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The Maastricht Treaty, the Principle of Subsidiarity and the Theory of Integration

I. The Maastricht Treaty – where is the concern?[1]

The Maastricht Treaty has raised objection and criticism from all sides, from the Member States, from the Community Organs, from public interest groups. It is striking to see that the substance matter of the Maastricht Treaty can hardly alone explain the public concern. The roots and sources must be found elsewhere in the silent dynamics of the European integration process, bound to markets, but challenging social and traditional structures and the missing public discussion on the objective of the integration process. It is right here where the subsidiarity principle comes into play, as an instrument to balance out the tensions between the Member States, the Community Organs and the European citizens. It seems as if the discussions around the role and functions of subsidiarity principle in the Community legal order provide a chance to make good what has been neglected not only during the Maastricht negotiation rounds but at least during the last five years, after the adoption of the Single European Act. The subsidiarity principle is inherently linked to federalism. It enhances the discussion on the competition between legal orders and it gives space for the Member States to take initiatives beyond the Community legal order[2]. Crisis is a opportunity and the Danish »no» to Maastricht is an irretrievable chance to rediscuss under the notion of subsidiarity the European edifice beyond the European legal order[3].

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[1] This paper is based on my habilitation on »Internationales Produktsicherheitsrecht», Bremen 1992. I would like to emphasise two papers which have inspired me in my research on subsidiarity: N. Reich, Competition Between Legal Orders: A new paradigm of EC Law?, CMLR 28, 1992, 861 et seq. and Ch. Joerges, European Economic Law, the Nation State and the Maastricht Treaty, to be published in R. Dehousse (ed.), The European Union Treaty, München 1993; a paper which has its predecessor: Markt ohne Staat? Die Wirtschaftsverfassung der Gemeinschaft und die Renaissance der regulativen Politik, in R. Wildenmann (ed.) Staatswerdung Europas? Optionen einer Europäischen Union, 191, 254 et seq.

[2] With respect to the »Competition between legal orders». cf. N. Reich, loc.cit.

[3] The Edinburgh meeting of the Council of Ministers where the subsidiarity principle was extensively discussed and reshaped, witnesses the politicisation of the debate on the European future, cf. Schlußfolgerungen der Tagung des Europäischen Rates der Staats- und Regierungschefs in Edinburgh am 11. und 12. Dezember 1992, reprinted in Europa-Archiv, Zeitschrift für Internationale Politik Heft 1 1993, D 1 et seq.

1. The substance matter of the Maastricht Treaty and the public opinion

Does it really present what it stands for: The building not only of a European Market, but an Economic, Monetary and a Political Union?[4] There seems to be a widespread consensus in legal doctrine that the revolutionary element, if any, lies in the Monetary Union. E. Steindorff writes[5]:

> »Bei der Wirtschafts- und Währungsunion geht es heute – vereinfacht ausgedrückt – aus der Sicht der Partner wesentlich darum, die Macht der Mark und der Bundesbank zu brechen. Bezeichnend ist, daß nur die darauf bezüglichen Vertragsteile grundlegend Neues bringen..»

It is nowhere to be found in the Treaty, it is more, however, than hearsay evidence that the FRG gave its consent to the Monetary Union in exchange for the Member States' support to the German unification. It seems to be, however, as if the deal does not bear the burden. Concern has been raised in Germany, although the Maastricht Treaty heavily draws on the German Bundesbank[6]. It suffices to refer to the manifest of the sixty economists against Maastricht[7]. And for the rest of the Maastricht Treaty, the Economic Union and the Political Union? Economic Policy remains national in substance. The Member States will retain their general powers, the Community is bound to coordination of governmental actors, Art. 103[8]. It remains to be seen whether coordination suffices to balance out possible tensions between a europeanised monetary policy and a remaining national economic policy. More or less the same holds true for the industrial policy, Art. 130, another subject of major concern in the discussion[9]. The Maastricht Treaty does not introduce industrial policy as a subject of a European Policy, this has already been done in the Single European Act[10]. True, Art, 130 extends and further develops industrial policy, but it is not put in the hands of the Community. »Contribution» of the Community to the national industrial policy shall be made possible, but only if the Council after consulting the European Parliament and the Economic and Social Com-

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4 Cf. R. Dehousse (ed.) The European Union Treaty, München 1993.

5 Cf. Quo vadis Europa? Freiheiten, Regulierung und soziale Rechte nach den erweiterten Zielen der EG-Verfassung, in: Forschungsinstitut für Wirtschaftsverfassung und Wettbewerb, ev. (ed.) Weiterentwicklung der Europäischen Gemeinschaften und der Marktwirtschaft, Köln–Berlin–Bonn–München, Heft 148 1992, 11–12.

6 On the role of the Deutsche Bundesbank in the Maastricht Treaty, cf.

7 Cf. Manifest von 60 Ökonomen gegen Maastricht, as documented in Integration 4/1992, 229 et seq.

8 Cf. Ch. Joerges, The Maastricht Treaty, loc.cit., E. Steindorff, Quo Vadis, loc.cit.

9 From the legal side, cf. E. Steindorff, Quo Vadis, loc.cit. 56 et seq.; comprehensively A. Veelken, Normstrukturen der Industriepolitik – Eine vergleichende Untersuchung nach deutschem und französischem Recht, 1991.

10 Cf. Ch.-P. Frees, Das neue industriepolitische Konzept der Europäischen Gemeinschaft, EuR 1991, 281 et seq. where he discusses the Commission's recent statement of its policy: Industrial policy in an open and competitive environment: guidelines for a Community approach, COM (90) 556 final of 16 November 1990.

mittee has unanimously agreed on a Commission's proposal. Here another objection should be registered, and again it is coming from the Federal Republic of Germany. Europeanisation of the industrial policy is seen to endanger the economic constitution of the FRG, in which industrial policy is not seen as a task attributed to the government[11].

Europeanisation of the social policy[12] is another subject of concern. Here the Member States are clashing together. Denmark fears that a European social policy will lower their social standards and set aside what is seen as an integral part of the Scandinavian model. The UK, quite to the contrary, has raised objections against each and every delegation of social powers away from the Member States to the Community[13]. Again, one should carefully analyse whether the provisions in the Maastricht Treaty justify the political debate. Social policy has been a subject of the Community before, and has not been europeanised at Maastricht, let alone the problems which result from the different levels of integration[14]. The newly introduced section on consumer protection, Art. 129 a, was certainly not the cornerstone in the negotiations of the Maastricht Treaty, although the subject matter gains importance beyond the narrow borders of nation states[15]. Consumer protection existed before, most of the directives coming under that scope were based on Art. 100 a[16].

Last but not least, one could make the overall objective of the Maastricht Treaty to establish a political union responsible for the reservations, the objections and the critics. Maastricht, however, could not stand for the establishment of a European State[17]. The powers of the Parliament have been enhanced, it has a right to veto in a finely tuned mechanism drawn from federalist systems which are familiar with the necessity to balance out conflicting interests between different actors in the law-making process[18]. Majority voting will exist in the field of transport policy Art. 75,

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[11] From the legal-political side, cf. h. Siebert, Die Weisheit einer höheren Instanz, Frankfurter Allgemeine Zeitung of 14. 3. 1992, 15; M. E. Streit, Krücken für die Champignons, Frankfurter Allgemeine Zeitung of 20 June 1992, E.-J. Mestmäcker, Wettwewerb oder Industriepolitik: Nicht nur in diesem Punkt verstößt der Vertrag von Maastricht gegen bewährte Grundsätze des Vertrages von Rom, Frankfurter Allgemeine Zeitung of 10 October 1992, 15.

[12] For a broader analysis St. Leibfried, Wohlfahrtstaatliche Entwicklungspotentiale – Die EG nach Maastricht, NDV 1992, 107 et seq.

[13] The Uk has not signed the European Social Charta, cf. Ph. Watson, The European Social Charter, 28, CMLR 1991, 37 et seq.

[14] May eleven countries develop an »acquis communautaire»? A question raised by Ch. Joerges, The Maastricht Treaty, loc.cit.

[15] Cf. H.-W. Micklitz/N. Reich, Verbraucherschutz im Vertrag über die Europäische Union – Perspektiven für 1993, EuZW 1992, 593 et seq.

[16] More comprehensively now, N. Reich, Europäisches Verbraucherrecht, 1993 forthcoming.

[17] Cf. R. Bieber, Democratization of the European Community through the European Parliament, Aussenwirtschaft 46 (1991) 159 et seq.

[18] Cf. H.-J. Rabe, Europäische Gesetzgebung – das unbekannte Wesen, NJW 1993, 1 et seq.; Th. Oppermann/C. D. Classen, Die EG vor der Europäischen Union, NJW 1993, 5 et seq. 7, cf. especially the scheme W. Wessels, developed, Integration, 1992, 2 (11); Nentwich, Institutionelle und verfahrensrechtliche Neuerungen im Vertrag über Maastricht, EuZw 1992, 235 et seq.

trade policy Art. 113 and environmental policy, Art. 130 s. And the Commission will, in limits, be dependent on the consent of the European Parliament, Art. 158 (2).

2. *The neglected public concern and the instrument to match the challenge: the subsidiarity principle*

The roots must be traced back to the founding principles of the European Community. It is worth while reiterating the strong language of Hallstein[19]: »Die Europäische Wirtschaftsgemeinschaft ist in dreifacher Hinsicht ein Phänomen des Rechts: Sie ist Schöpfung des Rechts, sie ist Rechtsquelle, und sie ist Rechtsordnung» (The European Economic Community is a threefold phenomenon of law, it is a creation of law, it is a source of law and it is a legal order). Such an assessment still holds true despite the irritations the European Community had to undergo in the seventies. The push towards the completion of the Internal market results from legal document[20]. The Single European Act has enhanced and strengthened the role of law in the integration, in quantitative and qualitative terms. »Integration Through Law» is not only the title of series of books edited by M. Cappelletti/M. Seccombe and J. H. H. Weiler[21]. The Internal Market is entirely built on directives and regulations aiming at the removal of barriers to trade[22].

The more, however, integration moved ahead, the clearer the intrusion of Community law into nationally reserved fields became obvious. The internal market required its price: a minimum of social integration[23]. The Community had to push for social integration. Its involvement revealed a weakness of the Community legal order. The Treaty even in its revised form was not shaped to cope with the institutional challenge which quite necessarily came up[24]. Consumer protection did play a crucial role, but not in the field of private law[25]. Harmonisation of health and safety regulation was inevitable to guarantee the free trade of goods. European stan-

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[19] Cf. W. Hallstein, Die Europäische Gemeinschaft, 5. Auflage 1974, 33 as cited in Ch. Joerges, Markt ohne Staat? Die Wirtschaftsverfassung der Gemeinschaft und die regulative Politik, in R:Wildemann, Staatswerdung Europas? Optionen für eine politische Union, 1991, 225 et seq.

