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## Subsidiarity and Transparency

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# Subsidiarity and Transparency

Christian Timmermans

## Abstract

Subsidiarity and transparency are entirely different concepts. . . . However different, both concepts are twins in the continuing quest of the Framers of European integration to increase the legitimacy of Community decision-making vis-à-vis the citizens. Indeed, there always has been, and there still is a very serious problem of lack of legitimacy. . . . Increasing the powers of the European Parliament is not sufficient to bridge this legitimacy gap, although the Maastricht Treaty did make progress in that respect, for instance, by introducing the co-decision procedure. The problem is much vaster. At any rate, the negative experiences of the ratification discussions on the Maastricht Treaty were one of the reasons for heads of state and government to undertake serious efforts to bring the subsidiarity principle into practice, to make it operational, and to enhance transparency. The Conclusions of the Edinburgh European Council of December 1992 render this effect abundantly clear. These Conclusions reflect a more general change of attitude towards Community law-making. The present Commission, under President Santer, strongly emphasized its commitment to these goals in the presentation of its first legislative program to the European Parliament in 1995 under the banner: Better Law-Making (*Mieux Légiférer*): Do less, but do it better. . . . Much progress has been made since the entry into force of the Maastricht Treaty in trying to make the application of the principle of subsidiarity effective and in increasing transparency in its various facets. Subsidiarity has become part and parcel of the institutional setting. The program set out in the Conclusions of the Edinburgh European Council largely has been met. Particularly with regard to subsidiarity, the original fears and objections raised from legal quarters have been allayed.

# SUBSIDIARITY AND TRANSPARENCY

*Christian Timmermans\**

## INTRODUCTION

Subsidiarity and transparency are entirely different concepts. Why treat them together? Subsidiarity has acquired the status of a constitutional principle of the European Community ("EC" or "Community") legal system since the Maastricht Treaty (or "TEU").<sup>1</sup> This principle expresses the Community approach to federalism. The principle of subsidiarity aims at protecting Member States' powers by limiting the exercise of Community powers to what is strictly necessary, that is to say to what cannot be sufficiently achieved by the Member States alone, and can therefore be better achieved on the Community level. Transparency is a more diffuse concept. It refers to openness of Community decision-making, to the right of access to documents held by Community institutions, and to the accessibility and quality of Community legislation.

However different, both concepts are twins in the continuing quest of the Framers of European integration to increase the legitimacy of Community decision-making vis-à-vis the citizens.<sup>2</sup> Indeed, there always has been, and there still is a very serious problem of lack of legitimacy. This problem may even have increased because of majority voting and the progressive extension of Community action to sectors other than the core ones of economic integration. In particular, the ratification debate on the TEU, not only during the referenda in Denmark and France, but also in other Member States, revealed unexpectedly strong and wide-spread feelings of frustration and resistance of the citizens

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\* Deputy Director-General of the Legal Service of the European Commission. The author expresses his personal views only. The text is the slightly adapted version of the oral presentation at the Fordham School of Law symposium titled "The European Union and the United States: Constitutional Systems in Evolution," held February 26-28, 1998.

1. Treaty on European Union, Feb. 7, 1992, art. 3b, O.J. C 224/1, at 9 (1992), [1992] 1 C.M.L.R. 719, 724 [hereinafter TEU] (amending Treaty establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter EEC Treaty], as amended by Single European Act, O.J. L 169/1 (1987), [1987] 2 C.M.L.R. 741 [hereinafter SEA]).

2. See European Commission, Report on the Operation of the Treaty on European Union, SEC (95) 731, at 29 (1995) [hereinafter The Report].

toward the ongoing process of European integration. Much criticism was directed at the complexity and lack of transparency of the decision-making process and at the intrusiveness of Community rules. Increasing the powers of the European Parliament is not sufficient to bridge this legitimacy gap, although the Maastricht Treaty did make progress in that respect, for instance, by introducing the co-decision procedure. The problem is much vaster. At any rate, the negative experiences of the ratification discussions on the Maastricht Treaty were one of the reasons for heads of state and government to undertake serious efforts to bring the subsidiarity principle into practice, to make it operational, and to enhance transparency. The Conclusions of the Edinburgh European Council of December 1992 render this effect abundantly clear.<sup>3</sup> These Conclusions reflect a more general change of attitude towards Community law-making. The present Commission, under President Santer, strongly emphasized its commitment to these goals in the presentation of its first legislative program to the European Parliament in 1995 under the banner: Better Law-Making (*Mieux Légiférer*): Do less, but do it better.

### I. SUBSIDIARITY

Prof. George Bermann used about 125 pages and 485 footnotes of the *Columbia Law Review* to present a very lucid, in-depth analysis of the subsidiarity principle.<sup>4</sup> I would refer those who are not familiar with the subsidiarity principle, its interpretation, and its background to this article, which is a leading one on the subject.<sup>5</sup> I limit myself here to a few comments on the following

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3. Edinburgh European Council, Conclusions of the Presidency, 25 E.C. BULL., no. 12 (1992) [hereinafter Conclusions].

4. See George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 32 COLUM. L. REV. 331 (1994) [hereinafter Bermann I]; see also George A. Bermann, *Regulatory Federalism: European Union and United States*, *Academy of International Law, The Hague*, 263 RECUEIL DES COURS 13 (1997) [hereinafter Bermann II] (discussing U.S. approach to federalism, which, quite interestingly, appears to do fine without subsidiarity).

5. See P.J.G. Kapteyn, *Community Law and the Principle of Subsidiarity*, REVUE DES AFFAIRES EUROPÉENNES 35 (1991); Koen Lenaerts & Patrick van Ypersele, *Le Principe de Subsidiarité et son contexte: étude de l'article 3B du Traité CE*, CAHIERS DE DROIT EUROPÉEN 3 (1994); Pierre Pescatore, *Mit der Subsidiarität leben, Gedanken zu einer drohenden Balkanisierung der Europäischen Gemeinschaft*, in FESTSCHRIFT FÜR ULRICH EVERLING BADEN-BADEN 1071 (1995); A.G. Toth, *The Principle of Subsidiarity in the Maastricht Treaty*, 29 COMMON MKT. L. REV. 1079 (1992).

two issues. First, comments discussing subsidiarity in practice. How does the Community, and in particular the Commission, handle subsidiarity. Is subsidiarity really applied? Second, comments referring to subsidiarity in the case law. There now exist two judgments of the Court of Justice that merit discussion.

