environmental policy.⁹⁶

93. *Titanium Dioxide*, [1991] E.C.R. at 2900, ¶ 17-19, [1993] 3 C.M.L.R. 384.

94. *Id.* at 2900, ¶ 20, [1993] 3 C.M.L.R. 384-85. This language was first used in two judgments. See *Roquette Frères v. Council*, Case 138/79, [1980] E.C.R. 3333, at 3360, ¶ 34; *Maizena v. Council*, Case 139/79, [1980] E.C.R. 3393, at 3424, ¶ 34.

95. EC Treaty, *supra* note 2, art. 100a(3).

96. Thus, after having stated that the procedures of decision-making laid down in Articles 100a and 130s are incompatible, while the procedure of decision-making laid down in Article 100a is more democratic, the Court returned to the substantive aspect of the legal basis debate, which in the initial stage of its reasoning had led to the conclusion stated in paragraph 16. This second move on substance was introduced with the consideration "that in the present case recourse to the dual legal basis of Articles 100a and 130s is excluded and that it is necessary to determine which of those two provisions is the appropriate legal basis." *Titanium Dioxide*, [1991] E.C.R. at I-2901, ¶ 21, [1993] 3 C.M.L.R. at 385. The Court used the language of what, hereinafter, will be defined as "competitive spillovers." This language was intended to connect the Directive at issue, predominantly (and thus exclusively, given the practical impossibility of a dual legal basis) to the establishment and functioning of the internal market. *Id.* at I-2901, ¶ 23, [1993] 3 C.M.L.R. at 385.

[P]rovisions which are made necessary by considerations relating to the environment and health may be a burden upon the undertakings to which they apply and, if there is no harmonization of national provisions on the matter, competition may be appreciably distorted. It follows that 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

Id. For an assessment, see René Barents, *The Internal Market Unlimited: Some Observations on the Legal Basis of Community Legislation*, 30 COMMON MKT. L. REV. 85 (1993).

The Court's approach to the substantive aspect of the legal basis litigation has undoubtedly been triggered to a large extent by its frank commitment to "the fundamental democratic principle" of parliamentary representation in the legislative process. This approach could not really be controversial in "a Community based on the rule of law,"⁹⁷ even though some Member States might have been surprised to learn that they had surrendered their veto right as to the necessary degree of environmental protection.

However, in its judgment of 17 March 1993,⁹⁸ the Court reached the opposite outcome, when it dismissed the action for annulment of the 1991 Council Directive on waste⁹⁹ brought by the Commission (again with the support of the European Parliament). The Court accepted Article 130s as the correct legal basis for the Directive (instead of Article 100a), in spite of its ancillary effect on the functioning of the internal market, caused, *inter alia*, by the uniform definition of waste (which might be relevant for the free movement of goods as it relates to waste) and the partial harmonization of conditions of competition (putting an end to the advantages enjoyed by industries established in Member States with a more permissive legislation). For the Court, the free movement of waste and the conditions of competition were not the "object" of the Directive.¹⁰⁰ Its aim

97. *Les Verts v. European Parliament*, Case 294/83, [1986] E.C.R. 1339, at 1365, ¶ 23, [1987] 2 C.M.L.R. 343.

98. *Commission v. Council*, Case C-155/91, [1993] E.C.R. I-939 [hereinafter *Waste*].

99. Council Directive No. 91/156/EEC of 18 March 1991, O.J. L 78/32 (1991).

100. *Waste*, [1993] E.C.R. at I-968-69, ¶¶ 19-20. In paragraph 20 of the judgment, the Court expressly distinguished its *Titanium Dioxide* ruling, in which the directive at issue was aimed at the approximation of laws relating to the conditions of manufacturing in one precise sector of industry with the purpose of eliminating distortions of competition. According to the Court in the *Waste* case, however, the contested directive had only a lateral impact on competitive conditions. That was not sufficient to require Article 100a. For the Court, recourse to Article 100a is not justified when the draft legislation has only an incidental effect on the harmonization of market conditions within the Community. *Parliament v. Council*, Case C-70/88, [1991] E.C.R. I-4529, at I-4566, ¶ 17 (restated in ¶ 19 of the *Waste* case). The Court reasoned in terms of "pollution spillovers" in spite of the possible significance on the functioning of the internal market. However, the principal, EC Treaty, *supra* note 2, art. 130s(2), must then prevail over the accessory, *id.* art. 100a, except if in a given case the internal market aspect really appears to be too heavy to still be capable of being regarded as the accessory. It is for such a case that the introductory sentence of Article 130s(2) contains the expression "without prejudice to Article 100a," which will lead to Article 100a serving as the sole legal basis for Community action. See *Titanium Dioxide*, [1991] E.C.R. I-2867, [1993] 3 C.M.L.R. 359.

and content were rather to ensure the management of waste, whether industrial or domestic, in conformity with the requirements of the protection of the environment. In particular, the Directive aimed at implementing the principle of correction by priority at source (stated in Article 130r(2)). The Court's analysis appears to be confirmed by the TEU version of Article 130s(2), which mentions "waste management" as an aspect of the Community policy on the environment to be acted upon in accordance with the general rule of "cooperation" of the Council (acting by a qualified majority) with the European Parliament after consultation of the Economic and Social Committee (i.e., the procedure of decision-making laid down in Article 130s(1)).

Reading the two judgments together leads to the conclusion that it is all a matter of the principal and the accessory:¹⁰¹ when

101. This conclusion may come as a surprise to those who read the *Titanium Dioxide* judgment to hold that any effect of Community environmental legislation on the functioning of the internal market leads to the requirement that Article 100a serve as the legal basis for that legislation. In reality, the Court already qualified that possible impression raised by its *Titanium Dioxide* judgment, when four months later it adopted a *lex specialis derogat legi generali* attitude in order to accept Article 31 of the Treaty Establishing the European Atomic Energy Community as the correct legal basis for Community legislation on maximum permitted levels of radioactive contamination of foodstuffs and of feedingsstuffs following a nuclear accident or any other case of radiological emergency, Council Regulation (Euratom) No. 3954/87, O.J. L 371/11 (1987), notwithstanding the incidental effect of that legislation on the functioning of the internal market. See *supra* note 100 (discussing *Waste*, [1993] E.C.R. I-939). Applied to environmental legislation, that attitude forced the Court to weigh the impact of such legislation on the internal market against its significance for the pursuit of the objectives of the Community policy on the environment. That is hardly a predictable exercise, as can be seen through the situation of "waste management:" although the Court assimilates waste to a "good," it has considered, in *Commission v. Belgium*, Case C-2/90, [1992] E.C.R. I-4431, [1993] 1 C.M.L.R. 365 [hereinafter *Walloon Waste*], that the principle of free movement could not as such be upheld. The Court even accepted to apply its *Cassis de Dijon* case law to the discriminatory *Walloon Waste* legislation. See P. Demaret, *Trade Related Environmental Measures (TREMS) in the External Relations of the European Community*, in *THE EUROPEAN COMMUNITY'S COMMERCIAL POLICY AFTER 1992: THE LEGAL DIMENSION* 305, 316, 341 (Marc Maresceau ed., 1992). It is against this background of an awareness that waste is a "good," but then a good containing special risks for the environment and, as a consequence, being of special significance for the pursuit of the objectives of the Community policy on the environment, that the Court must determine, for each aspect of "waste management," the principal and the accessory. In these circumstances it should not really be astonishing that the outcome of the Court's assessment does not always meet with general approval. See A. Wachsmann, *Comments, Case C-155/91*, 30 COMMON MKT. L. REV. 1051, 1064-65 (1993). Compare the doubts expressed by Jules Stuyck, on Article 130s serving as the legal basis for Council Regulation (EEC) No. 259/93 of 1 February 1993 on the supervision and control of shipments of waste within, into and out of the European Community, O.J. L 30/1 (1993) [hereinafter Council Regulation