[20] Cf. Koopmans, The role of law in the next stage of European Integration 35 (1986) I.C.L.Q. 925 et seq.

[21] Cf. M. Cappelletti/M. Seccombe/J. Weiler, Integration Through Law, Europe and the American Federal Experience, Volume 1 to 3, 1986.

[22] Cf. J. Falke, Föderalismus und rechtliche Regulierung in der Europäischen Gemeinschaft, in G. Stuby (ed.) Föderalismus und Demokratie, 1992, 195 et seq.

[23] Cf. N. Reich, Binnenmarkt als Rechtsbegriff, EuZW 1991, 203 et seq.

[24] Cf. R. Dehousse, 1992 and Beyond: The institutional Challenge of the Single Market Programme, Legal Issues of European Integration, 1989 (1), 109 et seq.; K.-H. Ladeur, European Community Institutional Reforms, Legal Issues of European Integration, 1990, 1 et seq.

[25] For a comprehensive analysis, G. Brüggemeier/Ch. Joerges, Europäisierung des Vertrags- und Haftungsrechts, in P.-Ch. Müller-Graff (ed.) Gemeinsames Privatrecht in der Europäischen Gemeinschaft, 1993; P.-Ch. Müller-Graff, Europäisches Gemeinschaftsrecht und Privatrecht, Das Privatrecht in der Europäischen Integration, NJW 1993, 13 et seq.

dards were needed to guarantee free access to the internal market and they had to be managed to keep the market open[26]. The European Community got necessarily involved in the erection of organisational structures, but did not have the means at hand to develop them[27]. Its efforts were limited by the Treaty. The lack of appropriate instruments have led the Community to indigenous activities[28]. The comitology witness these efforts[29]. At the very end, however, shortcomings, deficiencies and failures of missing organisational infrastructure document the intricacies of a legal technique which cannot overcome the constraints set out in the Treaty. The results of all these efforts are ambiguous: A European network of experts and administrators has been built[30]. Europeanisation is well developed here and one might even go one step further and conclude that the European integration process has nowhere better advanced than in the building of networks of organisational structures. This development, however, undermines the position of the nation-state in the Community and it might contribute to explain the Member States who try what they have tried to do since the founding of the European Community: to counterbalance the intrusion of European law into the national legal and societal system by referring to their political sovereignty, to their still existing autonomy against a European Community which by market integration transforms national-states.

The subsidiarity principle is just the last expression, one means in the long history of Member States to retain political powers against an ever growing independent legal order[31]. It is the subsidiarity principle and not the sovereignty or the autonomy of nation-states, which guides the aftermath of Maastricht. This needs to be kept in mind when it comes down to look at the consequences of competing

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[26] Cf. Ch. Joerges/J. Falke/H.-W. Micklitz/G. Brüggemeier, Die Sicherheit von Konsumgütern und die Entwicklung der Europäischen Gemeinschaft, 1988; H.-W. Micklitz (ed) Post Market Control of Consumer Goods, 1990.

[27] Cf. Organisational Structures of Product Safety Regulation, in B. Stauder (ed.) La sécurité des produits de la consommation, Integration Européenne et consommateur suisse, Actes du colloque organisé avec le Centre d'études juridiques européennes, Faculté de droit de Genève, Février 1992, 49 et seq.

[28] Cf. R. Dehousse/Ch. Joerges/G. Majone/F. Snyder in collaboration with M. Everson, Europe After 1992, New Regulatory Strategies, EUI Working Paper Law 1992/31, San Domenico di Fiesole/FI 1992.

[29] M. Bach, Eine leise Revolution durch Verwaltungsverfahren – Bürokratische Integrationsprozesse in der Europäischen Gemeinschaft, Zeitschrift für Soziologie 21 (1992), 16 et seq.

[30] Research is limited here, with the exception of product safety, cf. H.-W. Micklitz/Th. Roethe/S. Weatherill, Federalism and Responsibility, 1993 forthcoming.

[31] Cf. M. Wilke and M. Wallance, Subsidiarity, Approaches to Power Sharing in the European Community, RIIA Discussion Paper No. 27, 1990; L. A. Geelhoed, Het subsidiariteitsbeginsel, een communautair principle? SEW 7/8 1991, 422 et seq.; J. Pipkorn, Das Subsidiaritätsprinzip im Vertrag über die Europäische Union – rechtliche Bedeutung und gerichtliche Überrpüfbarkeit, EuZW 1992, 697 et seq.; D. Grimm, Subsidiarität ist nur ein Wort, Frankfurter Allgemeine Zeitung of 17 of September 1992, 38; N. Emiliou, Subsidiarity. An effective Barrier Against »the Enterprises of Ambition», ELR 1992, 385 et seq.; A. G. Toth, The principle of subsidiarity in the Maastricht Treaty, 29 CMLR 1992, 1079 et seq. and D. Z. Cass, The word that saves Maastricht? The principle of subsidiarity and the division of powers within the European Community, 29 CMLR 1992, 1107 et seq.

national legal orders under the umbrella of the Community legal order[32]. The subsidiarity principle has a twofold momentum: (1) it has traditionally to do with power sharing, with defining and delimiting competences – subsidiarity here may be called »subsidiarity from without», but (2) subsidiarity is also linked to the inner organisational structure of a community, it contains at least implicitly a conception of what should be done at what level, and it is exactly this side of the subsidiarity coin which is so often neglected. Subsidiarity seen that way enhances »interbrand» competition between the Member States[33] and the Community, it stands for the repercussion of power sharing on the structure of *a* Community, it may therefore be called »subsidiarity from within». The distinction between »subsidiarity from without» and »subsidiarity from within» in, will guide us in the development of a new and prospective reading of the principle[34].

Subsidiarity is not an invention of the Maastricht Treaty. It existed as part of the Community legal order long before Maastricht[35]. It has been explicitly mentioned in the Art. 130 r, to shape the role of the Member States and the Community in regulating environmental protection[36]. Art. 3 b of the Maastricht Treaty translates subsidiarity into a general rule, and its position in Art. 3 makes clear that it shall be fundamental to the European edifice[37]. Here lies the reason why the principle can be instrumentalised for each and every argument: FRG and the UK use it as a weapon against any Community intervention in the field of economic and social policy, Denmark uses it to defend its own concept of a social welfare state. The Commission refers to the subsidiarity principle to insist that the overall objective of the Maastricht Treaty is to create a Europe of citizens, and that the Maastricht Treaty determines that action must be taken where it is nearest to the people[38].

II. The Subsidiarity Principle – does it challenge the Community legal order and established integration theories?

The challenge today is where to settle the subsidiarity principle: is it or can it become part of the legal order and if so, what will it mean for the legal order, or is it

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32 Cf. Infra, IV.

33 Cf. For the conception of »interbrand competition», N. Reich, Competition of legal orders, loc.cit. 889 et seq.

34 Cf. Infra, IV.

35 Cf. N. Emilou, loc.cit. and M. Wilke and M. Wallace loc.cit. as to the historical sources. The most detailed analysis of the European history can be found in the study of D. Z. Cass, loc.cit. 1110 et seq.

36 For an early interpretation in the light of environmental protection, cf. D. Z. Cass, loc.cit. 1120.

37 Here in Artt. 2 and 3 the overall objectives of the Treaty are laid down.

38 Cf. Kom, SEK (92) 1990 endg. 12, 27. 11. 1992, Das Subsidiaritätsprinzip, Mitteilung der Kommission an den Rat und an das Europäische Parlament.

a political instrument to counterbalance the community legal order and even define its limits? Any answer entails necessarily a concept and a theory of integration. The intensity of the German debate over the Maastricht Treaty, the criticism expressed and the efforts to limit European regulation to framing a specific market-orientated economic constitution for the Community would not be possible to understand without its theoretical background[39]. And the same holds true vice versa: To instrumentalize the subsidiarity principle for political purposes presupposes a notion of what the subsidiarity should be instrumentalized for. It could be more than an economic constitution, it could be the emerging core of a more democratic European society and another, more developed and better shaped Community legal order[40], where the Member States and even lower and smaller entities than the national government or the national legislator contribute to a Europen Community[41].

1. The Community legal order and the building of an economic constitution

In 1981 E. Stein[42] published an article in the American Journal of International Law under the heading of: »Lawyers, Judges, and the Making of a Transnational Constitution». He analysed in the gentle tradition of common law the three pillars on which the Community legal order rests: supremacy, pre-emption and direct effect. His intention lies in the demonstration that the Treaty of Rome is more than a supranational treaty of states and that is has become by the very dictum of judges an independent legal order, somewhere in between a typical constitution and the loosely-knit rules of international organisations and international treaties[43].

The cases which have given the Court this path breaking opportunity deserve no further explanation[44]. What interests us here are the functions of these three »constitutional» principles. Supremacy defines the relationship between Community law and national law. First, it constitutes the existence of a Community legal order which is and which remains independent of the national legal orders. Second it establishes a hierarchy, under which community law prevails over national law. The national constitutional courts have accepted supremacy of Community law

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39 Cf. References in Fn., cf. E. Steindorff, Quo Vadis, loc.cit. and Bareis/Ohr, Hohenheimer Europa Colloquium: Europäische Integration auf Abwegen – Die ordnungspolitischen und institutionellen Fehlentscheidungen von »Maastricht», 1992; cf. L. Vollmer, Wirtschaftsverfassung und Wirtschaftspolitik der EG nach Maastricht, DB 1993, 25 et seq.

40 Cf. Ch. Joerges, The Maastricht Treaty, loc.cit.; R. Dehousse, Integration v. Regulation, loc.cit.

41 Cf. J. H. H. Weiler, who draws a line between »unity» and »community», The Transformation of Europe, loc.cit. 2476.

42 Cf. E. Stein, Lawyers, Judges and the Making of an International Constitution, American Journal of International Law 1981, 1 et seq.

43 In a way this perspective is characteristic for nearly his followers working in a common law tradition, cf. J. H. Weiler, loc.cit.

44 ECR 1963, 1 et seq. – van Gend en Loos ./. Nederlandes Administratie der Belastingen; ECR 1964, 585 et seq. – Costa ./. Enel.

over national law, perhaps because the Community legal order covered a small area of the national legal order, at least at its beginning[45].

Pre-emption[46], like Supremacy, relates to the relationship between Community law and national law. Pre-emption looks at the subject matters and states that the Member States are no longer enabled to act in areas which are subject to the competence of the Community[47]. The Single European Act has considerably strengthened the importance of the pre-emption doctrine by providing the Community with the exclusive competences in all matters which are necessary to complete the Internal Market[48].

Direct effect is the third pillar of the community legal order[49]. Citizens of the Member States can invoke Treaty provisions against national legal rules which run counter to EEC law. Direct effect is perhaps the most important element for the making of a constitution. The emergence of a community legal order requires that it is able to unfold repercussions on private individuals. The direct effect doctrine has become the driving force for the development of the Community legal order[50].