As George Bermann puts it, “[s]ubsidiarity will have to be practiced as well as preached.”<sup>6</sup> Is it being practiced? One can hardly contest that the Institutions<sup>7</sup> take subsidiarity seriously. Much has been done to make it operational. For example, first, the Inter-institutional Agreement of 1993<sup>8</sup> expressed the firm commitment of each Institution participating in the legislative process, the Commission, Council, and European Parliament, to justify Community legislation with regard to compliance with the principles of subsidiarity. The Commission includes this justification in the recitals of its legislative proposals, together with a more substantial reasoning under the tests of comparative efficiency and value added of Community action in the explanatory memorandum of its proposals. Second, internal procedures within the Commission have been structured to ensure a serious test of subsidiarity. For that purpose the Commission adopted general guidelines for legislative policy in 1995, together with a legislative checklist that the Commission services have been instructed to apply when drawing up proposals for Community legislation.<sup>9</sup> Third, since 1993 the Commission has produced an annual report on the application of the subsidiarity principle. Its scope has been widened since 1995 as is reflected in the title of the report: Better Law-Making, *Mieux légiférer*.<sup>10</sup> Consequently, internal mechanisms have been developed to make subsidiarity operational. What are the actual results? A twofold action has been launched since 1992.

First, a vast operation of withdrawing obsolete texts and, in

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6. See Bermann I, *supra* note 4, at 335.

7. The Council, the Commission, and the European Parliament.

8. Inter-institutional Agreement, 26 E.C. BULL., no. 10, at 125 (1993).

9. See C.W.A. Timmermans, *How Can One Improve the Quality of Community Legislation?*, 34 COMMON MKT. L. REV. 1229, 1242 (1997).

10. See European Commission, Report to the European Council on the application of the subsidiarity and proportionality principles, on simplification and on consolidation, CSE (95) 580 [hereinafter Better Law Making 95]; see also European Commission, Report to the European Council on the application of the subsidiarity and proportionality principles, on simplification and on consolidation, CSE (96) 7 and COM (97) 626 Final (Nov. 1997) (providing subsequent reports).

particular, simplifying legislation has been established in regards to past and existing legislation. A SLIM-rolling plan has been set up to reform internal market legislation.<sup>11</sup> Indeed, there is a stronger case for simplification than for repealing entire parts of Community legislation for reasons of not respecting subsidiarity. For example, there was a Report in 1978 of the United Kingdom House of Lords Select Committee on the European Communities<sup>12</sup> on harmonization of legislation based on Article 100 of the Treaty establishing the European Economic Community ("EEC Treaty").<sup>13</sup> About 500 directives and draft directives were analyzed. Only one directive and one draft directive were objected to as exceeding the limits of Community powers under Article 100.

Second, with regard to future legislation, the Commission has, first of all, withdrawn a certain number of earlier proposals and simplified some of these proposals.<sup>14</sup> The steep fall in the number of legislative proposals, in 1993 there were forty eight, while in 1997 there were only eight, illustrates that subsidiarity is taken seriously. On the other hand, in the last two years there has been a large increase in the number of consultation papers, green-papers,<sup>15</sup> white-papers,<sup>16</sup> and other communications produced by the Commission to prepare possible legislative initiatives by wide, consultative, and public debates.

It is undeniable that a real effort is being made to change law-making practice and to make it more subsidiarity-friendly. Indeed, for those like myself who experience the daily life of the

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11. See European Commission, *Simpler Legislation for the Internal Market (SLIM): A Pilot Project*, COM (96) 204 Final (May 1996); European Commission, *Simpler Legislation for the Internal Market: A Pilot Project*, COM (96) 559 Final (Nov. 1996); see also Council of the European Union, *The Action Plan for the Single Market*, CSE (97) 1 (Oct. 1997).

12. House of Lords, Select Committee on the EC, *Approximation of Laws under Article 100 of the EEC Treaty*, 22nd Rep., H.L. 131 (Lond. 1978).

13. EEC Treaty, *supra* note 1.

14. See Proposal for a 13th European Parliament and Council Directive on company law concerning takeover bids, O.J. C 162/5 (1996); see also *supra* note 10 (providing further details).

15. A Green Paper is a document presented for public discussion and debate. See Europa, *Official Documents – Green Papers* (visited Oct. 5, 1998) <<http://europa.eu.int/comm/off/green/index.htm>> (on file with the *Fordham International Law Journal*).

16. A White Paper is a document presenting detailed and debated policy both for discussion and political decision. See Europa, *Official Documents – White Papers* (visited Oct. 5, 1998) <<http://europa.eu.int/search97r.cgi>. . .=white¶paper&ViewTemplate=EUROPA\_view.htm> (on file with the *Fordham International Law Journal*).

Institutions from within, there is a clear change of culture. Subsidiarity has impregnated the political mindset. Many feel it is necessary not to do what it is not necessary to do. That is important in that subsidiarity is much more a political principle of common sense than a legal principle easily subject to legal review. Whether the real harvest of the last years is a rich one, particularly in terms of adequate reasoning as to compliance with the subsidiarity test, sufficiently substantiated by qualitative and quantitative indication, as the Conclusions of the Edinburg European Council and also the requirements of the Interinstitutional Agreement demand, merits a closer look. This closer look would be a good subject for academic research.

That is not to say that there are no problems. I would make three remarks in that respect. First, a certain tension between the European Parliament and the Council as to the assessment of subsidiarity has occasionally arisen. It could be expected that the Council would apply with some rigor the comparative efficiency test as to the possibility for Member States' action, whereas Parliament would be particularly sensitive as to the value added of possible Community action. The Zoo saga is a telling example. Should the Community lay down harmonized rules related to licensing and inspection of zoos? Originally, the Commission proposed a directive to that effect but finally decided for subsidiarity reasons to adopt a draft recommendation to Member States.<sup>17</sup> The European Parliament is now putting pressure on the Commission to opt again for the instrument of a directive. Leaving aside the issue of which position is most justified under a subsidiarity test, it seems to me that more generally it may be too easy to expect the European Parliament, particularly once its powers of co-decision are increased under the Amsterdam Treaty,<sup>18</sup> to be less subsidiarity-minded than the other

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17. See Better Law Making 95, *supra* note 10, at 6.

18. See Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, Oct. 2, 1997, art. 2(44), O.J. C 340/1, at 45 (1997) (not yet ratified) [hereinafter Treaty of Amsterdam] (amending co-decision procedure in Article 189b of the Treaty establishing the European Communities ("EC Treaty")); Consolidated version of the Treaty establishing the European Community, art. 251, O.J. C 340/3, at 279 (1997), 37 I.L.M. 79, 141 (not yet ratified) [hereinafter Consolidated EC Treaty] (art. 189b of EC Treaty), *incorporating changes made by* Treaty of Amsterdam, *supra*. By virtue of the Treaty of Amsterdam, articles of the EC Treaty will be renumbered in the Consolidated version of the Treaty establishing the European Community. Treaty of Amsterdam, *supra*, art. 12, O.J. C

Institutions. In its ongoing, fairly delicate struggle to build up the confidence of the European electorate and to establish its legitimacy, increased and overt attention to subsidiarity might pay off.