the "object" of Community action, according to its "aim" and "content," is mainly related to the objectives and principles stated in Article 130r, then it must be based on Article 130s, notwithstanding some lateral impact of that action on the internal market (e.g., the elimination of an element of distortion of competitive conditions); when the reverse is true, Article 100a will obviously be the correct legal basis; finally, when the "object" of Community action (always according to its "aim" and "content") relates similarly to the objectives and principles stated in Article 130r and in Article 100a(1), there should, in principle, be a double legal basis. But in view of the incompatibility of the decision-making procedures laid down in Article 100a(1) (after the TEU, "co-decision" between the Council and the European Parliament) and Article 130s(1) (after the TEU, "cooperation" of the Council with the European Parliament) the Court will probably still be inclined to favor the more democratic decision-making procedure, i.e., that which maximizes the co-legislative prerogatives of the European Parliament, namely Article 100a(1). In this respect it is worth noting that the TEU has amended Article 173 of the EC Treaty, giving the European Parliament - in line with the Court's case-law¹⁰² - the right to bring an action for annulment of acts of the Council or the Commission "for the purpose of protecting [its] prerogatives."¹⁰³ It may be expected that the European Parliament will continue to watch closely the choice between Article 100a and Article 130s as the legal basis for acts relating to the Community policy on the environment, as it is now the institution whose prerogatives are most directly affected by that choice. For the European Parliament, the difference between the procedures of "co-decision" or "cooperation" is indeed substantial,¹⁰⁴ even though in both procedures the Council acts by a qualified majority.

(EEC) No. 259/93], on the grounds that when Community legislation directly regulates the transportation of waste across Member State borders, it is so centrally concerned with the free movement of goods that in any event Article 100a should be used as legal basis. Jules Stuyck, *Le traitement des déchets dans la (non-)réalisation du marché intérieur*, JOURNAL DES TRIBUNAUX DROIT EUROPÉEN No. 7, at 10, 11 (1994). The Court of Justice, however, upheld Article 130s as the correct legal basis for the Regulation. *Parliament v. Council*, Case C-187/93 (Eur. Ct. J. June 28, 1994) (not yet reported).

102. *Parliament v. Council*, Case C-70/88, [1991] E.C.R. I-2041, [1992] 1 C.M.L.R. 91.

103. EC Treaty, *supra* note 2, art. 173.

104. *See supra* note 15.

The only situation in which this legal basis debate seems to be without object is when the Council adopts "general action programmes setting out priority objectives to be attained."¹⁰⁵ Under Article 130s(3), first paragraph, the same procedure of decision-making applies as under Article 100a(1).¹⁰⁶

On the contrary, the legal basis debate will be intense when the Council acts pursuant to Article 130s(2) - that is, unanimously on a proposal from the Commission and after consulting the European Parliament and the Economic and Social Committee. As already indicated, this procedure of decision-making applies "by way of derogation" to a limited list of politically sensitive matters, and this, according to the text of Article 130s(2), occurs "without prejudice to Article 100a."¹⁰⁷ Thus, in borderline cases of the *Titanium Dioxide* type, i.e. when substantively both articles are equally relevant, the temptation will remain, for both the Commission and the European Parliament, to argue in favor of Article 100a as the correct legal basis. Indeed, in such cases Article 100a(1) contains a radically more democratic decision-making procedure (co-decision between the Council and the European Parliament instead of the mere consultation of the latter institution). Moreover, the Commission should be happy to see the Council act by a qualified majority (Article 100a(1)), since it greatly increases the chances of successfully fulfilling its role of mediation in the several organs of the Council with minimal pressure from the Member States on the content of its original proposal.¹⁰⁸

Finally, it should be added that legal basis litigation may also arise within Article 130s when the Council, the Commission, and the European Parliament do not distinguish between sections (1), (2), and (3) of Article 130s in an identical way. The prerog-

105. EC Treaty, *supra* note 2, art. 130s(3).

106. *See* Commission v. Council, Case 165/87, [1988] E.C.R. 5545, 5562, ¶¶ 19-20, [1990] C.M.L.R. 457.

107. EC Treaty, *supra* note 2, art. 130s(2).

108. When unanimity is needed for the Council to adopt a proposal from the Commission, it may be used to amend the proposal against the Commission's will. *See id.* art. 189a(1). On the contrary, when the Council is authorized to act by a qualified majority on a proposal from the Commission, the proposal enjoys the advantage of a head start, because it will only take a qualified majority to accept it (and the Commission may alter the proposal during the Council's deliberations, per Article 189a(2), in order to have it reach such a majority), while all the Member States must agree (or, at least, abstain during the vote) to amend the proposal.

atives of the European Parliament differ strongly from one section to another (from cooperation through mere consultation to co-decision), whereas the Commission may see the effectiveness of its participation in the decision-making affected by the requirement of unanimity stated in section (2). The Council, on the other hand, could be inclined to give a somewhat larger interpretation to section (2) as it is the only route which continues to guarantee a veto right to the Member States (which they enjoyed for all Community actions in the field of the environment prior to the TEU). These divergent interests, held by the institutions in the several procedures of decision-making laid down in Article 130s, increase the likelihood that they will not always consider the "object" of a Community environmental act (taking into account its "aim" and "content") to be part of one and the same section ((1), (2), or (3)) of Article 130s.

B. *Subsidiarity: Assessment of the Need for Community Action*

When the Community finds in the Treaty a sufficient legal basis to act (and thus has the power to act), further questions arise as to whether it should act and, if so, to what extent. As we have seen, both of these questions are addressed in the second paragraph of Article 3b ("if and in so far as"). The principle of subsidiarity *sensu stricto* involves the assessment of the need for Community action (the *if* question). In the case of a positive assessment, the nature and intensity of Community action will have to be determined in the light of the several aspects of the principle of proportionality including the goal mentioned in the second paragraph of Article 3b that belongs to the principle of subsidiarity *sensu lato* (the *in-so-far-as* question). As this latter question is closely linked to the more general principle of proportionality, stated in the third paragraph of Article 3b, the two will be analyzed together.