German legal doctrine has never looked at the emerging legal principles alone. It has tried to build the Community legal order into a theoretical concept of the European economy and the role of the state[51]. Such an approach looks behind the constitutional principles of the community legal order and tries to fill its regulatory frame with a specific content. It is admittedly a very German debate, which is inevitably linked to the way in which the FRG came into being after the second world war[52]. This explains its strong commitment to the ordo-liberalism as the guiding

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[45] There is no need to rediscuss the reservations of the German, French and Italian supreme court against the supremacy doctrine. It suffices to recall that the courts were willing to follow the European Court of Justice, in the end and after some protest, cf. J. H. Weiler, The Transformation of Europe, loc.cit.

[46] Cf. M. Waelbrock, The Emergent Doctrine of Community Pre-emption – Consent and Redelegation, in T. Sandelow/E. Stein (ed.) The Courts and the free Markets: Perspectives from the United States and Europe, 1982, 548 et seq.

[47] It is not surprising that the rule was developed in the field of Common Commercial Policy, where the Community holds exclusive competence first, before the SEA was enacted. But its origin in a very specific field of Community law has never been really taken into consideration in the constitutionalisation process of the Community.

[48] Cf. To that respect, J. Pikorn, loc.cit. 699.

[49] There is an immense literature to the direct effect doctrine alone. References must remain arbitrary: cf. P. Pesctore, The doctrine of direct effect: an infant disease of Community law, 8 (1983) ELR 155 et seq.

[50] Cf. H.-W. Micklitz, Organisierte Rechtsdurchsetzung, KritV 1992, 172 et seq.

[51] Cf. A. Müller-Armack, Die Wirtschaftsordnung des Gemeinsamen Marktes in idem: Wirtschaftsordnung und Wirtschaftspolitik. Studien und Konzepte zur sozialen Marktwirtschaft und zur europäischen Integration, 1964, 401 et seq.; J. Scherer, Die Wirtschaftsverfassung der Europäischen Gemeinschaft, 1970; D. W. Rahmsdorf, Ordnungspolitischer Dissens und europäische Integration, 1980; H.v.d. Groeben. Zur Wirtschaftsordnung der europäischen Gemeinschaft 1981, in: id. Die Europäische Gemeinschaft und die Herausforderungen unserer Zeit. Aufsätze und Reden 1967–1987, 1987, 201 et seq.

[52] There is few literature outside Germany on the so called Wirtschaftsverfassung, cf. A. Nicholls, The Other Germany – The »Neo-Liberals», in R. J. Bullen/H. Pogge von Strandmann/

principle for the European economic constitution[53]. »Ordnungspolitik» has made its way through the floors of the Maastricht negotiation rounds and might become part of legal European doctrine. The starting point of the theory is that the Treaty of Rome contains a decision for a European law, which has to guide the European integration in a specific way. The »visible» law[54] of the Treaty is regarded as *economic* constitutional law, because it relies on the market as the decisive integration factor – in contrast to state-guided and organised economies. The driving of forces of integration are the enterprises, the entrepreneurs, and not the states. Visible law is not *economic* constitutional law alone, it is at the same time economic *constitutional* law, because it intends to constitute the internal market by way of a competitive process[55].

Supremacy, direct effect and pre-emption represent elements of that economic constitution. Supremacy is not regarded as a value in itself, its overwhelming importance comes clear, when it is linked to the four freedoms and the rules on competition in the Treaty[56]. They constitute the guiding principles of the European economic constitution, and they shall have supremacy over national even constitutional laws. The direct effect doctrine entitles the entrepreneurs to enforce the freedoms and the competition rules, thereby creating the economic constitution. The cornerstone for that theoretical concept is the pre-emption doctrine, which unfolds its far reaching repercussions in combination with the implied power doctrine[57]. Here it comes down to who has the competence, the Member States or the Community and what for. One should recall that exclusive competences for the Community exist only for the Common Commercial Policy and since the SEA for the completion of the Internal Market. The latter does not challenge the so called economic constitution as long as the interplay between freedom and regulation is not disturbed, ie. the freedom of the entrepreneurs to operate within the Internal Market and the reluctance of states to intervene into the market. The Court, however, and this is one of the main criticisms, has confirmed the »fraudulent» extension of competences by its implied power doctrine[58] or even using at as a means to erode the principle of

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A. Ba. Polonsky (eds.) Ideas into Politics. Aspects of European History, 1984 and the research by Ch. Joerges, Markt ohne Staat, loc.cit. and The Maastricht Treaty, loc.cit.

[53] This is not the place to develop the theory on ordo-liberalism. It contains in substance a specific conception of the society, in which the interrelationship between the state and the economy is determined, cf. I. Schmidt, Wettbewerbspolitik und Kartellrecht, 3. Auflage, 1990.

[54] Cf. E.-J. Mestmäcker, Die sichtbare Hand des Rechts, ...

[55] Cf. For a short description, Ch. Joerges, Markt ohne Staat, loc.cit.

[56] More specifically Art. 85 para 111, cf. N. Reich under the collaboration of D. Leahy, Internal Market and Diffuse Interests, An introduction to trade law, 1990, Chapter IV.

[57] That is why J. W. Weiler, The Transformation of Europe, loc.cit. refers to the implied power doctrine as the third element beside supremay and direct effect, 2415, let alone that he mentions human rights as a fourth element, not yet foreseen in E. Stein's analysis, loc.cit.

[58] Cf. E. Steindorff, Quo Vadis, loc.cit. 37: »Die Gemeinschaft hat zu sozialen Grundrechten – nach Zeiten der Kompetenzerschleichung – in Maastricht erreicht, was zur Änderung des Grundsgesetzes anläßlich der deutschen Einheit vielfältig gefordert, namenntlich von der

enumerated powers[59], on which the constitutionalisation of Europe was based. A deliberate interpretation of the competences under Art. 100 a, so runs the argument, has served as a basis for social regulation[60] which endanger the original concept of the European Community[61]. As each and everything affects the completion of the internal market, clear boundaries between internal-market related and unrelated social integration measures can no longer be set. Here lies the reason and the concern for the debate on »competences» in the German doctrine[62]. The proponents of the »Ordnungspolitik» invoke the competition of legal orders as an appropriate means to counteract the centralisation process in the European Community[63].

Transferred to the »constitutional » elements of the Community legal order the subsidiarity principle seems to be an appropriate means to challenge the basic elements of the Community legal order[64]: »supremacy[65]», »direct effect[66]», but most of all to put into question the pre-emption doctrine and to reinstall the principle of enumerated powers[67]. Where such far-reaching consequences on the »acquis communautaire» are rejected, subsidiarity is regarded as a means to use the »effet utile» in order to restrict competences of the Community now and no longer to enlarge them[68]. The German Ministry of Economics has elaborated a list of European draft directives and draft regulations where the competence is denied[69]. In the field of consumer protection rules, nearly each and every project currently under discus-

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derzeitigen Regierungsmehrheit in Bonn verweigert wird, nämlich ihren Auftrag zum schutz dieser sozialen Grundrechte».

[59] Cf. The dense analysis of the jurisprudence in J. H. Weiler, The Transformation of Europe, loc.cit. 2437 et seq. and K. Hailbronner, Legal Institutional Reforms of the EEC: What can be learn from Federation Theory and Practice, in E. Petersman (ed.) EC 92 and Beyond. New Political Structures and Constitutional Problems of European Integration, 1991.

[60] The term social regulation is used here in the way it has been developed in the United States. Its counter notion is economic regulation; as early as 1985, N. Reich, Staatliche Regulierung zwischen Marktversagen und Politikversagen, Erfahrungen mit der amerikanischen Federal Trade Commission und ihre Bedeutung für die Entwicklung des Verbraucherschutzrechtes, Forum Rechtswissenschaft, Beiträge zu neuern Entwicklungen in der Rechtswissenschaft 12; and cf. Ch. Joerges, The Maastricht Treaty, loc.cit. who refers to C. R. Sunstein, After the Rights Revolution, Reconceiving the Regulatory State, Cambridge, Mass.-London, 1990, 11 et seq., 47 et seq.

[61] Cf. E. Steindorff, Quo Vadis, loc.cit. and the same author, Grenzen der EG-Kompetenzen, 1990.

[62] Cf. E. Steindorff, Grenzen der EG-Kompetenzen, 1990.

[63] Cf. N. Reich, Competition, loc.cit. 862, where he refers to K. Hopt (ed. Europäische Integration als Herausforderung des Rechts: Mehr Marktrecht – weniger Einzelgesetze? Veröffentlichungen der Hanns Martin Schleyer Stiftung Band 32, 1992, where the concept of competition of legal orders is discussed in a number of contributions.

[64] It is right here where the theory on the »Ordnungspolitik» touches upon a sensitive though questionable element of the legal order.

[65] Cf. D. Z. Cass, loc.cit. 1129 et seq.

[66] Cf. D. Z. Cass, loc.cit. 1130 et seq.

[67] Which is much more than to challenge the doctrine of implied powers, cf. J. H. Weiler, The Transformation of Europe, loc.cit. 2453, believes that the mutation process as he calls it, might be turned back, he does not explain, however, how that should work.

[68] Cf. In that direction, J. Pipkorn, loc.cit. 700.

[69] Cf. Published in VuR 1/1993.

sion in the different organs of the European Community shall be dropped[70]. The Ministry intends to reduce the Community powers to an »ordnungspolitischen» concept of implementing the four freedoms and the competition rules. Rumour goes that the German government has even considered the opportunity to restrict Art. 177 procedures to requests of the upper courts[71]. One could easily imagine that such an initiative would have met sympathetic support by the British government[72]. It would have considerably reduced the possible impact of the Court of Justice on European law, as quite a number of important decisions have been requested by lower courts, and not only in the field of market integration[73].

Whether or not the subsidiarity principle could become a valuable weapon to defend the economic constitution of the European Community depends on whether it is possible to transform it into a constitutional element, standing side-by-side with supremacy, pre-emption and direct effect[74], or to submit the subsidiarity principle to the »acquis communautaire»[75] and to deprive it of any self-contained importance. If a fourth principle is in the offing, the Community legal order must be re-balanced, if the erosion of the principle of enumerated powers can not be brought to a halt or even repaired, the shaping of a »constitution for the European Community» must concentrate on the scope of direct effect, on the extent to which, environmental and consumer protection rules do give rights to citizens, on the content of these rights, and on their enforceability[76]. That is why the proponents of the »Ordnungspolitik» put for discussion the role and function of the European Court of Justice[77] who seems to become a promoter in the shaping of social rights. This is not to claim that the Court's position in the conceptualisation of the European legal order shall and must not be questioned. It is necessary indeed to know whether and

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70 For an overview, cf. H.-W. Micklitz, Verbraucherrecht und EG-Binnenmarkt, Vertrag, Werbung und öffnung der Rechtswege, VuR 1/1993.