Second, a more technical comment relates to the instruments for Community legislation. The subsidiarity debate between the institutions has produced a benchmark for the use of existing legislative instruments. Directives are preferred over regulations, and framework directives are preferred over detailed directives.<sup>19</sup> The Member States have always had a preference for directives over regulations. Community practice has largely followed this preference. The directive is normally regarded as the more subsidiarity-friendly instrument. Regulations are more interventionist as they replace and drive out national law. I leave aside the question whether this preference is a matter of subsidiarity or proportionality; indeed, the choice of the instrument becomes only relevant once the need of Community action has been established.

*Prima facie*, this preference for the directive as the less interventionist instrument is warranted. Legislative practice, however, is more complex. Directives tend to become fairly detailed. Sometimes they leave hardly any discretion for transposition into national law. The best examples are those directives that are transposed into national law by a simple reference.<sup>20</sup> A regula-

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340/1, at 78-79 (1997). The Treaty of Amsterdam applied the amended co-decision procedure to pre-existing and new articles of the EC Treaty. See Treaty of Amsterdam, *supra*, art. 2, O.J. C 340/1, at 26-48 (1997) (extending co-decision procedure under art. 189b of EC Treaty to arts. 6, 8a(2), 51, 56(2), 57(2), 73o, 75(1), 109r, 116, 118(2), 119(3), 125, 127(4), 129(4), 129d, 130e, 130i(1), 130o, 130s(1), 130w(1), 191a(2), 209a(4), 213a(1), and 213b(1) of EC Treaty); see Consolidated EC Treaty, *supra*, arts. 13, 18(2), 42, 46(2), 47(2), 67, 71(1), 129, 135, 137(2), 141(3), 148, 150(4), 152(4), 156, 162, 166(1), 172, 175(1), 179(1), 255(2), 280(4), 285(1), 286(1), O.J. C 340/3, at 185, 186, 194, 196, 196, 203-04, 205, 236, 238, 239-40, 242, 244, 245, 247, 249, 251, 252-53, 254, 255, 257, 282, 293, 294, 294 (1997), 37 I.L.M. at 82, 82, 86, 87, 87, 91, 92, 107, 108, 109, 110, 111, 112, 113, 114, 115, 115-16, 116, 117, 118, 130, 136, 136, 136 (arts. 6, 8a(2), 51, 56(2), 57(2), 73o, 75(1), 109r, 116, 118(2), 119(3), 125, 127(4), 129(4), 129d, 130e, 130i(1), 130o, 130s(1), 130w(1), 191a(2), 209a(4), 213a(1), and 213b(1) of EC Treaty).

19. See Commission of the European Communities, Communication of the European Commission on Subsidiarity, SEC (92) 1990, at 21 (1992) [hereinafter the Communication]; Conclusions, *supra* note 3, Annex 1.

20. The Netherlands has transposed Directives on public procurement, Council Directive No. 92/50/EEC, O.J. L 209/24 (1992) (services) and Council Directive No. 71/305/EEC, O.J. L 185/16 (1971), as amended by Council Directive No. 93/37/EEC,



tion might then be the less interventionist instrument, and considered to be so on the national level, particularly when transposition of a directive would imply a fairly complex operation of adapting various sets of national rules. Regulations would offer better guarantees for uniform application in the absence of any problem of belated or incorrect transposition; legislation would be more transparent, only one layer of regulation would exist, and adaptation of the rules concerned to technical progress would be more easily achieved. Member States might be convinced by another argument: when the Community legislates by way of a regulation, the Member States do not risk incurring liability under the Francovich case law<sup>21</sup> for lack of, or incorrect, transposition. Some fine-tuning of the mutual ranking of regulations and directives on legislative instruments might therefore be envisaged.<sup>22</sup>

Third, a comment relates to what is sometimes called the "upwards" application of the principle of subsidiarity.<sup>23</sup> This application concerns cases in which Community action is deemed necessary, but instead of acting autonomously, accession to international treaties or participation in decision-making of international organizations is preferred to achieve more effective and far reaching results. This approach is not new,<sup>24</sup> but the phenomenon of international harmonization by international treaty or rule-making is of rapidly growing importance.<sup>25</sup> Both in

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O.J. L 199/8 (1993) (public works), by using this technique. See *Besluit overheidsaansbestedingen van 4 juni 1993*, Stb. 1993, nr 305.

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

22. See Council of the European Union, *The Internal Market After 1992*, The Sutherland Report Recommendation No. 11, SEC (92) 2044, at 30 (1992).

23. See The Communication, *supra* note 19, SEC (92) 1990, at 14; Commission of the European Communities, Report to the European Council on the application of the subsidiarity and proportionality principles, on simplification and on consolidation, COM (97) 626 Final, at 4 (1997) [hereinafter *Better Law Making 97*].

24. For example, the GATT (General Agreement on Tariffs and Trade, opened for signature Oct. 30, 1947, 61 Stat. A3, 55 U.N.T.S. 187 (150)), the various Fishery Organizations (for example The Convention on Future Multilateral Cooperation in North Western Atlantic Fishery Organization, Oct. 24, 1978 Canada Treaty Service no. 11 (1979) and the The Convention on Future Multilateral Cooperation in North Eastern Atlantic Fishery Organization, Nov. 18, 1980, 1285 U.N.T.S. 129 (1980)), and the Food and Agriculture Organization of the United Nations, all were concerned with upwards application of subsidiarity.

25. See Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C,

terms of comparative efficiency and value added, the international approach presents in similar cases the better solution. The problem is of course, in cases where external Community competencies are shared with the Member States, to convince Member States to permit the Community to act. Here, the subsidiarity test could help. Instead of entering into a sterile debate on the possible exclusive nature of Community competencies, the question should be formulated in terms of what the Member States win in terms of efficiency gains and added value, by acting through the Community. The ongoing discussion on a possible Open Skies Agreement between the Community and the United States, replacing bilateral agreements between the United States and various Member States, demonstrates the difficulty of such a debate.