According to the second paragraph of Article 3b, the need for Community action depends on the finding that "the objectives of the proposed action cannot be sufficiently achieved by the Member States."¹⁰⁹ This finding seems to make the *effectiveness* of the means at the disposal of the Member States the crucial criterion in the following respect: when the means at the disposal of at least one Member State prove to be ineffective to

109. *Id.* art. 3b.

sufficiently achieve the objectives of the proposed action, the need for some Community action¹¹⁰ will be established, as these objectives will then indeed be "better achieved by the Community."¹¹¹

As it is drafted, the second paragraph of Article 3b sounds rather restrictive as to the need for Community action: "only if" there is a shortcoming in the possibilities of action of some or all Member States, can the Community ("therefore") better achieve the objectives of the proposed action.¹¹² The greater *efficiency* of the Community is not, as such, presented as an alternative criterion, standing on a par with the criterion of the effectiveness of the means available to the Member States. In other words, if the means available to *all* Member States are perfectly *effective* in order to sufficiently achieve the objectives of the proposed action, but the Community is more *efficient* in achieving these objectives, a literal reading of the Treaty text should prevent the Community from acting. It goes without saying that such a literal reading leads to an unsatisfactory result, because the Community could apparently be forced to abandon actions which are to benefit from economies of scale when undertaken at the European level of government.

The truth of the matter is that two logics were mixed in the final version of the second paragraph of Article 3b.¹¹³ On the one hand, this provision was worded as a direct guarantee of the proximity of government, which requires that the Community abstain from acting if the Member States can sufficiently achieve the objectives of the proposed action (criterion of effectiveness). Only the outcome counts: when the Member States are producing it (whatever the means they have to use), the Community should not take their place. On the contrary, the Community

110. In case of discrepancies in the capacity of Member States to achieve the objectives of a proposed action in a sufficient manner, the Community may have to differentiate its action, in accordance with the principle of subsidiarity, in order to take into account these discrepancies. Such a differentiation of action by the Community does not infringe upon the principle of equality between Member States, but might in fact even be necessary to meet the requirements of that principle. See *Italy v. Commission*, Case 13/63, [1963] E.C.R. 165, [1963] C.M.L.R. 289.

111. EC Treaty, *supra* note 2, art. 3b.

112. The final part of the second paragraph of Article 3b rests on the assumption that the Community will necessarily be in a position to fill the gap left by the Member States. *Id.*

113. See Dehousse, *supra* note 73, at 207-08.

must take the place of the Member States when they do not produce the required outcome and "therefore" the latter can "be better achieved by the Community." On the other hand, the Treaty authors have shown some sensitivity to *efficiency* concerns as well through the reference to "the scale or effects of the proposed action." However, this element can in principle come into play "only if" the Member States cannot sufficiently achieve the objectives of the proposed action and "therefore" the Community is authorized to act (in which case, it is so authorized irrespective of the "efficiency" of its action).

The criteria of *effectiveness* and *efficiency* would have coexisted more smoothly if the assessment of the need for action by the Community had been made dependent *either* on the ineffectiveness of the means at the disposal of at least one Member State *or* on the greater efficiency of action by the Community (when both the Community and the Member States are in a position to produce the required outcome, but the latter at a considerably higher cost than the Community). The words "and . . . therefore" linking the two parts of the sentence, might, at first sight, appear to constitute a real obstacle to this common-sense interpretation of the test to be applied to assess the need for Community action. However, in actual practice, it should be rather easy for the Community to overcome that obstacle. It is indeed up to the Community's political process (operating according to the rules laid down in the Treaty article serving as the legal basis for the proposed action) to define "the objectives of the proposed action," and nothing prevents that process from including considerations relating to the *efficiency* of the proposed action in the definition of its objectives. It may even be argued that the second paragraph of Article 3b encourages the Community to do so, as it refers to "the scale or effects of the proposed action," a part of the sentence which does not play a direct role in the assessment of the need for Community action, but which takes its full significance in the larger context of the definition of the objectives of *any* proposed Community action. The question whether the objectives of the proposed action can be "sufficiently" achieved by the Member States will then necessarily include an enquiry into the efficiency of the means at the disposal of the Member States to reach the required outcome. Thus, the criteria of effectiveness and efficiency will to a large extent become interchangeable.

In its Communication to the Council and the European Parliament of 27 October 1992, the Commission has made no particular effort to connect its understanding of the principle of subsidiarity to the precise wording of the second paragraph of Article 3b, a provision which is said to contain *in globo* a "test of comparative efficiency between Community action and that of Member States."¹¹⁴ The test "implies that we have to examine if there are other methods available for Member States, for example legislation, administrative instructions or codes of conduct, in order to achieve the objectives in a sufficient manner."¹¹⁵ Other factors to be examined are "the effect of the scale of the operation (transfrontier problems, critical mass, etc.), the cost of inaction, the necessity to maintain a reasonable coherence, the possible limits on action at national level (including cases of potential distortion where some Member States were able to act and others were not able to do so) and the necessity to ensure that competition is not distorted within the common market."¹¹⁶

The ineffectiveness of the means available to the Member States and the greater efficiency of action at Community level are also stated as *alternative* criteria for the assessment of the need for Community action in the "guidelines" to be used by the Council (adopted by the European Council at its Edinburgh meeting of 11 and 12 December 1992). They are as follows:

- the issue under consideration has transnational aspects which cannot be satisfactorily regulated by action by Member States; and/or
- actions by Member States alone or lack of Community action would conflict with the requirements of the Treaty (such as the need to correct distortion of competition or avoid disguised restrictions on trade or strengthen economic and social cohesion) or would otherwise significantly damage Member States' interests; and/or
- the Council must be satisfied that action at Community level would produce clear benefits by reason of its scale or effects compared with action at the level of the Member States.¹¹⁷

For the European Council, the need for Community action

114. 25 E.C. BULL., *supra* note 18, at 116.

115. *Id.*

116. *Id.*

117. 25 E.C. BULL., *supra* note 76, at 14-16.

exists when the Council ascertains that one or more of the criteria set in these guidelines are met. This is why the three guidelines are linked to one another with the words "and/or."

The first two guidelines refer to cases in which only the Community is in a position to act *effectively*, mainly in view of inter-State spillovers that cannot really be apprehended "at the level of the individual Member States" (see Article 130r(4) - SEA version).

The third guideline refers to cases in which the Community is more *efficient* than the individual Member States in achieving the objectives of the proposed action in a sufficient manner, even though the latter may also be capable of producing the required outcome (but at a much higher cost). The European Council thus turns the comparative efficiency test into a fully-fledged alternative criterion for the assessment of the need for Community action, which by itself is capable of leading to the recognition of the need for such action "by reason of its scale or effects" (the third guideline takes over these words from the second paragraph of Article 3b, but - contrary to that provision - it interprets the words "and . . . therefore" as "and/or").