71 A restriction which exists in the Rome Convention, 80/934/EWG, 19. 6. 1980, OJ L 266, 1 et seq.

72 Cf. Factortame, C 213/90, 19. 6. 1990, EuZW 1990, 356 et seq.; thereto cf. D. Simon/A. Barav, Le droit communautaire et la suspension provisoire des mesures nationales, les enjeux de l'affaire factortame, Revue du Marché Commun 1990, 591 et seq.; L. J. Smith, Fischereipolitik, EG-Recht und die britische Justiz, EuZW 1992, 308 et seq.

73 The assessment cannot be based on any complexe analysis. It seems to be, however, as if the interesting cases, which have invited the Court to further develop the Community legal result from Art. 177 procedures, cf. Ch. Harding, Who goes to Court in Europe? An Analysis of Litigation against the European Community, ELR 1992, 105 et seq.

74 Cf. On the different position of the subsidiarity principle in the American and the Canadia Constitution, J. H. Weiler, The Transformation of Europe, loc.cit. 2432 et seq.

75 Art. B makes clear that the »acquis communautaire» shall remain unaffected by, inter alia, the subsidiarity principle, but Art. H exempts Art. B from judical control! The conclusions of the Edinburgh meeting of the Council of Ministers states that the »acquis communautaire» shall remain unaffected by the subsidiarity principle, cf. loc.cit. 1. Grundprinzipien, under 4, D 8.

76 Cf. H.-W. Micklitz, Consumer Rights in A. Cassese/A. Clapham/J. H. H.Weiler (eds.), Human Rights and the European Community: The Substantative Law, European – The Human Rights Challenge, Firenze 1991, 53 et seq.

77 Cf. E. Steindorff, Quo Vadis, loc.cit. 22 on the hand, G. Brüggemeier/Ch. Joerges, loc.cit. on the other.

to what extent the European Community could be built on law, a law which is not explicitly foreseen in the Treaty. If the Court of Justice pursues the path prepared by numerous declarations and recommendations of the European Parliament[78] to integrate into the Community legal order human and social rights, it might run into a legitimacy crisis[79]. It seems as if the Community legal order needs to be reshaped and that the subsidiarity principle will become a fourth element of the Community legal order.

2. *Maintaining or introducing a countervailing power to a predominant Community legal order?*

Law alone cannot decide on the concept of the European Community. The Court of Justice operating somewhere in the nowhere land between solid legal ground and conflicting legal policy[80], cannot rescue the Community as a Social Space[81]. The Member States, and this is one lesson to be learned from the critics, which came up in and around Maastricht, will no longer let the Community organs go as they have done whilst taking measures to complete the Internal Market. The Member States claim political power and political influence on the Community organs. As the Courts' role was not changed, to some extent even strengthened[82], Member States must bring to bear their influence in the Commission, which takes the initiatives and sets the law machinery into motion[83].

J. H. Weiler[84] has analysed the interrelationship between the divergencies of legal and political developments, between the Court and the Commission on the hand and the Member States as represented in the Council of Ministers on the other. He stated, in 1982 (!), a growing interest of the Member States to influence the decision-making process in the Commission in order to counterbalance the Court's attempt to erect a supranational constitution[85]. The clou of his analysis lies in the conclusion: The double structure of supranationalism and intergovernmentalism stabilises the integration process. The constant struggle between the differ-

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78 Cf. A. Clapham, Human Rights and the European Community: A critical Overview: European Union – The Human Rights Challenge, 1991.

79 This is what the House of Lords predicts, cf. N. Emiliou, loc.cit. 404.

80 Cf. Ch. Joerges, The Maastricht Treaty, loc.cit.

81 Cf. D. Grimm, loc.cit. »Der Richter als Retter».

82 Cf. Art. 171 as revised gives the court the right to put an compulsory levy on Member States violating EEC law.

83 Here is the point where the subsidiarity prinicple could challenge the interinstitutional balance.

84 Cf. The Community Legal System, The Dual Character of Supranationalism, Yearbook of European Law, 1 (1981), 267 et seq.

85 Cf. J. H. H. Weiler, Supranational Law and Supranational Legal System: Legal Structures and Political Process in the European Community, PH.D. Thesis European University Institute, Florence 1982.

ent organs, in and around the shaping of the legal order bears a constructive pro-European element. Member States resistance and reluctance outweighs the predominance of the Community legal order. The perspective here focuses not so much on the economic constitution but on the pros and cons of a supranational community with an independent legal order.

The further development of the European Community seems to confirm the mutual dependency[86]. The Single European Act has been blamed for weakening the Community legal order, mainly from officials of the Commission and from Members of the European Court of Justice[87]. At the core of the critique stands Art. 100 a IV which allows Member States to maintain or even to insert national rules even if the Community has adopted measures for the completion of the Internal Market. Art. 100 a IV is said not to be compatible with the idea of a homogeneous Community legal order which might replace step by step national legal orders. Those who argue that way, insist on the building of the Community with the means of law and the technique of majority decisions. One could turn Art. 100 a IV upside down, and interpret it as the necessary means allowing Member States to exercise the necessary influence on the Commission and on the Court[88].

Member States have not visibly used Art. 100 a IV to stop the integration process or more precisely to disturb the Commission in its attempts to complete the Internal Market[89]. There is not a single case pending at the European Court of Justice where the function of Art. 100 a IV is at stake. That does not prove the insufficiency of Art. 100 a IV as a political instrument. The only problem is, that the effects are much more difficult to measure and hard to fix. The German Governments' attempt to oblige the German car industry to produce cars which could run with lead-free patrol, finally failed[90]. But who dares to say that it was politically useless[91]. The attempt alone initiated a political debate, and a promising legal one![92]

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[86] Cf. J. H. H. Weiler, The European Community in Change: Exit. Voice and Loyality, Saarbrücken 1987 (Vorträge, Berichte und Reden aus dem Europa Institut), No. 109.

[87] Cf. C-D. Ehlermann, The Internal Market following the Single European Act, 24 CMLR 1987, 361 et seq. and P. Pescatore, Some critical comments on the »Single European Act», 24 CMLR 1987, 9 et seq.; further references to the position of Community officials in N. Reich, Competition, loc.cit. 892, Fn. 117.

[88] Cf. This is what J. H. Weiler, The European Community in Change, loc.cit. is doing to defend his theory after the introduction of the Single European Act.

[89] Cf. J. Pipkorn, in Gemeinschaftskommentar ztum EWGV, 4. Auflage 1991, Art. 100 a Rdnr. 86.

[90] For the background, K. Hailbronner, Der »nationale» Alleingang im Gemeinschaftsrecht am Beispiel der Abgasstandards für PKW, EuGRZ 1987, 73 et seq.

[91] It would be helpful to evaluate the function of Art. 100 a IV in case studies. The history of the product safety directive could serve as a striking example that opting out is and has been used as a means to eliminate elements of the drafts by the Member States.

[92] Beside K. Hailbronner, loc.cit. cf. 1. Pernice, Kompetenzordnung und Handlungsbefugnisse der Europäischen Gemeinschaft auf dem Gebiete des Umwelt- und Technikrechts, Die Verwaltung 1989, 1 et seq.; cf. D.-H. Scheuing, Umweltschutz auf der Grundlage der Einheitlichen Europäischen Akte, EuR 1989, 152 et seq.

Other conflicts of the same type are already in the offing[93]. It is much more lack of the political will of the Member States to test their freedoms under Art. 100 a IV, than the illegality of such an action which is at stake here. And even below litigation before the Court of Justice, one has to consider that no one knows the indirect effects of Art. 100 a IV. Does the article play a role in the debates within the Council of Ministers? Is there any country that refers to Art. 100 a IV just to indicate that it is not willing to follow the others? Any answer would require research. But already the legitimacy of the question justifies the fear of the Community officials. Political influence could prevail over the consistency of the Community legal order.

It seems to be worthwhile to refer here to an action the German Government has filed against the Council[94], because of Art. 9 of the General Product Safety Directive[95]. The provision in question concerns the Commission's power to take measures in case of emergency situations which are legally binding for the Member States. The Council claims competence to regulate under Art. 100 a the enforcement of the directive and to give the Commission the power to execute the directive. Art. 9, although the Commissions' decision-making power is bound to a number of prerequisites, could be seen as a test-case to shape the responsibilities and the organisational structures between the Member States on the one hand and the Community on the other[96]. The legal arguments turn around the notion of Art. 100 a V, but the conflict is in substance one of the scope of competences, the reach of the inherent powers of the Community. It is significant that the German government does not challenge the competence of the Community per se to regulate product safety, but to intrude into the administrative organisation of the Member States.

It remains to be seen whether the Court is willing to interpret the Maastricht Treaty and its reference to the subsidiarity principle in a way which supports the German position[97]. The outcome of the decision is important beyond the narrow

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[93] The subject of concern here is or could become the German packaging order which conflicts with the EEC draft directive on packaging, OJ No. C 263, 12. 10. 1992, 1 et seq.; thereto U. Schliessner, Entwurf einer EG-Richtlinie über Verpackgungen und Verpackungsabfall und mögliche Auswirkungen auf die deutsche Verpackungsordnung, cf. H. W. Micklitz, The German Packaging Ordre, A Model for State-Induced Risk Avoidance, in Columbia Journal of World Business, Focus Issue: Corporate Environmentalism Fall/Winter 1992, Volume XXVII Nos. 11 & 4 IV, 120 et seq.

[94] Cf. Case C-359/92, in Tätigkeiten des Gerichtshofes und des Gerichts Erster Instanz der Europäischen Gemeinschaften, Woche vom 12. bis 16. Oktober 1992, Nr. 26/92.

[95] Cf. OJ No. L 287, 11. 8. 1992, 24 et seq.; Ch. Joerges, Product Safety, Product Safety Law, Internal Market Policy, and the Proposal for a Directive on General Product Safey, in M. Fallon/ F. Maniet (eds.) Product Safety and Control Processes in the EC, Brussels, 1990, 139 et seq. and H.-W. Micklitz, Die Richtlinie über die allgemeine Produktsicherheit vom 29. 6. 1992, VuR 5/ 1992, 261 et seq.

[96] CF. H.-W. Micklitz, Organisational Structures, loc.cit.