#### A. *Consequences of the Amsterdam Treaty*

Before turning to the case law, I should like to conclude with a word on the consequences of the Treaty of Amsterdam for subsidiarity. A rather lengthy Protocol on the application of the principles of subsidiarity and proportionality ("Subsidiarity Protocol")<sup>26</sup> will be annexed to the Treaty establishing the European Community ("EC Treaty").<sup>27</sup> The Subsidiarity Protocol largely codifies the *acquis* of the Conclusions of the Edinburgh European Council and the subsequent Inter-institutional Agreement. The Subsidiarity Protocol's importance resides mainly, in my view, in raising this *acquis* to the level of primary Community law, that is, giving it the rank of treaty law, and also, in so doing, in using imperative language such as "shall." Consequently, the possibilities for legal review by the Court of Justice will be strengthened, particularly as to the procedural requirements imposed by the Protocol. It should be noted, however, that the

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LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 31, 33 I.L.M. 81 (1994); Geneva Agreement (1958) (concerning adoption of uniform conditions of approval and reciprocal recognition of approval for motor vehicle equipment and parts); *see also* Council Decision No. 97/836/EC, O.J. L 346 (1997) (concluding Geneva Agreement). Each of these agreements demonstrates the growing importance of international harmonization.

26. *See* Treaty of Amsterdam, *supra* note 18, Protocol on the application of the principles of subsidiarity and proportionality, O.J. C 340/1, at 105 (1997).

27. Treaty establishing the European Community, Feb. 7, 1992, O.J. C 224/1 (1992), [1992] 1 C.M.L.R. 573 [hereinafter EC Treaty], *incorporating changes made by* TEU, *supra* note 1.

Subsidiarity Protocol does not impose a specific obligation on the Community legislator to justify a Community act in terms of its compliance with the principles of subsidiarity and proportionality. The requirements to state reasons are related to the proposed legislation, not to the final act. In this respect, the need for the Commission to give the necessary justification in the explanatory memorandum to its proposals is not phrased in terms of a strict obligation. No explicit reference is made to any recital regarding subsidiarity, not even with regard to a Commission proposal. I note in passing that the Subsidiarity Protocol implicitly recognizes for the first time in the Treaty of Amsterdam the constitutional principles developed by the Court regarding the relationship between Community law and national laws, that is, the principle of supremacy.

### B. *Is the Subsidiarity Principle Justiciable?*

For subsidiarity to be taken seriously, the possibility of judicial review of compliance with this principle is essential. It cannot be reasonably argued that, on grounds of principle, the application of the subsidiarity principle should be immune from legal review. It has been enshrined in Article 3b<sup>28</sup> as a legal rule. The Conclusions of the Edinburgh European Council qualify subsidiarity as a general principle of law, an expression that has not been repeated in the Inter-institutional Agreement of 1993<sup>29</sup> or in the Subsidiarity Protocol.

The EC Court has until now been confronted with subsidiarity on only two occasions. Its first judgment, on November 7, 1996 in the action brought by the United Kingdom for the annulment of the Working Time Directive,<sup>30</sup> demonstrates great reluctance to proceed to a substantive legal review of compliance with subsidiarity.<sup>31</sup> Its second judgment, on May 13, 1997, however, regarding an action by Germany against the Directive on deposit-guarantee schemes,<sup>32</sup> is less timid and shows the willingness of the Court to proceed at least to a formal review of the

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28. EC Treaty, *supra* note 27, art. 3b, O.J. C 224/1, at 9 (1992), [1992] 1 C.M.L.R. at 590.

29. Inter-institutional Agreement No. 96/6, O.J. C 102/2, at 2 (1994).

30. Council Directive No. 93/104, O.J. L 307/18 (1993).

31. United Kingdom v. Council, Case C-84/94, [1996] E.C.R. I-5793, [1996] 3 C.M.L.R. 671.

32. Council Directive No. 94/19, O.J. L 135/5 (1994).

reasoning of a Community act regarding subsidiarity.<sup>33</sup>

The first case concerns the Working-Time Directive of November 23, 1993, a harmonization directive based on Article 118a of the EC Treaty.<sup>34</sup> According to this article, the Council shall adapt minimum requirements to encourage improvements, especially in the working environment, as regards the health and safety at work, with a view to harmonizing conditions in this area.<sup>35</sup> The United Kingdom requested the Court to annul the directive on the grounds, *inter alia*, of the wrongful use of Article 118a as a legal base, and a breach of proportionality. Without arguing non compliance with the subsidiarity principle as a distinct plea, the United Kingdom submitted that the Council, when exercising the competence granted under Article 118a, should interpret the article in the light of the principle of subsidiarity and fully consider and demonstrate the insufficient nature of national action and the value added of Community action. According to the United Kingdom, that had not been done. Indeed the recitals of the Directive do not reflect any clear subsidiarity reasoning. Advocate General Léger gave short shrift to this argument. The objective of Article 118a is harmonization; it would be illusory to expect the Member States alone to achieve harmonization; this necessarily involves supranational action. With all due respect, this approach would make a subsidiarity review superfluous in all those cases where the EC Treaty requires Community action. The Court followed in substance its Advocate-General but with a slightly different wording. The Court held that “[o]nce the Council has found that it is necessary to improve the existing level of protection as regards the health and safety of workers and to harmonize the conditions in this area . . . achievement of that objective through the imposition of minimum requirements necessarily presupposes Community wide action . . . .”<sup>36</sup>

Clearly, the Court shows great reluctance to enter into a substantive review of subsidiarity. What the Council deems nec-

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33. Germany v. Parliament and Council, Case C-233/94, [1997] E.C.R. I-2441, [1997] 3 C.M.L.R. 1379.

34. EC Treaty, *supra* note 27, art. 118a, O.J. C 224/1, at 45 (1992), [1992] 1 C.M.L.R. at 658.

35. *Id.*

36. United Kingdom v. Council, [1996] E.C.R. at 5796, ¶ 47, [1996] 3 C.M.L.R. at 674.

essary is necessary. One should take into account, however, that the United Kingdom had not raised a plea of non-compliance with the subsidiarity principle. Moreover, the Directive had been adopted only twenty-three days after the entering into force of the Maastricht Treaty.