It may be concluded that both the Commission and the European Council continue to read the Treaty text as if it were in essence equal to the former Article 130r(4), which prescribes a comparative efficiency test to assess the need for Community action ("the objectives . . . can be attained better at Community level than at the level of the individual Member States").¹¹⁸

The guidelines reflect the more fundamental approach of the European Council to "subsidiarity," which it sees as "a dynamic concept" that "allows Community action to be expanded where circumstances so require, and conversely, to be restricted or discontinued where it is no longer justified."¹¹⁹

In the field of the environment, it can safely be said that the

118. EEC Treaty, *supra* note 1, art. 130r(4). It should be noted that this interpretation of the second paragraph of Article 3b is consistent with the initial draft of that Treaty provision, proposed by the Luxembourg Presidency in April 1991. It introduced as the sole criterion for the operation of the principle of subsidiarity, that the objectives of the proposed action could be "better achieved by the Community than by the Member States acting separately." *Projet de Traité Sur L'Union*, EUROPE DOCUMENTS, July 5, 1991, No. 1722/1723, at 4. Clearly, this is a comparative efficiency test, the only basic ingredient of which is the sheer effectiveness of Member States in reaching the required outcome.

119. 25 E.C. BULL., *supra* note 76, at 13-14.

three guidelines contain an extremely low threshold with regard to the assessment of the need for Community action. From the moment that there is any kind of inter-State spillover there will undoubtedly be transnational aspects which cannot be satisfactorily regulated by action by Member States (first guideline) or risks of distortion of competition or disguised restrictions on trade between Member States or - even more generally - damage to Member States' interests (second guideline). As a result, individual Member States will be ineffective in their efforts to sufficiently achieve the objectives of proposed Community action relating to the inter-State spillover. In addition, the Community will obviously be more efficient than the individual Member States in dealing with such spillover (and this precisely by reason of the scale or effects of its proposed action - see the third guideline). In environmental matters, therefore, the three guidelines will most often combine to support the need for Community action, if relevant spillovers can be traced. The real problem then will be to know what kinds of spillovers are relevant.

I propose to follow the classification of the several types of environmental spillovers elaborated by Professor Richard B. Stewart:¹²⁰ product spillovers, pollution spillovers, competitive spillovers, and preservation spillovers.

Product spillovers are created when Member States "seek to exclude products from other [Member] States on the ground that they are environmentally deficient, creating trade barriers" or when the "imposition of different product regulations by [Member] States . . . prevent[s] realization of scale economies in manufacturing and marketing."¹²¹ Article 100a provides the appropriate legal basis for the Community to intervene in such cases and the need for action will flow from the second guideline ("avoid disguised restrictions on trade").¹²²

Pollution spillovers occur "when pollutants or wastes generated by industry, transport, or agriculture cross [Member] State boundaries. The polluter [Member] State will have little or no incentive to take the interests of the receiving [Member] State into account in deciding on the extent of environmentally pro-

120. Stewart, *supra* note 25, at 45-46.

121. *Id.* at 45.

122. For a recent example, see Council Directive 93/12/EEC of 23 March 1993 relating to the sulphur content of certain liquid fuels, O.J. L 74/81 (1993) (based on Article 100a).

tective measures."¹²³ Article 130s(1), (2) and (3) contain, in principle,¹²⁴ the required legal basis for Community action. The need for such action will be justified under the first guideline ("transnational aspects" which the individual Member States cannot regulate in a satisfactory way, in particular in view of the absence of a serious incentive to do so).

Competitive spillovers result from "the effects of [Member S]tate environmental regulatory decisions on competition and industrial location."¹²⁵ Member States might fear that the imposition of strict environmental standards (and the enforcement thereof) could scare away industry and thus put the national economy at a competitive disadvantage relative to that of other Member States. Action at Community level would avoid that risk (and is therefore warranted under the second guideline - "the need to correct distortion of competition").¹²⁶ Articles 100a and 130s are both likely to come into play as the legal basis for some aspects of Community action.¹²⁷

Finally, there are the so-called *preservation spillovers*, described as follows: "An especially scenic or ecologically significant natural resource located in one [Member S]tate will be admired by citizens in other [Member S]tates, who will wish to visit it or simply know that it is being preserved. The [Member S]tate in which the resource is located, however, is likely to disregard out-of-state interests."¹²⁸ The distinctive feature of this type of "spillover" is that it is not physical or economic, as the natural resource at stake is confined to the territory of one Member State. But the inhabitants of all Member States draw some benefits from that natural resource when they come to view and enjoy it, and in some settings pay a fee for its maintenance. Even when they do not "use" it, inhabitants of Member States may derive benefits through the mere fact of knowing that it exists and is being preserved.¹²⁹ The Community undoubtedly finds in Arti-

123. Stewart, *supra* note 25, at 45.

124. See *supra* notes 100-03 and accompanying text.

125. Stewart, *supra* note 25, at 45.

126. 25 E.C. BULL., *supra* note 76, at 14.

127. See *supra* notes 96 and accompanying text (discussing *Titanium Dioxide* case and whether Article 100a or 130s was the proper legal basis for environmental directives).

128. Stewart, *supra* note 25, at 45-46.

129. For a convincing argument that "psychic spillovers" should be relevant in order to overcome the apparent obstacle formed by the principle of subsidiarity to deal at

cle 130s a sufficient legal basis to act with a view to preserving such a natural resource. It may even give financial support to the Member State on whose territory the resource is located, if the costs of preservation are deemed to be disproportionate for the public authorities of that Member State (Article 130s(5)). As to the need for Community action, it may be argued that the first guideline applies because there are "transnational aspects" of a particular kind, namely potential users living in other Member States as well as the "existence value" of the natural resource shared by people everywhere. But this is obviously a borderline case, in which the Community must establish that the Member State in question just *cannot* achieve the required level of preservation in a sufficient manner, although the issue looks in all material respects like a local one. Any action by the Community will thus have to be preceded by a statement of the reasons for such action, revealing that the principle of subsidiarity *sensu stricto* will be observed.¹³⁰

C. *Proportionality: Determination of the Nature and Intensity of Community Action*

As indicated earlier, Article 3b contains two expressions of the principle of proportionality: a general one, stating that "any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty" (third paragraph of Article 3b); and a more specific one, which takes part of the principle of subsidiarity *sensu lato* directing the Community to take action "only in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States" (second paragraph of Article 3b). In spite of the difference in wording between "objectives of this Treaty" and "objectives of the proposed action" it seems that the intention of the Treaty authors has in reality been to guarantee that the means chosen do not go beyond what is necessary to achieve the *objectives of the proposed action*. Indeed, any actions by the Community which were to go beyond what is necessary to achieve the "objectives of this Treaty" would by the same token be without legal basis - and thus

Community level with issues that are local in a physical or economic sense, see W.P.J. Wils, *Subsidiarity and EC Environmental Policy: Taking People's Concerns Seriously*, 6 J. OF ENVTL L. 83-89 (1994).