[97] The FRG could refer to »subsidiarity from within», cf. loc.cit. supra.

borders of product safety regulation[98], just for one reason: It is »subsidiarity from within», what is at stake in one of the rare cases where it really and obviously matters. And it will be a disadvantage that there is little public concern on what is going on in Luxembourg before the Court. The subsidiarity principle provides the ground to raise the question, though it must not necessarily contain the answer. The theory on the fruitful though conflicting balance of supranationalism and intergovernmentalism seems to be confirmed[99]. The subsidiarity principle entitles the Member States to raise the question whether the inner architecture of the European Community could and should be built on competence rules alone. Then the question comes up whether a strong and powerful subsidiarity principle »from within» drives *back* the Community legal order behind supremacy, pre-emption and direct effect. This is too short a question. It concentrates on the present legal order, where the organisational and institutional structure of the European Union is not really shaped, let alone the subsidiarity principle. If one takes J. H. H. Weiler's momentum for granted[100], the subsidiarity principle in its twofold dimension »from without» – »from within» – might one day – in between the interplay of intergovernmentalism and supranationalism – be regarded as a tool which had saved[101] the European Community, simply because it provided the ground for discussing all those issues which have so blatantly been neglected during and around Maastricht, with the organisational and institutional matters at its core.

There is no answer, not yet, but the importance of the answer comes clear, if one contrasts the two models here taken to explain the community legal order and the function of the subsidiarity principle. The theory of the economic constitution of the European Community must focus on the subsidiarity principle as a rule to reduce social integration[102], to reshape the pre-emption doctrine, i.e. to reconsider the Courts' implied power doctrine. The idea here is to have a European market and European rules to guarantee market integration, but to leave social regulation to the Member States. The theory of the mutual dependence of the legal order and the political impact of the Member States could instrumentalize the subsidiarity principle as a means to generate arguments for the building of a Community beyond mere market integration. Here the democratic dimension of the subsidiarity principle could come to bear, whilst discussing powers, one will have to discuss organisation structures and in between the role of individuals in such a Community[103]. It

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98 It concerns in substance the question to what extent it is legally possible under existing primary law to delegate executory powers to the Commission.

99 Cf. J. H. H. Weiler, The Transformation of Europe, loc.cit., 2403 et seq.

100 Which can be traced back since the early eighties at the time where he developed his theory of integration.

101 Cf. The title of D. Z. Cass, loc.cit.

102 Cf. R. Dehousse, Integration vs. Regulation? Social Regulation in the European Community, EUI Working Paper Law No. 92/23.

103 Cf. Ch. Joerges, The Maastricht Treaty, loc.cit. reads the reference to Member States not as nation states but as bearers of democracies.

would be misleading to play off in the concepts presented here social integration against market integration or vice versa. Both models struggle with the same type of problems, although they differ in their answers.

III. The subsidiarity – legal rule and – ? – or policy instrument?

The subsidiarity principle is prompted into a key rule. Given the pressure exercised on it, and the expectations set in it, be they political or legal, any answer must remain provisional. The theoretical implications of the subsidiarity principle for the further European integration process have been highlighted. The task now is to break the subsidiarity principle down to a workable and feasible instrument in the hands of politicians and lawyers. Such an attempt should be restricted to the development of guidelines and the consideration of perspectives. There are far to many open questions to give definite answers. First the changing patterns of the subsidiarity rule are worked out, before it comes down to decide whether the subsidiarity rule may guide the Court's jurisprudence.

1. Subsidiarity from without, subsidiarity from within and the individual – the threefold extension of the subsidiarity principle

Theoretical analysis of European integration has brought to light the distinction between subsidiarity »from without» (competences) and subsidiarity »from within» (structures). The roots of the subsidiarity principle have to be found elsewhere and they demonstrate a threefold dimension, delimiting beyond competences and structures the role of the individual. It has to be worked out that »subsidiarity» has undergone substantial changes in less than sixty years and that the context in which it has been used and introduced differ considerably. Historically seen the subsidiarity principle has made its way from a social rule in canon law to a constitutional principle in the German Basic Law and now it is prepared to make a big step into a leading principle perhaps governing a supranational body, the European Community.

The social context comes best clear in Pope Pius XI's Encyclical Letter, Quadragesimo Anno 1931, at a time where the role of the individual was threatened by a growing totalitarian state. The Pope wrote[104]:

> »... just as it is wrong to withdraw from the individual and commit to a group what private enterprise and industry can accomplish, so to it is an injustice, a grave evil and a disturbance of the right order, for a larger and a higher association to arrogate to it itself functions which can be performed efficiently by

[104] Pope Pius XI, Quadragesimo Anno, London Catholic Truth Society, 1936, 31 para 79, here taken from N. Emiliou, Subsidiarity, loc.cit. 384; likewise reprinted in D. Z. Cass, loc.cit. 1111; in German reprinted in J. Pikorn, loc.cit.

smaller and lower societies. This a fundamental principle of social philosophy, unshaken and unchangeable. Of its very nature the true aim of all social activity should be to help members of that social body, but never destroy or absorb them».

The Encyclical Letter contains two messages: it draws a dividing line between the individual sphere and that of the state and it provides for a division of competence[105]. The starting point, however, and this is a point to insist on, is the role and the function of the individual in a given society, or a social body, as the Letter puts it[106]. The Federal Republic of Germany extended the social rule beyond its historical context to embrace political institutions and authorities[107]. It was a legal response[108] to the historical experience that central authorities tend to impair the freedom of lower levels of government. The emphasis shifted away from the individual to dividing competences – subsidiarity from without – between the national government on the one hand and the Lander on the other. Since then subsidiarity and competences belong together[109]. Subsidiarity is the institutional side of the division of competences. That is why subsidiarity can only be fully understood and defined within the context of federalism[110].

The subsidiarity principle has been introduced in the discussion on the European Community when the project under consideration was to develop a European constitution. Subsidiarity was sustained, although the concept of fully-fledged constitution for the European Community vanished[111]. The results is an imperfect transplantation of a principle which has developed its full meaning in western federations. Exactly this experience would have brought to light that the principle bears different concepts of federations and that it has never fully guaranteed what it stands for in canon law and in the federalist states. History shows that there is a trend in federalist states to shifting competences away from the regional level to the central level. This is true for the United States and it is true for the Federal Republic of Germany[112]. If any, the debate focussed on who should have competences

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105 Cf. N. Emiliou, loc.cit. 386.

106 Again it is not possible to fully discuss the concept which lies behind the role and position of an individual under canon law. There is a certain need to come back to that starting point in the definition of the role of the »individual» under European law, cf. supra V.

107 Cf. J. Ziller, Droit administratif et droit communautaire: du bon usage du principe de subsidiarité, in Mélanges, René Chapus, Droit Administratif, 1992, 681 et seq.

108 One should not forget the way in which the Federal Republic of Germany was founded. There was no German people who elected a constitution, the Federal Republic of Germany was founded by the Basic law. Germans derive their idenity from that legal status, and not so much from their mere fact being German.

109 Again, here is the explanation why German legal doctrine devotes so much attention to competences in the European legal order.

110 Refreshingly clear, cf. N. Emiliou, loc.cit. 386.

111 Cf. A. G. Toth, loc.cit. 1091 et seq.

112 Cf. H.-J. Blanke, Das Subsidiaritatsprinzip als Schranke des Europäischen Gemeinschaftsrechts, EuR 1991, 133 et seq.; v. Alstyne, The Second Death of Federalism, 83 Mich.L.Rev. 1985, 1709 et seq.

at what level – subsidiarity from without – and somewhat neglected the institutional/federalist implications of the centralisation process – subsidiarity from within. The European debate focuses on the re-allocation of power[113] and sets aside the structural dimension although the most notable deficiencies of the Community are to be recognized in the lack of appropriate institutional structures. This insufficient and imperfect principle should now protect the Member States against the Community dictating downwards from Brussels what shall be done more effectively at the state level? Such a reading goes along with the German constitution, if one concentrates on powersharing, if one equates the Länder level with the Member States level and if one sets aside that those who argue this way, demonstrate a thoroughly federalist thinking[114]. Such a reading does not comply, however, with the Encyclical Letter where smaller and lower levels of the societies are mentioned as a possible alternative, it leaves subsidiarity »from within» out of consideration. Long before the negotiations on the Maastricht Treaty, Member States have used European regulation to increase their national powers to the detriment of lower societal units[115]. That is why the whole discussion on the subsidiarity principle even in the forefront of Maastricht is somewhat hypocritical. To put it bluntly: Already before the subsidiarity principle was shaped, the overall political purpose has been to define a weapon against excessive community powers and it has not been to find out where the appropriate level of regulation in a »European Union» should lie. Here the important difference comes into being between the concentration on competences – subsidiarity from within, and the analysis of the institutional and organisational patterns – subsidiarity from without.

The predecessors of Art. 3 b have been analysed elsewhere[116]. They document the strong relationship to the German constitution, based on a distinction between exclusive and concurrent powers[117], which survived, at least rudimentarily, in the final provision of the Maastricht Treaty:

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

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[113] Cf. D. Z. Cass, loc.cit. insist on this aspect in her efforts to trace back the roots in the European Community since the early seventies.

[114] Although the UK insisted that federalism should nowhere be mentioned in the Maastricht Treaty, cf. J. Pipkorn, loc.cit. 699.

[115] This is true for the Federal Republic of Germany and it is likewise true for the United Kingdom. Product safety regulation is a striking example, cf. H.-W. Micklitz, Organisational Structures, loc.cit.; but also broadcasting should be mentioned. The Member States do not demonstrate a unique stream-lined development. France, Spain and Italy demonstrate at the same time, that the very umbrella of the Community legal order gives space for enhanced regionalism, cf. J. H. Weiler, The Transformation of Europe, loc.cit. 2470.

[116] Cf. Notably N. Emiliou, loc.cit. and comprehensively, D. Z. Cass, loc.cit. 1110 et seq.

[117] The clarifications on those two notions given by N. Emiliou, loc.cit. 392 are very helpful for a non-German lawyers.

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.

Any action by the Community shall not go beyond what is *necessary* to achieve the objectives of the this Treaty (emphasis put by the author)».

Art. 3 b is different from the German constitution because there is no list of exclusive and concurrent powers behind on which its function and importance could be built[118]. Even the exclusive competences cannot easily assigned to the Community outside the Common Commercial Policy and the power to complete the Internal market. Concurrent competences do not exist in the tradition of the German Basic Law. The Community has received limited powers in specific regulatory fields, like social policy, educational policy, media policy, environmental policy, consumer policy, and in industrial policy, regional planning and the policy for small and medium seized enterprises. These powers are not concretised. They define much more an objective the Community has to pursue than concrete tasks. The subsidiarity rule, as referred to in the Encyclical Letter and the German Basic Law is *action-related*, the subsidiarity rule under Art. 3 b is necessarily *objective-related*[119]. And this is just another variant of the ever existing problem of the Community which is blamed for stretching its exclusive powers beyond all borders to achieve the politically defined objective, be it the Internal Market or the European Union[120].