On the issue of working hours and labor conditions, there exists rich case law of the U.S. Supreme Court where federal legislation on these issues was tested under the Commerce Clause. *Carter v. Carter Coals Corporation*<sup>37</sup> and *Schechter Poultry Corporation v. United States*,<sup>38</sup> are both examples of cases in which federal legislation was struck down because Congress was considered to lack the necessary regulatory powers. Of course, any comparison in this respect is delicate. The EC Treaty grants explicit powers to the Community on these subjects. Nevertheless, experiences of U.S. case law are quite interesting when considering issues of legal review regarding the application of subsidiarity within the Community. The approach of the European Court in its judgment concerning the Working Time Directive is much closer to the U.S. Supreme Court's decision in *Garcia v. San Antonio Metropolitan Transit Authority*<sup>39</sup> than to the approaches taken by the U.S. Supreme Court in the two cases just mentioned. In *Garcia*, the Supreme Court showed as much deference to the assessment of the legislator as the EC Court did in the case of the Working Time Directive when it stated: "State sovereign interests are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power."<sup>40</sup> This trend, however, has been apparently reversed. In *United States v. Lopez*,<sup>41</sup> the U.S. Supreme Court appeared much less deferential to Congressional action and did not hesitate to qualify this action as an unwarranted interference with state power.

The second judgment delivered by the European Court concerns an action for annulment lodged by Germany against the Directive on deposit-guarantee schemes of May 30, 1994.

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37. *Carter v. Carter Coals Corp.*, 298 U.S. 238 (1936).

38. *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

39. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

40. *United Kingdom v. Council*, Case C-84/94, [1996] E.C.R. I-5793, I-5797, [1996] 3 C.M.L.R. 671, 678.

41. *United States v. Lopez*, 514 U.S. 549 (1995) (concerning issues other than labor law); see Bermann II, *supra* note 4, at 101.

This Directive had been based on Article 57(2) of the EC Treaty and has a clear internal market rationale, to remove restrictions on the right of establishment and freedom to provide services in the banking sector, that is, restrictions caused by differences between national systems of deposit protection. Apart from contesting the legal basis, Germany argued that a breach of Article 190 of the EC Treaty occurred because of insufficient reasoning concerning compliance with the principle of subsidiarity.<sup>42</sup> Germany did not allege a similar violation of the subsidiarity principle. Advocate General Léger accepted the Commission argument that Community competence in this area was exclusive.<sup>43</sup> Therefore subsidiarity did not apply and no reasoning was necessary. The Advocate General accepted, however, that when the principle does apply, adequate reasoning as to its respect must be given as a consequence of the general requirement under Article 190 of the EC Treaty to state reasons. The Court concluded after an examination of the recitals of the Directive that:

[I]t is apparent that, on any view, the Parliament and the Council did explain why they considered that their action was in conformity with the principle of subsidiarity and, accordingly, that they complied with the obligation to give reasons as required under Article 190 of the [EC] Treaty. An express reference to that principle cannot be required.<sup>44</sup>

This judgment, in my view, could have important consequences for the application and respect the subsidiarity principle and judicial review thereof. I say "could have" because the text is not entirely clear. All depends on whether the phrase "on any view" relates only to the first part or also to the second part of the sentence. If one limits the phrase "on any view" to the first part, which seems grammatically correct, the consequences would be far reaching.

First, the Community legislator would be required to justify compliance with the subsidiarity principle as part of its general obligations under Article 190 of the EC Treaty to state the reasons on which a Community act is based. The Court would have based this obligation directly on Article 190 of the EC Treaty

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42. *Germany v. Parliament and Council*, [1997] E.C.R. at I-2444, [1997] 3 C.M.L.R. at 346.

43. *Id.* at I-2447, [1997] 3 C.M.L.R. at 349.

44. *Id.* at I-2443, ¶ 28, [1997] 3 C.M.L.R. at 382.

without any reference to the Interinstitutional Agreement on Subsidiarity or the Conclusions of the Edinburgh European Council. This fact is not self-evident. Normally, it will not be necessary to state the reasons why an act complies with general principles of law, except for acts that have retroactive effects or otherwise affect legitimate expectations. In view of the constitutional status conferred upon the principle of subsidiarity and the limits that this principle imposes on the use of a non-exclusive Community competence, a general requirement of this nature appears acceptable. This type of requirement would imply an important reinforcement compared with both the Conclusions of the Edinburgh European Council, the Interinstitutional Agreement on Subsidiarity, and the Subsidiarity Protocol, none of which imposes a similar requirement as to the final Community act itself.

Second, it could be argued that by upholding this type of requirement with regard to a Community competence related to the internal market, the Court rejects the view of the Advocate General that competence is exclusive in the sense of Article 3b of the EC Treaty. If so, it would have also rejected the Commission view that competencies related to the internal market, such as Article 57<sup>45</sup> or 100a,<sup>46</sup> at least when their exercise aims at the completion of the internal market are exclusive and need not be made subject to a subsidiarity test. It would be hazardous, however, to draw any firm conclusion in the absence of any reasoning on the issue.

Third, in scrutinizing the reasoning of the Directive as to its compliance with the subsidiarity principle, the Court implicitly applies the two tests generally recognized in this respect: The test of value added of Community action, *in casu* the trans-border dimension of the problem; the test of comparative efficiency, *in casu* the obvious insufficiency of Member States' action. This application indicates to the Community legislator how to structure the Court's reasoning in similar cases. It is interesting to note that the Court accepts as a pertinent element for the second test the failure of the earlier Recommendation of the Commission, a non-binding instrument, to achieve the de-

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45. EC Treaty, *supra* note 27, art. 57, O.J. C 224/1, at 23 (1992), [1992] 1 C.M.L.R. at 616.

46. *Id.* art. 100a, O.J. C 224/1, at 32 (1992), [1992] 1 C.M.L.R. at 633-34.

sired result. Consequently, the follow-up of a recommendation can be used as an instrument to verify comparative efficiency. This use of follow ups of recommendations is nothing new, particularly for the banking sector. In those cases there is an obvious overlap with the proportionality test because the choice of the instrument must be made by applying that test.

Fourth, it is established case law, to which the European Court refers in this case, that the obligation to state the reasons under Article 190 of the EC Treaty also serves the purpose of allowing the European Court to exercise its power of review. In requiring the reasons related to the application of the subsidiarity test to be stated, the European Court would implicitly recognize the possibility of review, at least in terms of a formal control, to verify whether the legislator has examined compliance with the principle of subsidiarity. Requiring reasons would at the same time pave the way for a substantive control. I do not see any reason why the European Court should not proceed for that purpose to at least the same restrictive control as it normally applies where the legislator holds far-reaching discretionary powers.<sup>47</sup> When the Court sees fit to subject the proportionality principle to a similar control, as it did in the same judgment,<sup>48</sup> it is difficult to understand why a similar control should not be exercised as to subsidiarity. That approach would also be consistent with a line of cases, admittedly thin, in which the Court, outside the framework of the proportionality principle, has reviewed the necessity or adequacy of a harmonization measure regarding the objectives imposed by the Amsterdam Treaty.<sup>49</sup> But once again, it may be too early to draw any definite conclusions in these respects on the basis of this judgment alone.