130. See, e.g., Communication from the Commission to the Council and the European Parliament on the protection of animals, COM (93) 384 (July 1993).

run afoul of the first paragraph of Article 3b - since all Community powers are strictly defined in order to make possible the achievement of one or more objectives of the Treaty. Going beyond these objectives therefore amounts to acting *ultra vires*. But when the Community assigns some specific objectives to a proposed action, which objectives remain within the limits of the Treaty article serving as the legal basis for the action, it remains meaningful to enquire whether the nature and intensity of the proposed action are not out of proportion with what is necessary to achieve the objectives of that action. On this score there is convergence between the second and the third paragraphs of Article 3b.

That leaves us with the question of why there are two expressions of the principle of proportionality in Article 3b. It certainly is in part an *accident de parcours* in the drafting process of a complex Treaty text, but, this being the case, there are also some differences. First, the principle of proportionality stated in the third paragraph applies to all Community powers whether they are exclusive or not, whereas the proportionality aspect inherent in the principle of subsidiarity *sensu lato* applies, just as the latter principle, to non-exclusive Community powers only. Second, the proportionality of Community action performs a precise function within the operation of the principle of subsidiarity *sensu lato*: the measure of Community action should be limited to what is necessary to fill the policy gap left by the Member States as a consequence of their partial or total incapacity to achieve the objectives of the proposed action in a sufficient manner (the *in-so-far-as* question). In other words, the competing value to be protected by this expression of the principle of proportionality is the sovereignty of the Member States and their subnational authorities. The residual powers of the Member States should not be affected more than is needed in order for the Community and the Member States, or their subnational authorities, to be able to act effectively, in a spirit of loyal cooperation,¹³¹ towards the achievement of the objectives of the proposed action. On the contrary, the competing values to be protected through the general principle of proportionality (third

131. EC Treaty, *supra* note 2, art. 5; *see id.* art. 130r(1).

paragraph of Article 3b) are not at all identified.¹³² They must therefore be all the values protected under superior Community law, i.e., the "values" stated in the Treaties, or protected as unwritten general principles of law including fundamental rights, or else enumerated in the preamble to the TEU or in the common provisions of that Treaty, where the proximity of government certainly occupies a prominent place.¹³³ In this latter respect the actual impact of the third paragraph of Article 3b on the nature and intensity of Community action may to some extent coincide with that of the answer given to the *in-so-far-as* question raised in the second paragraph.

It is not astonishing then that the Edinburgh European Council has amalgamated the two expressions of the principle of proportionality, when it declared that "any burdens, whether financial or administrative, falling upon the Community, national governments, local authorities, economic operators and citizens, should be proportionate to the objective to be achieved."¹³⁴ It continued that "Community measures should leave *as much scope for national decision as possible*, consistent with securing the aim of the measure and observing the requirements of the Treaty" and that "where appropriate and *subject to the need for proper enforcement*, Community measures should provide Member States with alternative ways to achieve the objectives of the measures."¹³⁵

These sentences indicate the terms of the debate about the proportionality of Community action in the field of the environment: on the one hand, the Community should leave "as much scope for national decision as possible," yet on the other hand, this must happen "subject to the need for proper enforcement."¹³⁶ The question is how these two goals can be reconciled. The relevant Treaty provisions (Article 100a and Articles 130r to 130t) endeavor to strike the balance.

First, Article 100a(3), although calling for "a high level of protection," leaves open the possibility of *bona fide* higher national standards of protection of the environment, i.e., if "they are not a means of arbitrary discrimination or a disguised restric-

132. See Lenaerts & van Ypersele, *supra* note 16, at 52-54, 67-70; J.H. Jans, *Evenredigheid: ja, maar waartussen?*, 40 SOCIAAL-ECONOMISCHE WETGEVING 751 (1992).

133. TEU, *supra* note 2, pmbl., arts. A, B, F(1).

134. 25 E.C. BULL., *supra* note 76, at 15.

135. *Id.* (emphasis added).

136. *Id.*

tion on trade between Member States."¹³⁷ The same applies when Article 130s is to be the legal basis for Community action.¹³⁸ Community action leads to "minimum standards," but an important burden of proof weighs on a Member State setting higher national standards: it must establish that it is not in fact distorting competition within the internal market.¹³⁹

Second, Articles 100a and 130s do not specify the normative instruments to be used by the Community, which means that the political process must choose the normative instrument in each case.¹⁴⁰ The Edinburgh European Council has streamlined that choice on the basis of its interpretation of the principle of proportionality. It considered the following: "The form of action should be as simple as possible consistent with satisfactory achievement of the objective of the measure and the need for effective enforcement. The Community should legislate only to the extent necessary. Other things being equal, directives should be preferred to regulations and framework directives to detailed measures. Non-binding measures such as recommendations should be preferred where appropriate. Consideration should also be given where appropriate to the use of voluntary codes of conduct."¹⁴¹ This statement favors the directive as the most "proportional" normative instrument, on the assumption that it will be used as it was envisaged in Article 189 of the EC Treaty, that is, "[leaving] to the national authorities the choice of form and methods."¹⁴² In its Communication of 1992, the Commission launches a vigorous plea in favor of "systematically reverting to the original concept of the directive as a framework of

137. EC Treaty, *supra* note 2, art. 100a(4).

138. *Id.* art. 130t.

139. See D. Geradin, *Free Trade and Environmental Protection in an Integrated Market: A Survey of the Case Law of the United States Supreme Court and the European Court of Justice*, 2 FLA. ST. U. J. TRANSNAT'L L. & POL'Y 141 (1993).

140. The directive has always served as the main normative instrument for Community environmental policy. See ECKARD REHBINDER & RICHARD STEWART, ENVIRONMENTAL PROTECTION POLICY 33-34 (1985). This does not mean that regulations have not been enacted. See, e.g., Council Regulation (EEC) No. 594/91 of 4 March 1991, O.J. L 67/1 (1991) (relating to substances that deplete the ozone layer); Council Regulation (EEC) No. 259/93, *supra* note 101.

141. 25 E.C. BULL., *supra* note 76, at 15. It must be observed that recommendations, although without "binding force," see E.C. Treaty, *supra* note 2, art. 189, are not deprived of any legal effect. See *Grimaldi*, Case C-322/88, [1989] E.C.R. 4407, at 4420-21, ¶¶ 16-18, [1991] 2 C.M.L.R. 265, 276-77 (recommendations to play role in interpretation of national law and in delineating national policy).