The pre-draft Treaty operated on the basis of a »more effective attainment test» which was bound to an »assessment of the possible cross-boundary dimension effect»[121]. The »more effective attainment test»(Art. 3 b (2) scale or effects) sustained in connection with an »absolute necessary test», (Art. 3 b (3) necessary to achieve). The »cross-boundary dimension effectiveness test» reappeared somewhat hidden in the »better attainment test», (Art. 3 b (2) cannot sufficiently achieved/better achieved)[122]. Both tests are interlinked and they do not provide consistent results[123]. The Community has first to make clear that the Member States cannot efficiently

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[118] The differences are explained in N. Emiliou, loc.cit. who devotes specific attention to the German Basic Law, 338 et seq. and A. D. Toth, loc.cit. 1079/1987.

[119] Helpful and concise, D. Grimm. Subsidiaritat ist nur ein Uort, FAZ 17. 9. 1992, cf. J. Pikorn, loc.cit. 699.

[120] Cf. The research done by E. Steindorff, Grenzen der EG Kompetenzen, loc.cit. and Quo vadis Europa, loc.cit.

[121] Cf. Art. 12 of the draft Union Treaty drawn up by the European Parliament, OJ C 77, 1984, 33 et seq., as reprinted in N. Emiliou, loc.cit. 391 et seq.

[122] Cf. N. Emiliou, loc.cit. 402.

[123] Cf. A. D. Toth, loc.cit. 1097/1098 who applies Art. 3 b to the question whether the Community should regulate water quality and comes to contradictory results under the effectiveness test (pro Community regulation) and under the absolute necessary test (against Community regulation).

deal with the substance matter and then justify why it is better equipped to take the measures and why they must be necessarily taken at the higher Community level[124]. It seems to be as if the criteria can best be dealt with by the development of appropriate procedural rules rather than by submitting them to the Courts' interpretative power. The shaping of the procedure must then stand for compliance with the two tests. This seems to be the main objective of the resolutions taken at the Edinburgh meeting in December 1992[125].

2. *Political cooperation and/or judicial control*

Jacque/Weiler had made an attempt to formulate a provision which should entitle the Court to control the subsidiarity principle[126]. It has been introduced in the debate in a parliamentary session[127], but has not reached the level of high meetings in the Council of Ministers[128]. Legal doctrine is divided. Arguments turn around the entire political character of the rule[129], its subjective nature[130], a possible legitimacy crisis of the European Court of Justice[131]. Those who argue in favour of judicial control[132], push the similarity between the subsidiarity rule and the proportionality rule[133], though they are not identical[134]. The subsidiarity principle is primarily meant

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[124] Cf. J. Pipkorn, loc.cit. 699: »Die Regelung in Art. 3 b verbindet noch intensiver beide Ausprägungen des Subsidiaritätsprinzips (gemeint ist die Wirksamkeit und die Notwendigkeit des besseren Eingriffs). Die Ziele der angestrebten Maßnahme müssen wegen ihres Umfangs oder ihrer Wirkung besser auf EG-Ebene erreicht werden. Dies ist eine positive Rechtfertigung des Handlungsauftrages der Gemeinschaft.

Doch muß sich dieser qualitative Mehrwert des Gemeinschaftshandelns gerade daraus ergeben, daß die Ziel auf der Ebene der Mitgliedstaaten nicht in genügendem Maße erreicht werden können. Damit wird der qualitative Mehrwert an die Voraussetzung des Handlungsbedarfes aufgrund der potentiellen Unwirksamkeit der Mitgliedstaaten geknupft» (unter Berufung auf Schmidhauer-Hitzler, NVüZ 1992, 720 et seq. (723).

[125] Cf. Loc.cit. 11 Leitlinien im Gesamtkonzept für die Anwendung des Subsidiaritatsprinzips und des Artikels 3 b es Vertrags über die Europäische Union durch den Rat (Teil A, Anlage 1), D 9.

[126] Cf. J.P. Jacquè/J. H. H. Weiler, On the Road to European Union – A new judicial Architecture: An Agenda for the Intergovernmental Conference 27 CMLR 1990, 185 et seq.

[127] Cf. D. Z. Cass, loc.cit. 1133 referring to Giscard d'Estaing, who suggested as rapporteur of the Community that Art. 164 should be extended to explicitly include the principle of subsidiarity, Fn. 103.

[128] Though it is interesting to note that J. H. Weiler pleads for judicial control to balance out conflicts between the legal order and the political role of the Member States.

[129] Cf. D. Grimm, loc.cit.

[130] Cf. The House of Lords Select Committee on the European Communities in their Report on »Economic and Monetary Union and Political Union»: the test of subsidiarity can never be wholly objective or consistent over time – different people regard collective action as more effective than individual action in different circumstances..»

[131] Cf . House of Lords, loc.cit. ..»to leave legislation open to annulment or revision by the Eureopan Court on such subjective grounds would lead to imnense confusion and uncertainty in Community law»; cf. N. Emiliou, loc.cit. 403.

[132] Cf J. Pipkorn, loc.cit. 700.

[133] Cf. J. Pipkorn, loc.cit. 700, Fn. 14.

[134] Cf. Concise, N. Emiliou, loc.cit. 401.

to limit Community powers to Member States, the proportionality rule is applicable to the relationship between the Community and its citizens[135]. This difference could lose importance, if the Court is willing to bring to bear the notion in the preamble of the Maastricht Treaty that decisions should be taken near to the citizen[136]. The preamble allows what has been in the Encyclical Letter the starting point for the definition of the subsidiarity principle: to draw a dividing line between the individual sphere and that of the state. But even where judicial control is held possible it is made clear that it could be exercised to a limited extent only, by way of a rough test to find out whether the Community organs have obviously violated the criteria[137].

It goes without saying that the Community is the primary addressee of the subsidiarity principle and that it has to define procedural rules how to cope with the better attainment and the efficiency test. Both impose on the Commission an obligation to justify why it is willing to take this and that action in a field where it has no exclusive competence. On the request of the COREPER the Legal Service of the Commission had to respond to the direct applicability of the subsidiarity principle and on the relationship between the »effet utile» and the subsidiarity principle[138]. It denied direct effect to the subsidiarity principle because it is not unconditional and not sufficiently precise and clear. The legal service points out the discretion which is left to the Community organs to execute the effective and the better attainment test. Translated into the threefold meaning of the subsidiarity principle, the individual himself or herself could not base his or her right on the rule, that a decision has not been taken at the appropriate level[139].

Such a reading goes along with the interpretation given to Art. 5, if one follows the jurisprudence as spelt out in Casati[140] and Webb[141]. Any opinion on the relationship between Art. 3 b and the »effet utile» touches on the implied powers doctrine. Without really discussing the issue, the Legal Service referred to Kramer[142] and the opinion 1/91[143], where the doctrine was fully developed in the field of external relations and then applied to the agreement between the Community and the EFTA countries. The same position is taken by N. Emiliou who even interprets Art. 3 b (1) as express recognition of the doctrine of implied powers[144]. This seems too easy

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135 Cf. N. Emilou, loc.cit. 03 with references from the Courts' case-law; cf. A. D. Toth, loc.cit. 1083.
136 Cf. J. Pipkorn, loc.cit. 700.
137 Cf. N. Emiliou, loc.cit. 404, in a similar sense with reference to the German constitutional court, J. Pipkorn, loc.cit.700.
138 Cf. Note à l'attention de MMS et MM les Directeurs Generaux et Chefs de Service, Bruxelles, 26. 10. 1992, SEC (92) 2019.
139 Cf. Infra, at the end of III.2., where the indirect opportunities are discussed.
140 Cf. ECR Judgement of 11. 11. 1981, 203/80, 2595 et seq.
141 Cf. ECR Judgement of 17. 12. 1981, 279/80, 3305 et seq.
142 Cf. ECR Judgement of 14. 7. 1976, 6/76, No. 19–20, 1309 et seq.
143 Cf. Opinion 1/91, 14. 12. 1991, No. 21, OJ 110, 29. April 1992, 11 et seq.
144 Cf. Loc.cit. 399.

an answer, although the legal service opens up a door to bring the implied power doctrine and the subsidiarity principle together. The subsidiarity principle should serve as a means to interpret the existing doctrine. This is not too far away from J. Pipkorn's statement that the Court should apply the »effet utile» now in a restrictive way[145]. It would result in a process of reconsidering basic principles of the Community legal order.

Much clearer on the possible consequences are the statements presented at the interinstitutional conference on the subsidiarity principle and transparency held in Brussels on the 10th of November 1992[146]. The conference expresses the need for joint action by the Community organs. European Parliament and the Commission both are under political pressure, and both fear that the subsidiarity principle is used to challenge the institutional balance as provided for in the Treaty. The Commission feels concerned that the Member States will exercise control over the right of the Commission to introduce legal acts, the European Parliament is worried because of its possible impact on the »acquis communautaire». Might be that the newly introduced right to take action will be reshaped in the light of the subsidiarity principle[147]. Under the 27th of November 1992, the Commission has published its communication to the Council and to the European Parliament on the subsidiarity principle[148]. It contains both elements subsidiarity »from without» and subsidiarity »from within».

The document provides first for a classification of measures for which the Community has no exclusive powers. Here it is subsidiarity from without, the classical reallocation of powers, what is done. The document distinguishes between legislative measures, joint measures, contributory measures and complimentary measures and underlines the need to reconsider the possibility of using directives which are restricted to formulating a real frame rather than to lay down concrete rights and obligations. Subsidiarity from within comes into play! As criteria for taking action it mentions a comparative efficiency test and a surplusvalue test, just other words for the effective and better attainment test. How the Commission will carry out these tests remains open, with one notable exception. The Commission is prepared to conclude an interinstitutional agreement and the Edinburgh meeting has confirmed its necessity[149]. Such an agreement does not yet exist, but it lies within subsidiarity from within to develop procedural rules which integrate the relevant actors in order to secure consent before the Commission starts an initiative. Public

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[145] Cf. Loc.cit. 700.

[146] Note à l'attention des membres de la commission et des directeurs généraux, Conférence interinstitutionelle sur las subsidiarité et la transparence, tenue à Bruxelles, el 10 novembre 1992, SEC (92) 2163.

[147] The Court of Justice has granted the Parliament standing, Case 70/88, Judgement of 22. 5. 1990, ECR 1990, 2041, Art. 173 (3) as revised.

[148] Cf. SEK (92) 1990 endg./2.

[149] Cf. Loc.cit. III. Verfahren und Praxis, D 9.

attention should focus on the shaping of the procedure. The rules set out here could be submitted to the Court when it comes down to decide a case. Even if the Member States due to its political character are not legally entitled to challenge a Community decision because it violates the subsidiarity principle, they cannot prevent the national courts from exactly raising that question, if a private individual in a given case builds an argument on the violation of the subsidiarity principle to his detriment[150]. Just two questions: who should have access to the negotiations, and should they be held publicly?[151]

IV. Considerations for a new reading of the subsidiarity principle

The traditional reading of the subsidiarity principle strengthens the political influence of the Member States on the Community. It increases the weight of the intergovernmental side of the balance or in the terms of the theory of the »Ordnungspolitik», it allows to challenge the existing legal order, mainly the pre-emption doctrine. The pendulum swings away from the community legal order to the political order. Exactly this movement away from a formalistic, rigid[152] legal order, however, gives scope for the intellectual development, – i.e. for the intellectual furtherance of the Community legal order! There is a mutual dependence of the two elements of European integration, supranationalism and intergovernmentalism[153]. The political impact of the subsidiarity principle provides the ground for the search of legal (!) relief strategies.