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47. See *Racke v. Hauptzollamt Mainz*, Case 136/77, [1978] E.C.R. 1245, 1256, [1978] 3 C.M.L.R. 610, 622; *Racke v. Hauptzollamt Mainz*, Case 98/78, [1979] E.C.R. 69, 81, [1979-1982 Transfer Binder] Common Mkt. Rep. (CCH) at 8541; *Denkavit Nederland v. Produktschap Voor Zuivel*, Case 35/80, [1981] E.C.R. 45, 62; *Timex v. Council and Commission*, Case 264/82, [1985] E.C.R. 849, 866, [1985] 3 C.M.L.R. 550, 561.

48. *Germany v. Parliament and Council*, Case C-233/94, [1997] E.C.R. I-2441, I-2461, ¶ 56, [1997] 3 C.M.L.R. 1379; see *Queen v. Ex parte Fedesa and Others*, Case C-331/88, [1990] E.C.R. I-4023, I-4063, [1991] 1 C.M.L.R. 507, 532.

49. See *Pinna v. Caisse d'allocations familiales de la Savoie*, Case 41/84, [1986] E.C.R. I, 25, ¶ 21, [1988] 1 C.M.L.R. 350, 375; *Hönig v. Stadt Stockach*, Case C-128/94, [1995] E.C.R. I-3389, I-3404; see also *Germany v. Parliament and Council*, [1997] E.C.R. at I-2457 (1997) (deposit-guarantee scheme judgment).



## II. TRANSPARENCY

Transparency of the legislative process, particularly as far as the role of the Council is concerned, has been advocated as a basic principle of democracy to allow citizens to see how the powers attributed with their consent are being exercised by the institutions mandated thereto, and to make those institutions accountable. Transparency, seen from that perspective, is also an indispensable condition to permit informed participation in the process by the citizens and their interest groups outside the normal channels of representative democracy. A reference to the democracy argument can also be found in Declaration No. 17 to the Maastricht Treaty on the right of access to information,<sup>50</sup> which was to my knowledge the first formal reference to transparency in the context of the Community. The further reference in the same Declaration, however, to the strengthening of the public's confidence in the administration might more closely reflect the intentions, and underlying preoccupations, of the drafters of the Maastricht Treaty. Indeed, as the ratification debates on the Maastricht Treaty amply confirmed, one is confronted with a "spectacular alienation of the people in the various Member States."<sup>51</sup> In a recent report on European policies published in the United Kingdom, the European Union ("Union") was qualified as the ultimate public relations disaster. It should be said in passing that much of this verdict is due to the success of the anti-marketeer campaign in the United Kingdom.

Transparency, in any event, has become a prominent issue on the political agenda, as one of the instruments to bring the Union closer to its citizens. Action has been taken, in particular, in three rather distinct fields. Here too, the Conclusions of the Edinburgh European Council have mapped out the initiatives to be taken.<sup>52</sup>

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50. TEU, *supra* note 1, Declaration on the right of access to information, [1992] 1 C.M.L.R. at 785, 31 I.L.M. at 367 (1992) (annexed to Treaty on European Union ("TEU")).

51. D.M. Curtin, *Between and Between: Democracy and Transparency in the Governance of the European Union*, in REFORMING THE TREATY ON EUROPEAN UNION - THE LEGAL DEBATE 97 (Jan A. Winter et al. eds., 1996).

52. See Interinstitutional Declaration on Democracy: Transparency and Subsidiarity, 26 E.C. BULL., no. 10, at 125 (1993).

*A. Openness of the Legislative Process*

The Commission took measures to ensure publication of its annual working program and legislative program.<sup>53</sup> For the Council, openness of decision-making is a delicate issue. The Council cannot be regarded as a parliamentary Chamber representing the states. It is composed of national ministers, on the level of the working groups of national civil servants. Deliberations are in the nature of intergovernmental negotiations; the culture of the decision-making is similar to the traditions of international diplomacy. Opening up the interiors of these delicate processes is generally regarded as causing an immediate threat to the effectiveness of decision-making.<sup>54</sup> In spite of the many resistences, the Council has achieved some progress in this area. First, the media have been granted access to some Council debates, for example on the six monthly work program submitted by the Presidency.<sup>55</sup> This access, however, does not seem to be an overwhelming success.

The decision of the Council to make public the record of the votes, the explanations of the votes and the statements in the minutes in all cases where the Council is acting as a legislator, has been much more important.<sup>56</sup> Disclosure of voting results and the explanations of the votes are important because they facilitate scrutiny by national parliaments regarding the participation of national ministers in the Council's decision-making. Making public statements in the minutes is important to increase transparency of the legislation itself and also to bring some order to earlier practices of obscure commitments or interpretations that do not fit well with the actual texts of the decisions to which they refer. The latter effects have been refused

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53. See The Report, *supra* note 2, SEC (95) 731, at 32.

54. See *Carvel and Guardian Newspapers v. Council*, Case T-194/94, [1995] E.C.R. II-2765, II-2785, ¶ 52, [1995] 3 C.M.L.R. 359, 370 (submission of Council). A faint echo of this argument can be found in Article 151, paragraph three, third sentence of the EC Treaty as amended by the Amsterdam Treaty. See Treaty of Amsterdam, *supra* note 18, art. 2(39), O.J. C 340/1, at 43 (1997) (replacing art. 151 of EC Treaty); Consolidated EC Treaty, *supra* note 18, art. 207, ¶ 3, O.J. C. 340/3, at 265-66 (art. 151, ¶ 3 of EC Treaty).

55. See The Council Rules of Procedure No. 93/662, art. 6, O.J. L 304/1 (1993).

56. See *id.* arts. 7, ¶ 5 & Annex, O.J. L 304/1, at 3 (1993); Code of Conduct on Public Access to the Minutes and Statements in the Minutes of the Council Acting as a Legislator, Oct. 2, 1995.

any legal effect by the Court.<sup>57</sup> Nevertheless, the Court could affect the application of these texts or imply hidden agendas for, and impact on, future legislation. It must be said that the European Parliament, by using its increased powers under the co-decision procedure and by putting pressure on the Commission, exercised an appreciable influence in obtaining these results. The Amsterdam Treaty further strengthens transparency in these respects by requiring without exception the results of votes and the explanations of votes as well as the statements in the minutes to be made public when the Council acts in its legislative capacity.<sup>58</sup>

### B. *Transparency of Legislation*

The Edinburgh European Council first addressed the problem of Community legislation, access to which has become difficult because of numerous amendments, and advocated more unofficial consolidation of these texts and increased codification.<sup>59</sup> The latter implies the formal replacement of dispersed texts by a new integrated text but without any substantive changes. In 1994, an Interinstitutional Agreement was concluded between the European Parliament, Council, and Commission, providing for an accelerated working method to speed up ongoing codification efforts.<sup>60</sup> At present, a similar agreement is being prepared regarding recasting, *refonte*, which, like codification, aims at integrating existing texts in one single text but at the same time amending part of these texts. Information technology as

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57. *Regina v. Antonissen*, Case 292/89, [1991] E.C.R. I-745, I-773, ¶ 18, [1991] 2 C.M.L.R. 373, 392; *Bautiaa and Société Française Maritime v. Directeur des Services Fiscaux du Finistere*, Joined Cases C-197, 252/94, [1996] E.C.R. I-505, I-549, ¶ 51.