142. EC Treaty, *supra* note 2, art. 189.

general rules, or even simply of objectives, for the attainment of which the Member States have sole responsibility."¹⁴³ To reach that outcome, the Commission must overcome resistance due to "a mutual lack of confidence."¹⁴⁴

Already at the Edinburgh meeting of the European Council (December 1992), the Commission had made it known that it would "be tougher about rejecting amendments proposed by the Council and Parliament that run counter to the proportionality rule or would unnecessarily complicate directives or recommendations."¹⁴⁵ Under the Interinstitutional Agreement of 29 October 1993, the Council and Parliament must justify all such amendments in view of the principle of subsidiarity, including its proportionality aspect.¹⁴⁶

At the Edinburgh meeting of the European Council, the Commission also translated into a concrete undertaking its intention to alleviate the regulatory density of directives in the area of the environment. The Commission promised to make an effort "to simplify, consolidate and update existing texts, particularly those on air and water, to take new knowledge and technical progress into account."¹⁴⁷ In its 1993 Report, it announced that it will make the necessary legislative proposals to replace six

143. 25 E.C. BULL., *supra* note 76, at 123. Reh binder and Stewart distinguish "three types of directives in terms of specificity and legal effect on Member States:"

1. *Typical directives* which closely follow the 'result' model of Article 189 of the E[E]C Treaty.

2. *Regulation-type directives*: The directive itself or an annex to it (which forms an integral part of the directive but can normally be amended by a simplified procedure) contains detailed substantive provisions, such as prohibitions, standards and tolerances, and provisions for implementation, such as testing and measurement methods.

3. *Framework directives*: The framework directive sets out the objectives and basic principles applicable to a broad area of environmental protection. . . . One or more special directives, which may be 'typical' or regulation-type and contain more detailed substantive rules, may fill out the framework directive.

REHBINDER & STEWART, *supra* note 140, at 35.

It goes without saying that, in this latter respect, more responsibilities may be left to the Member States in order to fill out the framework directive. This appears to be what is envisaged by the Commission in relation to several aspects of Community water quality legislation.

144. See *supra* note 18 (discussing Communication on the principle of subsidiarity).

145. 25 E.C. BULL., *supra* note 76, at 18.

146. 26 E.C. BULL., no. 10, at 129-30 (1993).

147. 25 E.C. BULL., *supra* note 76, at 17.

named directives on water quality by so-called "framework directives," reoriented "towards compliance with essential quality and health parameters, leaving Member States free to add secondary parameters if they see fit."¹⁴⁸ These "framework directives" should comprise: (1) a *drinking water quality directive* that "would define general parameters, some of which would be fixed in technical terms at Community level and others at national level"; (2) a *directive on the ecological quality of surface water* "setting general objectives to be fleshed out by national or regional authorities as the case may be"; (3) a *directive on the quality of bathing water*, whose parameters "need to be simplified and adapted to new scientific knowledge" and easily adaptable "in the light of Community criteria and local realities, by a procedure that offers more flexibility than a Council decision requiring unanimity";¹⁴⁹ and (4) a *directive on freshwater management and groundwater protection* defining "guiding principles for the qualitative and quantitative protection of groundwater, integrating it into a general freshwater management policy."¹⁵⁰

Besides these newly proposed "framework directives," the Commission mentioned two directives adopted in 1991 to control pollution at the source, namely the *Directive concerning urban waste water treatment*¹⁵¹ and the *Directive concerning the protection of waters against pollution by nitrates from agricultural sources*.¹⁵² The Commission noted that these two directives "comply with the subsidiarity principle in that they simply define an objective leaving Member States free to achieve it in their own way."¹⁵³ The Commission adds that the new proposal for a *Directive on the integrated prevention and reduction of industrial pollution* is designed "to supplement existing directives by requiring Member States to adapt minimum discharge standards to best practice. In line with the subsidiarity principle this adaptation will be a matter for the appropriate national authorities and will cover industries dis-

148. Commission Report to the European Council, *supra* note 24, at 15.

149. The latter is an early call for application of the second paragraph of Article 130s(2), authorizing the Council, through a unanimous vote, to substitute a qualified majority vote for the requirement of unanimity as far as future revisions of the parameters laid down in the proposed directive are concerned. See EC Treaty, *supra* note 2, art. 130s(2).

150. Commission Report to the European Council, *supra* note 24, at 15-16, No. (i).

151. Directive No. 91/271/EEC of 21 May 1991, O.J. L 135/40 (1991).

152. Directive No. 91/676/EEC of 12 December 1991, O.J. L 375/1 (1991).

153. Commission Report to the European Council, *supra* note 24, at 16, No. (ii).

charging the substances appearing on Lists I and II of the 1976 framework directive."¹⁵⁴

As to air quality, the Commission intends to propose a "definition of objectives or of harmonized monitoring criteria" for Community standards.¹⁵⁵ These standards could streamline and simplify present legislation.¹⁵⁶ At the same time, however, the Commission made it clear that it will not allow the application of the subsidiarity principle to lower or compromise the high level of existing Community environmental standards.¹⁵⁷ The Commission's approach is only meant to enlist, as much as possible, the help of the Member States or their subnational authorities in reaching these standards. That approach is perfectly consistent with Articles 130r to 130t, as they were revised (in part) by the TEU. As mentioned previously, the introductory sentence of Article 130r was drafted in such a way as to emphasize the concurrent responsibility of the Member States to pursue the objectives of the Community policy on the environment.¹⁵⁸ Furthermore, Article 130s(4) states, as a general rule, that the Member States shall finance and implement the environmental policy.¹⁵⁹

All of this indicates that in the environmental field major efforts are indeed made to "leave as much scope for national decision as possible."¹⁶⁰ Does this not happen, however, at the expense of "the need for proper enforcement?"¹⁶¹ That question is all the more pressing as it has been argued that the early successes of passing Community environmental legislation, under a regime of unanimous voting in the Council (in accordance with Articles 100 or 235 of the EC Treaty), were precisely due to the fact that Member States did not use their right of veto against legislation whose implementation would in any event be weak and lightly monitored.¹⁶² As a remedy to the perceived implementation gap, proposals were made to legislate more often

154. *Id.*

155. *Id.* at 17.

156. *Id.*

157. *Id.*

158. See EC Treaty, *supra* note 2, art. 130r.

159. *Id.* art. 130s(4).

160. 25 E.C. BULL., *supra* note 76, at 15.