The heading of this section is chosen in order to demonstrate the provisional character of the interpretation proposed here. The basic idea is to lay down lines of arguments which should and which must be further developed in order to transform them into legal principles. Such an approach allows to tie the considerations for a new reading of the subsidiarity principle to the theories of integration. The first consideration turns the classical reading of the subsidiarity principle as a means to reallocate powers – subsidiarity from without – upside down, and raises the question whether it could become a means to generate responsibilities instead of merely defending competences. The second consideration aims at the inner architecture of the community legal order, it advocates a modified pre-emption doctrine[154].

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[150] Cf. N. Emiliou, loc.cit. 404.

[151] Some progress might result from the decisions taken in Edinburgh on the transparency of the work which is done at the Council level, cf. loc.cit. D 14.

[152] Cf. J. Bengoetxa, Institutions, Legal Theory and EEC Law, ARSP 1989, 195 et seq. According to J. H. Weiler, The Transformation of Europe, loc.cit. 2476 the formal, non-ideological character of the Community legal order is bound to the unanimity principle.

[153] Cf. J. H. Weiler, loc.cit. 2426.

[154] Cf. Already, H.-W. Micklitz, Organisational Structures, loc.cit. and H.-W. Micklitz/ N. Reich, Verbraucherschutz im Vertrag über die Europäische Union, loc.cit.

A concept of shared competences could make the Community legal order more flexible and invalidate the Community's encroachment on the Member States' powers[155]. Both aspects contain an element of »competition» bottom-up, of »interbrand» competition[156] and they provide for a comprehensive view on the both elements of subsidiarity – from without and from within.

1. Consequences of subsidiarity from without – the emergent doctrine of responsibility

Under the 6th of July the »Independent» published a cartoon, showing J. Major as the subsidiarityman[157]. On the left hand side he is telling the Commission »Thanks to my super hero powers you can't tell me what to do», on the right hand side, he is telling the local gov.: »thanks to my super hero powers, I can tell you what to do». Seen this way the subsidiarity principle provides for an assumption that all (non exclusive) powers are vested in the Member States[158]. At the perspective seems correct. At a second glance one might raise doubts on the message inherent to that cartoon. Does it catch the vertical distribution of competences correctly is the first question? And the second one concerns the neglected horizontal dimension between the Member States.

The subsidiarity principle cannot be used as a mere weapon of Member States to refute Community activities. It has been introduced to better balance out conflicts between the Community and the Member States. Inherent in the principle of subsidiarity lies a positive constructive element, which would mean, that the Member States might have to support the Community in the development of adequate rules to achieve the objectives of the Community[159]. Subsidiarity does not aim at the shaping of competence structures alone which brings together or divides Member States and the Community, it encourages *the allocation of competence on the basis of efficiency rather than nationality*[160]. Put this way, the notion of subsidiarity loses its destructive, defensive touch and could transform to an able instrument in the shaping of the Community legal order after 1992. If the German Ministry of Economic Affairs intends to set aside each and every measure under discussion in the Community organs to improve consumer protection at the Community level, the

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[155] E. Steindorff, Quo Vadis, loc.cit. uses the argument, but does not draw the conclusion here proposed, 43.

[156] Cf. N. Reich, Competition, loc.cit. 899 et seq. and 895: »The more competences the Community is acquiring, the less exclusive will be its jurisdiction, and the more »interbrand» competition between legal orders will take place».

[157] Cf. The Independent, Monday 6 July 1992, page 20.

[158] Cf. A. D. Toth, loc.cit. 1103.

[159] Cf. This is what the Commission is stressing in its communication, loc.cit.

[160] Cf. St. Weatherill, in Federalism and Responsibility, loc.cit. Some support can be drawn from N. Emiliou, loc.cit. 402 with reference to 402, though the argument is not developed.

responsibility for consumer protection which was largely delegated away from the Member States to the Commission and the European Parliament will fall back on the national governments[161]. Member States have used the activities of the Commission as a pretext to stay away from own initiatives.

It has already been mentioned that the Member States have taken secondary Community law, to concentrate powers at the national level to the detriment of lower levels[162]. Legal measures adopted at the Community level are directed to the Member States, and the Court has constantly made clear that the Member States are free in the way they build up the necessary infrastructure to secure compliance with European law[163]. One should not forget, however, that the Court of Justice has likewise obliged national courts and national administrations to enforce Community law[164]. Here lies an important potential for national courts and national administrations at the lower level to bring to bear European law and to somewhat counteract the centralistic tendency which is inherent to Community law[165]. Member States with a federalistic structure, like the FRG, might even benefit from legislative activities taken at the Länder level[166].

What the Cartoon does not cover, but what is already in the political and the legal discussion is a revision of the responsibilities incumbent upon on national and even regional administrations in the extraterritorial enforcement of Community law[167]. It is the *horizontal* dimension of Community law, it is Art. 5 of the Treaty of Rome which could and must be reshaped in the light of the subsidiarity rule[168]. The Commission is constantly arguing that enforcement could be secured only if

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[161] The point then is, at least in civil law, whether conflict rules suffice to solve transboundary consumer litigtions.

[162] Cf. Reference in the field of product safety regulation, H.-W. Micklitz, Organisational Structures, loc.cit.

[163] Cf. ECR 1971 Case 39/70, 49 et seq., cf. H.-W. Micklitz, Internationales Produktsicherheitsrecht, loc.cit. 403 et seq.

[164] As far as the administrations are concerned, ECR 1989, 1839, 1870 et seq. – Constanzo/ Mailand = EuZW 1990, 296 et seq.; thereto Fischer, NVwZ 1992, 635; as far as the courts are concerned, ECR 1984, 1891, 1908 et seq. – von Colson and Kaman.

[165] Initiatives have been at the local level, to build up the necessary knowhow to enforce European law, where the national government has failed to transfrom secondary Community law into national law.

[166] It is not the place here to discuss the German Basic Law. It has to be recalled, however, that Art. 23 was amended and the influence of the Länder strengthens within the ratification process in the German Bundestag, cf. BGBl. Jahrgang 1992, Teil I, 20 86 et seq. Gesetz zur Änderung des Grundgesetzes vom 21. Dezember 1992. There is an overwhelming literature on the interlationship between the Maastricht Treaty and the German Basic Law, cf. in the context of the European legal order Ch. Joerges, Maastricht Treaty, loc.cit.

[167] Cf. P. Sutherland, The Internal Market After 1992, Meeting the Challenge, Report to the EC Commission by the High Level Group on the Operation of Internal Market, 1992.

[168] Cf. The results from the Edinburgh meeting, loc.cit. I. Grundprinzipien under 4, D. 8. The subsidiarity principle does not eliminate Art. 5, quite the contrary is true, it strengthens the already developed horizontal dimension of Art. 5 in the Court's jurisprudence, cf. J. Temple Lang, Community Constitutional Law, Art. 5 EEC Treaty, CMLR 1990, 645 et seq.

Member States build up mutual confidence to increase compliance and enforcement[169]. It is only one step to combine enforcement with the mutual recognition principle (home country control) and to oblige Member States authorities to control all kind of risks which are originated from that very Member State and which endanger the citizens of other Member States[170]. Such a rule could easily backed with the subsidiarity principle, although the Member States have refused to integrate a provision on cooperation of administrations in the Maastricht Treaty[171]. One may formulate in a much more ambitious way and state, what is needed and what might be possible is to reshape the notion of »state» under European[172].

2. *Consequences of subsidiarity from within – the building of a new architecture on the basis of shared competences*

Community law draws a clear line between total and minimum harmonisation. Harmonisation under Art. 100 a is total. Harmonisation in specific policy sectors is bound to certain type of measures and most of all restricted to the adoption of minimum standards. The point at stake then has been and still is, how to decide which rule applies, e.g. Art. 100 a or Art. 130 s, Art. 118a or Art. 129 a. One approach is to distinguish between measures which relate to the Internal Market and those that are not. The Court of Justice has justified the application of Art. 100 a if the measure concerns both: the Internal Market and the policy outside the Internal Market. The Court referred to Art. 100 a because the position of the parliament is stronger here due to cooperation procedure, Art. 149[173]. Competence is linked to the notion of democracy, a consequence which does not facilitate the search for a solution because the Maastricht Treaty will add a fourth type of parliamentary participation to

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[169] Cf. Communication of the Commission, loc.cit. and the speach of J. Delors, loc.cit. on the role and function of subsidiarity; cf. in that context ECR Case 25/88, Ministère Pubkic v. E:R. Wurmser, judgement of 11. 5. 1989, No. 17 and thereo N. Reich, Internal Market, loc.cit. No. 46.

[170] Cf. Path-breaking N. Reich, Rechtsprobleme grenzüberschreitender irreführender Werbung im Binnenmarkt, 56 (1992) RabelsZ , 444 et seq.

[171] As foreseen in Art. 5 of the Luxemburg Draft of June 1991, cf. Ch. Joerges, loc.cit.

[172] Again it would be a subject to investigate in depth. The Court of Justice seems to develop a view of state which raises doubts on its acceptability and compatibility with traditional national understanding. cf. D. Curtain, The Province of Government: Delimiting the Direct Effect of Directives in the Common Law Context, ELR 1990, 195 et seq.; N. Reich, Competition, loc.cit. 884 et seq. both discussing the interrelationship between the EEC competition rules and national supply monopolies.

Even more important is an analysis of the relationship between the erosion of the principle of the enumerated powers and classical function of a state. Powers are generated at the Community level, but there is no »state» behind the powers, cf. J. H. Weiler, The Transformation of Europe, loc.cit. 2446. The European Community is not only a market without a state, Ch. Joerges, Markt ohne Staat, loc.cit. or, a legal system without a state, Koopmanns, Editorial Comment, loc.cit. it seems to become a state which do no longer take over traditional state functions.

[173] Cf. M. Zuleeg, Umweltschutz in der Rechtsprechung der Europaischen Gemeinschaft, NJW 1993. 31 et seq. 33.

the already existing three: the Art. 189 b procedure which provides parliament with a right to veto.

The Court is expected to adjucate on the legality of Community acts on the basis of Art. 3 b. Whether it can develop rules on the interpretation of Art. 3 b remains to be seen. If one will not leave the solution on the character of Art. 3 b to the Court alone, one has to take a new look at the division of responsibilities? Why not restrict the Community power to adopt *minimum* standards in all fields outside the four freedoms and the competition rules and leave it to the Member States to decide whether they want to go beyond that level playing field? Such a view, though based on a re-allocation of competences, provides the ground for building a new Community architecture, one in the direction of »co-operative federalism» rather than the German or American type of centralised federalism[174].