58. See Treaty of Amsterdam, *supra* note 18, arts. 1(10), 1(11), 2(39), O.J. C 340/1, at 16, 22, 43 (1997) (introducing arts. J.18 & K.13 into TEU and replacing art. 151(3) of EC Treaty); see Consolidated version of the Treaty on European Union, arts. 28, 41, O.J. C 340/2, at 162, 168 (1997), 37 I.L.M. 67, 73, 76 (not yet ratified) [hereinafter Consolidated TEU] (arts. J.18 & K.13 of TEU), *incorporating changes made by Treaty of Amsterdam*, *supra*; Consolidated EC Treaty, *supra* note 18, art. 207(3), O.J. C 340/3, at 266 (1997), 37 I.L.M. at 128 (art. 151(3) of EC Treaty). By virtue of the Treaty of Amsterdam, articles of the TEU will be renumbered in the Consolidated version of the Treaty on European Union. Treaty of Amsterdam, *supra*, art. 12, O.J. C 340/1, at 78-79 (1997). The new Article 151, paragraph three of the EC Treaty will also apply to acts adopted by the Council in its legislative capacity under the second and third pillars of the European Union according to the new Articles J.18 and K.13 of the TEU.

59. See Timmermans, *supra* note 9, at 1250.

60. Inter-institutional Agreement No. 96/6, O.J. C 102/2, at 2 (1994).

developed by the Communities Publication Office greatly facilitates the production of integrated texts.

Transparency of legislation is closely linked with, and dependent on, the quality of legislation. Various initiatives have been taken to improve the quality of Community legislation.<sup>61</sup> Declaration No. 39 of the Amsterdam Treaty advocates the conclusion of another interinstitutional agreement between the European Parliament, Council, and Commission to establish guidelines for improving the quality of the drafting of Community legislation.<sup>62</sup> Preparatory work has started.

### C. Access to Documents

As a follow-up to Declaration No. 17 of the Maastricht Treaty on the right of access to information, the Commission and Council agreed in 1993 to a Code of Conduct ("Code") laying down the principles governing access to Commission and Council documents.<sup>63</sup> Both institutions have implemented the Code, which is to be regarded as a preparatory act, each by way of a separate decision (collectively "Access Decisions").<sup>64</sup> The European Parliament adopted its own regime by decision of July 10 1997.<sup>65</sup>

Before 1993 there existed neither at the Community level, nor at the level of the Institutions, a general regime on access to documents. Special regimes, however, existed for particular sectors.<sup>66</sup>

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61. See Council Resolution of 8 June 1993, O.J. C 166/1 (1993) (concerning drafting quality of Community legislation).

62. Treaty of Amsterdam, *supra* note 18, Declaration on the quality of the drafting of Community legislation, O.J. C 340/1, at 139 (1997).

63. Code of Conduct of the Council of the European Community, O.J. L 340/41 (1993) [hereinafter Code].

64. Council Decision No. 93/731/EC, O.J. L 340/43 (1993) (on public access to council documents), *as amended by* Council Decision No. 96/705/ECSC, EC, Euratom, O.J. L 325/1, at 19 (1996); Commission Decision No. 94/90/ECSC, EC, Euratom, O.J. L 46/58 (1994), *as amended by* Commission Decision No. 96/567/Euratom, ECSC, EC, O.J. L 247/1, at 45 (1996) [hereinafter Access Decision] (concerning public access to Commission documents).

65. European Parliament Decision of 10 July 1997, No. 97/632/ECSC, EC, Euratom, O.J. L 236/1, at 27 (1997) [hereinafter Parliament Decision].

66. Undertakings involved in an Article 85 or Article 86 EC procedure (or merger control procedure) have access to the file under conditions developed in the Commission's decision-making practice on the basis of an extensive case law of the European Courts. See Council Directive No. 90/313/EEC, O.J. L 158/1, at 56 (1990) (to freedom of access to information in field of environment).

The Code states the general principle of granting the public "the widest possible access to documents held by the Commission and the Council."<sup>67</sup> Access may be requested by anybody regardless of personal or professional status. No interest need to be proved. Only documents originating from within the Institutions are covered. Applications for documents held by the Institutions but originating from outside must be addressed to the author. Procedural mechanisms to handle applications have been established. A final refusal to grant access must be by reasoned decision, which is subject to legal review. Access must be refused on a limited number of grounds explicitly set forth. These grounds include protection of the public interest, protection of the individual and of privacy, and protection of commercial and industrial secrecy. Access may be refused to protect the Institution's interest in the confidentiality of its proceedings and to allow the Institution to "think in private," as a Commission Guide reported.

The scope of the access regime of the Commission and the Council is in principle very wide. It also covers, subject of course to the above-mentioned exceptions, all internal preparatory documents, internal notes, etc. This width seems even to go beyond the scope of Sweden's Freedom of the Press Act,<sup>68</sup> the Member State generally regarded as the most transparency minded. Indeed, the Swedish Act limits access to official documents.<sup>69</sup> Under this act, a document drawn up by a public authority only becomes an official document when it has received its final form.<sup>70</sup> Internal notes or preliminary outlines or drafts that have not been dispatched apparently are not regarded as official documents unless they have been accepted for filing and registration.<sup>71</sup>

It is interesting to note that the scope of the access regime of the European Parliament also appears to be more limited than that of the Commission and Council. Whereas the Code defines its scope by reference to documents held by these institutions without any further qualification,<sup>72</sup> Parliament Decisions

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67. Council Decision No. 93/731/EC, O.J. L 340/43, at 43 (1993)

68. Freedom of the Press Act, Swed. Const. Ch. 2 [hereinafter Swedish Press Act].

69. *Id.* arts. 1, 2.

70. *Id.* art. 7.

71. *Id.* art. 9.