161. *Id.*

162. See *supra* note 17 (discussing voting procedure in the Council); see also Rolf Wägenbaur, *The European Community's Policy on Implementation of Environmental Directives*, 14 *FORDHAM INT'L L.J.* 455, 465-66 (1990-91).

through regulations (which do not in principle need further implementation) and to establish an enforcement authority at Community level empowered to impose sanctions against offenders of the directly applicable legislation. This authority would resemble the American "EPA" (Environmental Protection Agency), which operates at the federal level.¹⁶³

Such proposals, however, lead to a system that would definitely suffer from the "overload" of centralization, as it is being criticized in the United States,¹⁶⁴ and at the same time would conflict with the tradition of decentralized enforcement of Community law, expounded by the Court's case-law, of which the *Van Gend & Loos* and *Francovich* judgments¹⁶⁵ are the milestones. In addition, in the area of the environment, the tendency towards decentralization has precisely been strengthened through the latest drafting of Articles 130r to 130t of the EC Treaty (by the TEU).¹⁶⁶

Implementation of Community environmental legislation is therefore largely left to the Member States and their subnational authorities. The proposed elaboration of "framework directives" will confirm that option. The European Environment Agency has been established with the sole objective "to provide the Community and the Member States with:

- objective, reliable and comparable information at European level enabling them to take the requisite measures to protect the environment, to assess the results of such measures and to ensure that the public is properly informed about the state of the environment,
- to that end, the necessary technical and scientific support.¹⁶⁷

The Agency will thus assist the Member States when they implement Community environmental legislation, but it will not take over their responsibilities.¹⁶⁸

163. Wägenbaur, *supra* note 162, at 468-73.

164. See Stewart, *supra* note 25, at 43.

165. See *supra* notes 30-32 and accompanying text (discussing the *Van Gend & Loos* and *Francovich* judgments).

166. See Astrid Epiney & Andreas Furrer, *Umweltschutz nach Maastricht*, 27 EuR. 369 (1992).

167. Council Regulation No. 1210/90, *supra* note 66, art. 1(2).

168. This remains so even in view of the "dynamic clause" contained in Article 20 of the European Environment Agency Regulation, Council Regulation No. 1210/90, *supra* note 66, which reads as follows:

The difficulties of implementing Community environmental legislation are often associated with the use of the directive as the normative instrument for such legislation. It is therefore important to point out that the Court of Justice has already gone a long way to diminish the effectiveness-handicap of the directive. First, national courts are obliged, as a consequence of the supremacy of Community law, to "interpret" national law in such a way as to make it conform to a directive for which the time-limit for implementation has expired (whether implementation has taken place or not).¹⁶⁹ This obligation applies in relation to *all* directives even if their content does not as such create enforceable rights and obligations due to a lack of clarity, precision, or unconditionality (i.e., the conditions for it to be capable to produce "direct effect").¹⁷⁰ In particular in the area of the environment, directives (especially "framework directives") will often not meet, at least for several of their provisions, the conditions necessary for them to have "direct effect."¹⁷¹ However,

No later than two years after the entry into force of this Regulation, and after having consulted the European Parliament, the Council shall, on the same basis as this Regulation and on the basis of a report from the Commission with appropriate proposals, decide on further tasks for the Agency in particular in the following areas: - associating in the monitoring of the implementation of Community environmental legislation, in cooperation with the Commission and existing competent bodies in the Member States

Id. The Agency is only to be "associated" in the "monitoring" of the implementation of Community environmental legislation, and not to be itself charged with such implementation. The Regulation entered into force, in accordance with Article 21, "on the day following that on which the competent authorities have decided the seat of the Agency," i.e., on 30 October 1993, after the Governments of the Member States had determined, on 29 October 1993, "by common accord," EC Treaty, *supra* note 2, art. 216, the seat of the Agency, which will be in Copenhagen. The management board of the Agency met for the first time in Brussels on 17 December 1993. *Agence Europe*, No. 6135 of 23 December 1993. All of this means that the Council must act pursuant to Article 20 of the Regulation no later than 30 October 1995.

169. See *Marleasing SA v. La Comercial Internacional de Alimentacion SA*, Case C-106/89, [1990] E.C.R. I-4135, [1992] 1 C.M.L.R. 305 (most complete statement of this doctrine); J. Stuyck & P. Wytinck, 28 *COMMON MKT. L. REV.* 205 (1991) (discussing *Marleasing*).

170. See, e.g., *Van Duyn v. Home Office*, Case 41/74, [1974] E.C.R. 1337 [1975] 1 C.M.L.R. 1; *Pubblico Ministero v. Ratti*, Case 148/78, [1979] E.C.R. 1629, [1980] 1 C.M.L.R. 96; *Becker v. Finanzamt Münster-Innenstadt*, Case 8/81, [1982] E.C.R. 53, [1982] 1 C.M.L.R. 499 (discussion of doctrine of direct effect).

171. This was confirmed by the Court of Justice. *Comitato di Coordinamento per la Difesa della Cava and Others v. Regione Lombardia and Others*, Case C-236/92 (Eur. Ct. J. Feb. 23, 1994) (not yet reported).

[T]he provision at issue must be regarded as defining the framework for the action to be taken by the Member States regarding the treatment of waste and

even if the provisions of the framework directives do not have direct effect, they may serve as a useful reference for the interpretation of national law. They will thus be "invocable" before any national court to that effect.¹⁷²

Second, as it was already mentioned, in case of non-implementation or incorrect implementation of a directive, a liability action will lie, directly under Community law, against the Member State in question. The injured party must establish: (1) that the result prescribed by the directive entails the grant of rights to individuals; (2) that it is possible to identify the content of those rights on the basis of the provisions of the directive; and (3) that there is a causal link between the breach of the State's obligation to correctly implement the directive and the loss and damage suffered by the injured party.¹⁷³ Admittedly, it might be difficult for an injured party to succeed at establishing all three elements in relation to environmental directives given the vague (and abstract) substance of many of them, but this should not necessarily discourage the injured party from bringing liability actions against public authorities or even private parties when they appear to infringe upon non-implemented or incorrectly implemented directives. Indeed, the just stated general requirement for Member State courts to interpret domestic law in a way consistent with all Community directives applies also in the context of the operation of national liability law. It may thus occur that a court is in a position of finding a "fault" within the meaning of national liability law when the defendant has knowingly disregarded the content of a non-implemented or incorrectly implemented directive,¹⁷⁴ even if the *Francovich* conditions for State

not as requiring, in itself, the adoption of specific measures or a particular method of waste disposal. It is therefore neither unconditional nor sufficiently precise and thus is not capable of conferring rights on which individuals may rely as against the State.

Id. § 14.

172. See Ph. Manin, *L'invocabilité des directives: Quelques interrogations*, 28 REVUE TRIMESTRIELLE DE DROIT EUROPÉEN 669, 675-78 (1990).

173. See *Francovich v. Italy*, Joined Cases C-6/90 and C-9/90, [1991] E.C.R. I-5357, I-5415, ¶ 40, [1993] 2 C.M.L.R. 66, 114-15. See also John Temple Lang, *New Legal Effects Resulting from the Failure of States to Fulfill Obligations under European Community Law: the Francovich Judgment*, 16 FORDHAM INT'L L. J. 1 (1992-93); J. Steiner, *From Direct Effects to Francovich: Shifting Means of Enforcement of Community Law*, 18 EUR. L. REV. 3 (1993).

174. Since the entry into force of the TEU, it will be almost impossible for private parties to hide behind their lack of knowledge of directives that have not been incorporated into the national legal order. Article 191 of the EC Treaty now prescribes that

liability based on Community law are not entirely met.

Future developments in the case law will have to clarify this matter, but it seems certain, in any event, that just as in the United States, liability actions are bound to play an increasing role as a means of pressing for faithful implementation of Community environmental legislation. Liability actions are thus likely to serve as an efficient alternative to a bureaucratic machinery of centralized supervision.¹⁷⁵ In this sense also, the Court's statement in *Van Gend & Loos* that "the vigilance of individuals concerned to protect their rights amounts to an effective supervision in addition to the supervision entrusted . . . to the diligence of the Commission"¹⁷⁶ remains good law.

The decentralized enforcement of the implementation by Member States and their subnational authorities of Community environmental legislation rests on the idea that interested private parties possess a natural incentive to take the supervision of compliance with that legislation seriously. This may be seen as evidence of the larger function that could be assigned to economic and/or fiscal incentives to make environmental regulation work properly and to increase its chances of producing the

directives which are addressed to all Member States shall be published (just as regulations) in the Official Journal of the Community. Directives thus receive the same publicity as regulations, which everyone is deemed to know after their publication in the Official Journal of the Community. Environmental directives are all of the type covered by Article 191. Furthermore, the identical status of directives and regulations as to their publication in the Official Journal of the Community could well become one of the decisive arguments for the Court of Justice to recognize full "horizontal effects" to directives after the expiry of the time left to the Member States for their implementation into national law. The rationale is that Member States will get a first chance to insert directives as smoothly as possible into that law, but when they fail to seize that chance, the directives will operate as do regulations — that is, also between private parties. See Walter van Gerven, *The Horizontal Effect of Directive Provisions Revisited*, in LIBER AMICORUM H.G. SCHERMERS 335-53 (Deirdre Curtin & Ton Heukels eds., 1994).

175. See Communication from the Commission to the Council and Parliament and the Economic and Social Committee: Green Paper on Remedying Environmental Damage, of 14 May 1993, COM (93) 47 final [hereinafter Green Paper]. "This Green Paper considers . . . the usefulness of civil liability as a means for allocating responsibility for the costs of environmental restoration. Civil liability is a legal and financial tool used to make those responsible for causing damage pay compensation for the costs of remedying that damage. By requiring those responsible to pay the costs of the damage they cause, civil liability also has the important secondary function of enforcing standards of behaviour and preventing people from causing damage in the future." *Id.* at 4; see Amended proposal from the Commission for a Council Directive on civil liability for damage caused by waste, O.J. C 192/15 (1991).

176. See *supra* note 31.

envisaged outcome more effectively and more efficiently. In this perspective, so-called "command and control" legislation might possibly be replaced by or supplemented with mechanisms that leave it to the market to determine ways in which the tolerated level of pollution will be allocated among the several pollution sources. The government then has only to set the tolerated level of pollution, to organize a system of tradable emission permits, and to ensure that emissions do not exceed the amount authorized by the permits that every polluter holds. Industry will thus be pressured into choosing between buying emission permits or investing in research and development to prevent pollution altogether. This again is an expression of "subsidiarity," focused this time on the relationship between government regulation and private decision-making as alternative means of reaching a given outcome. Fiscal tools can have a similar finality, but given the sensitivity that is linked for the Member States to any kind of taxation power conferred upon the Community, unanimity is still being required in the Council when it adopts environmental provisions "primarily of a fiscal nature."¹⁷⁷ This is regrettable because fiscal tools may have as their main purpose and effect to create the appropriate economic incentives for private parties to adapt their behaviour to what is needed for government policy to work, without the government having to "command and control" as such.

CONCLUSION

The foregoing analysis confirms the view held by the Commission on the scope of "subsidiarity," that it "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 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."¹⁷⁸

The European Council had earlier remarked that "the principle of subsidiarity does not relate to and cannot call into question the powers conferred on the European Community by the Treaty as interpreted by the Court."¹⁷⁹ The *acquis communautaire*

177. EC Treaty, *supra* note 2, art. 130s(2).

178. See Commission Report to the European Council, *supra* note 24, at 1.

179. 25 E.C. BULL., *supra* note 76, at 13.

as well as the balance between the Community institutions do not therefore come under pressure as a consequence of the statement of the principle of subsidiarity in the Treaty. There is no separate decision on subsidiarity preceding the decision on the substance of Community action. Subsidiarity and substance are necessarily and inextricably intertwined and thus must be part of a single decision-making process.¹⁸⁰

When taking action, the Community is obliged to state reasons pursuant to Article 190 of the EC Treaty, including those which reveal that the political institutions consider that the action is consistent with the principles of subsidiarity and proportionality. The Court of Justice is likely to enforce that obligation strictly,¹⁸¹ which means that it will control whether the reasons stated set out the steps that led to the recognition of the need for Community action and further explain why the nature and intensity of the action were necessary to achieve its objectives. It should be borne in mind that judicial scrutiny of the appropriateness of the reasons stated for Community action is about the only practical route for the Court of Justice to supervise the respect by the political institutions of the principles of subsidiarity and proportionality flowing from Article 3b. The idea behind that kind of supervision is that the political institutions ought to be forced to express their reasoning with regard to the operation of subsidiarity and proportionality as limits *intra vires* to Community action. In this manner these institutions will think thoroughly before acting and will be more directly subject to the "political" control of the Member States, their subnational authorities and interested citizens.¹⁸²

180. See Interinstitutional Agreement between the European Parliament, the Council and the Commission on the procedures of implementation of the principle of subsidiarity, of 29 October 1993, *supra* note 146 and accompanying text.

181. See *Hauptzollamt München Mitte v. Technische Universität München*, Case C-269/90, [1991] E.C.R. I-5469, I-5501-02, ¶¶ 26 & 27.

182. Compare, in relation to U.S. federalism, the statement by Justice Blackmun, writing for the majority of the Supreme Court in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, at 554 (1985): "[We] are convinced that the fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect the 'States as States' is one of process rather than one of result." *Id.* The States are therefore to rely on the "effectiveness of the federal political process" to protect their interests rather than on the judiciary, which would enforce a precise substantive "result" mandated by the constitution. It is interesting to note that the stakes involved in the *Garcia* case are not without resemblance to those dominating the present-day subsidiarity debate in Europe. The dissenting opinion by Justice Powell states: "[T]he

As we have seen, in the area of the environment, it should be easy to substantiate the reasons for Community action. As far as the need for such action is concerned, reference will be made to the several types of environmental spillovers. As to the nature and intensity of Community action, it will be sufficient to justify the division of responsibilities between the Community and the Member States for regulation, implementation, and monitoring by reference to their respective capabilities.

members of the immense federal bureaucracy are not elected, know less about the services traditionally rendered by States and localities, and are inevitably less responsive to recipients of such services, than are State legislatures, city councils . . . and [local] agencies. It is at these State and local levels - not in Washington, as the Court so mistakenly thinks - that 'democratic self-government' is best exemplified." *Id.* at 575.