72. Code, *supra* note 63, O.J. L 340/41 (1993).

refer to European Parliament documents and defines them as documents "drawn up by the Institution."<sup>73</sup> Taken strictly, this definition could considerably limit the scope of Parliament Decisions by excluding any internal or preparatory document for which the Institution as such has taken no responsibility. That would imply, for instance, that the exception provided to protect the confidentiality of deliberations of the political groups or of the relevant services of the Secretariat would only apply to documents established by Parliament itself, or for which it has taken responsibility. All other internal documents of the political groups or the "relevant services" of the Secretariat simply would fall outside the scope of the Access Decisions.<sup>74</sup> We shall have to await how Parliament is going to interpret its Decision on this point.

As far as the mandatory exceptions are concerned, Parliament's Decision is similar to the Code apart from one point that could be of practical interest. The exception related to the protection of the public interest in the Parliament Decision in referring to various examples is of an enumerative, non-exhaustive nature. The Code of Conduct refers to various examples within brackets without adding the phrase "in particular." This reference could be interpreted as an exhaustive enumeration. The President of the Court of First Instance in his Order of March 3, 1998 in case T-610/97R, however, came to the opposite conclusion.<sup>75</sup> This interpretation may be provisional but it is couched in rather definite terms.

The Code has enjoyed increasing interest in practice. The Commission received 180 requests in 1994, 500 in 1996, and 750 in 1997. More than ninety percent of the requests in the period 1994-1997 were favorably answered. These requests originated from academics (1997: twenty-five percent), public authorities (1997: sixteen percent), industry (seventeen percent), and lawyers (thirteen percent). Most of the refusals were based on the public interest exceptions (1997: forty-nine percent). The Council received seventy requests in 1994, seventy-two in 1995, here too academics (twenty-seven percent) and lawyers (twenty-

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73. See Parliament Decision, *supra* note 65, O.J. L 236/1, at 27 (1997) ("*établi par l'Institution*").

74. Code, *supra* note 63, O.J. L 340/41 (1993); Access Decision, *supra* note 64, O.J. L 247/1, at 45 (1996).

75. Carlsen and Others, T-610/97, [1998] E.C.R. II-488.

three percent) being particularly active. Of a total of 443 documents requested, sixty-five were considered to fall outside the scope of the regime. Of the remainder, 58.7% of the documents were considered to fall within the regime. For the refusals, the optional exception related to the confidentiality of proceedings was applied in forty-four percent of the cases.

The first cases appealing decisions refusing access have now been brought before the Court of First Instance. In three out of five cases, the fifth being an order on a request for interim relief, the outcome was successful for the applicant.<sup>76</sup> The relevant decisions, one of the Council, two of the Commission, were annulled on formal grounds, mainly for insufficient reasoning. The Court of First Instance is particularly demanding with regard to the optional exception. When applying the confidentiality of proceedings exception, the Institution must proceed to a serious balance of interests, weighing the interests of the applicant against those of the Institution, and must be seen to have done so in the reasoning of its decision. Albeit that the applicant, in demanding access to a document, is not required to state his interests, it might be wise to do so in the light of this case law. A number of cases are still pending before the Court of First Instance. One of these cases raises the question of whether the Council can invoke a legal privilege to refuse all access to the legal opinions issued by its Legal Service.<sup>77</sup>

Also in this field, the Treaty of Amsterdam introduces important innovation into the EC Treaty by introducing a right of access to European Parliament, Council, and Commission documents into the EC Treaty.<sup>78</sup> Interestingly, the right of access to information, the title of Declaration No. 17 of the Maastricht

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76. See *Carvel and Guardian Newspapers v. Council*, Case T-194/94, [1995] E.C.R. II-2765, II-2767, [1995] 359, 359; *WWF v. Commission*, T-105/95, [1997] E.C.R. II-315, [1997] 2 C.M.L.R. 55; *Interporc Im- und Export GmbH v. Commission*, Case T-124/96, [1998] E.C.R. 231, [1998] 2 C.M.L.R. 82. The relevant Commission decision was upheld in *Van der Wal*, Case T-83/96, [1998] E.C.R. 289, [1998] 4 C.M.L.R. 954. In the fifth case, still pending, a request for interim measures requiring the Council to produce the requested documents was refused.

77. See *Carlsen*, [1998] E.C.R. at II-490 (President's orders). The President's orders went a long way in accepting this under the mandatory public interest exception of the Code of Conduct. See *Spain v. Council*, Case C-350/92, [1995] E.C.R. I-1985, I-1997-98, [1996] 1 C.M.L.R. 415, 426 (Advocate General Jacobs' conclusions).

78. See Treaty of Amsterdam, *supra* note 18, art. 2(45), 340/1, at 46 (1997) (inserting art. 191a into EC Treaty); Consolidated EC Treaty, *supra* note 18, art. 255, O.J. C 340/3, at 282 (1997), 37 I.L.M. at 130 (art. 191a of EC Treaty).

Treaty, has now become a right of access to documents, which is not the same.

The necessary implementation rules, including limits on grounds of public or private interest, will be determined by co-decision, that is by Parliament and Council together, within two years after the entry into force of the Amsterdam Treaty. This right of access recognized on the level of treaty law is not limited to the Community alone, but also applies in principle to the second and third pillars of the Union, that is, to common foreign and security policy and to police and judicial cooperation in criminal matters.<sup>79</sup> One might expect that the implementing regime will provide for specific rules for these sectors.

### CONCLUSION

Much progress has been made since the entry into force of the Maastricht Treaty in trying to make the application of the principle of subsidiarity effective and in increasing transparency in its various facets. Subsidiarity has become part and parcel of the institutional setting. The program set out in the Conclusions of the Edinburgh European Council largely has been met. Particularly with regard to subsidiarity, the original fears and objections raised from legal quarters have been allayed. Legal minds are coming to grips with the concept by making subsidiarity operational through the rather classic techniques of reinforcing requirements concerning the reasoning of an act. Judge Pescatore, in an article published in 1995, was very much concerned about the possible influence of subsidiarity on the development of the Community.<sup>80</sup> He feared that subsidiarity would set us back into the dark times of anarchy of the nation states. I am happy to say now in 1998 that after five years of subsidiarity, the Community is still very much alive.

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79. See Treaty of Amsterdam, *supra* note 18, arts. 1(10), 1(11) O.J. C 340/1, at 16, 22 (1997) (replacing arts. J.18 & K.13 of TEU); Consolidated TEU, *supra* note 58, arts. 28, 41, O.J. C 340/2, at 162, 168 (1997), 37 I.L.M. at 73, 76 (arts. J.18 & K.13 of TEU).

80. See *supra* note 5.