The leading idea is to seek the solution in the allocation of competences on the basis of efficiency and not in the fruitless differentiation between Internal Market related measures and pure non market-related measures[175]. Efficiency means to decide what can be done best at what level. If one accepts that the Community cannot survive as an Internal Market alone, but that it must meet the social challenge and transform the near-to completed Internal Market into a social European space, then it is necessary to enable the Community to take action at the European level and to prevent the subsidiarity principle from becoming just another hurdle to overcome in the transformation of Europe[176]. The subsidiarity principle would strengthen the assumption of an obligation of the Member States to contribute to the elaboration of such rules. Such a concept could work only if the distinction between Art. 100 a and the non-exclusive competence rules in the non-economic area is turned down. Measures under Art. 100 a would then *per se* be possible only as minimum rules, total harmonisation should not be excluded, but should no longer be the rule.

So far, there is little evidence in the Treaty and in the case-law which could back such a concept of shared competences[177]. A new reading of Art. 100 a IV might pave the pay[178]. If Art. 100 a IV is no longer seen then as an exemption rule, but as an instrument whose emergence can only be explained with the necessity to maintain competences in the hands of the Member States and to ensure that sharing competence will not entail disintegrating effects. Does the idea of shared concepts endanger the »acquis communautaire», because the pre-emption doctrine would be watered down? One might at the same time ask, whether it is really a danger or

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[174] Cf. This message is contained in Ch. Joerges, loc.cit. but not really developed.

[175] Or in retroactive and active, as E. Steindorff, Quo Vadis, loc.cit. puts it now.

[176] This is the heading of J. H. Weiler's article in the Yale Law Journal, loc.cit.

[177] Cf. J. H. Weiler, The Transformation of Europe, loc.cit. 2479 speaks of »shared sovereignty».

[178] That is, what we have tried, H.-W. Micklitz/N. Reich, Verbraucherschutz im Vertrag über die Europäische Union, loc.cit.; N. Reich, Competition of legal orders, loc.cit. Art. 100 a IV constitutes already a break to the pre-emption doctrine, cf. J. H. Weiler, The Transformation of Europe, loc.cit. 2458.

whether it is not a progress. The Community is based on the idea that it has competence only as far as the Treaty provides it for. The principle of a restricted transfer of competence is bound to the understanding of the Community as a supranational body which is different from a state. If law-making at the community level is bound to the adoption of minimum standards, then there might be an opportunity to rethink the perspectives of the Community legal order. The subsidiarity principle could become a sort of a hinge bringing together internal market thinking and social integration, shaping cooperative federalist structures instead of re-allocating powers.

V. Outlook – The subsidiarity principle and the position of the individual

The new reading allows one to get to grips with the competence dimension and the institutional implications of the subsidiarity rule. The third dimension of the subsidiarity principle is still missing: Its starting point, as spelt out in the Encyclical Letter[179], has lost importance over the decades and shifted the attention away from the individual to the institutional and organisational side of the principle. It is tempting to dig into the notion of the individual under canon law and to evaluate to what extent that very perception is inherently transferred to the institutional setting of the European Community[180]. For the purpose of this piece of work it suffices to recall that the Encyclical Letter shows a perception of the »state» where protection *against* the state is the striking issue (security), whereas social regulation involves protection by the state (safety)[181]. Even that change could not set aside, however, that the individual and his position in a given society is and must be the starting point for the development of social structures. That very lack of concern in the Maastricht Treaty demonstrates a significant neglect of the role and the legal position of individuals in the Community. Decisions shall be taken »citizennear», that seems to be all what remained from the initiative of the European Parliament to integrate in the Maastricht Treaty a set of social rights[182]. The subsidiarity principle in Art. 3 b allowing for or even requiring citizen-near decision-making may not bear the development and the integration of social rights into the Treaty. Here an addi-

[179] Cf. loc.cit. »just as it is wrong to withdraw from the individual..» or in German »Wie dasjenige was der Einzelmensch aus eigener Initiative und mit seinen eigenen Kräften leisten kann, ihm nicht entzogen werden darf...», cf. D. Grimm, loc.cit.

[180] An in-depth analysis would require to discuss the constitutional relationship between states and churches, the concordats, and to define the different views on the individual.

[181] For the context of social rights in the European Community, cf. H.-W. Micklitz, Consumer Rights, loc.cit.

[182] Cf. Declarations of Fundamental Rights and Freedoms, PE 132.563=EuGRZ 1989, 204 et seq.; thereto B. Beutler, Die Erklarung des Europäischen Parlaments über die Grundrechte und Grundfreiheiten, vom 12. 4. 1989, EuGRZ 1989, 185 et seq.

tional input is needed. It should have to do with the placement of the individual in the Community legal order and in the context of social regulation with organised individuals, with social groups who try to bring to bear raise their voices. Right here subsidiarity comes together with democracy. The democratic deficit of the European Community is not restricted to the imperfect shaping of the European Parliament, it is nowhere better felt than in the representation of diffuse interests at the Community level[183]. One might wonder whether the Court of Justice could and should take the initiative again.

1. The emergence of social rights for individuals and the role of the Court of Justice

The Court has granted individual rights under European law to enforce the four freedoms of the Treaty. The four freedoms have transformed to individual enforceable rights. The Court, however, has gone further. It has developed and it is developing social rights out of the Art. 36[184]. *Primary* addressee of these social rights, whether they are derived from Art. 36 and/or from secondary Community law[185], are the Member States. Art. 36 approaches the Member States and the directives are addressed to the Member States. All that the Court is doing in order to enhance the position of the individual in the field of social rights is to supervise the Member States in that they provide adequate means in their national legal systems for the enforcement of European law[186]. Such a jurisprudence constitutes a promising and powerful way to secure the enforcement of European law[187]. Difficulties could come up, if the concept of shared powers in the field of social regulation would receive support and legal status. Does it lead to shared mechanisms of law enforcement? Member States could and should use the lee-way under the shared powers

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The Edinburgh meeting in December 1992 tries to clarify what should be understood by citizen-near, loc.cit. And it might uell be that the real progrees is made here and not so much in the struggle on the subsidiarity principle.

[183] Cf. J. H. Weiler, The Transformation of Europe, loc.cit. 2453, although he sets aside that the legislative machinery at the Community level provides lee-way for exercising influence where it does not even exist at the national level, cf. H.-W. Micklitz, Internationales Produktsicherheitsrecht, loc.cit.

[184] Cf. E. Steindorff, Quo vadis, loc.cit. who elaborates how the Court of Justice encouraged and fostered the development of social rights beyond the limits of Community power. The Court, however, goes even one step further. It develops under the notion of negative integration social rights, cf. van Heydebrand u.d. Lasa, H.-Ch. Free Movement of Foodstuffs, Consumer Protection and Food Standards in the EC: Has the Court of Justice got it Wrong?, 16 European Law Review, 1991, 391 et seq.; cf. H.-W. Micklitz, Internationales Produktsicherheitsrecht, 1992, 329 et seq. where the attempt is undertaken to prove that the Court has already developed a right to safety.

[185] Here the Federal Republic of Germany provides indirectly the ground for the furtherance of the jurisprudence in its reluctant and insufficient transformation of secondary community law in the field of environmental protection into national law, cf. M. Zuleeg, loc.cit.

[186] Helpful and clear, M. Zuleeg, loc.cit. 37.

[187] Cf. St. Weatherill, National Remedies and Equal Access to Public Procurement, Yearbook of European Law, 10 (1990), 243 et seq. and the remarks made by Judge M. Zuleeg, loc.cit. 37.

rule for an indigenous development of enforcement mechanisms. It is quite another issue how and if national enforcement mechanisms could and should be europeanized[188].

A much more elegant ambitious concept would be to build social, European-wide enforceable rights, directly on secondary Community law[189]. One could make an argument out of the interrelationship between primary and secondary Community law. Primary law guarantees primarily the four freedoms, secondary Community law focuses nearly entirely on social regulation. The enforcement of the four freedoms have led to the establishment of a »Europäische Wirtschaftsverfassung», enforcement of secondary Community law could contribute to the development of a Community which reaches beyond mere market integration. The Court has already gone far that way, although it still refuses to grant directives horizontal effect[190]. It seems to be, as if the Court is not willing to go much further than »Francovich»[191]. The debate on a possible horizontal effect would gain importance and reappear in a new light if the Member States refute or delay the transformation of directives into national law by reference to the subsidiarity principle[192].

The Court has to be much more systematically approached by the holders of the social rights, be it individually or be it in form of organised enforcement. This might be the only opportunity to test, what the Court is prepared to grant private individuals as enforceable social rights. It suffices to recall that the making of a constitution[193] started with van Gend en Los, not with supremacy or pre-emption, but with direct effect. Then, it was a market citizen, an importer, who took the initiative. Only in the light of time it becomes clear how *systematically* the doctrine of direct effect has been used to implement the four freedoms and to give shape to the »Wirtschaftsverfassung» of the European Community[194]. Now, it rests on the citizens, the workers and the consumers to bring their cases to the Court and to see whether it is willing to follow suit[195]. Building a constitution bottom up and step by step through the Court of Justice provides lee-way for imagination. The private citizen, again as an individual or as participant of a social group which takes care of his/her interests, will have to play a much more important role than he or she

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[188] The concept of minimum standards presupposes that there are ways and means of cooperation between the Member States and the Community Organs to constantly review the minimum standards, cf. H.-W. Micklitz, Internationales Produktsicherheitsrecht, loc.cit. 388 et seq.

[189] Cf. Götz, Europäische Gesetzgebung durch Richtlinien, NJW 1992, 1949 et seq.

[190] Cf. For an overview, N. Reich, Protection of consumers' economic interests by the EC, 14 (1992) Sydney Law Review, 23 et seq.

[191] Cf. Case C-6/90 and C-9/90, Francovich, Judgement of 19. 11. 1991, EuZW 1991, 758 et seq.

[192] Cf. N. Reich, Competition, loc.cit. 877 et seq.

[193] Cf. G. F. Mancini, The Making of a Constitution for Europe, CMLR 26 1989, 595 et seq.

[194] Cf. H.-W. Micklitz, Organisierte Rechtsdurchsetzung im Binnenmarkt, loc.cit. and Ch. Harding, Who goes to Court in Europe, loc.cit.

[195] Cf. Ch. Pollmann, Die Rolle des Rechts bei der Durchsetzung der EG-Freizügigkeit, KritV 1990, 23 et seq.; cf. H.-W. Micklitz, Organisierte Rechtsdurchsetzung im Binnenmarkt, loc.cit.

already believes[196]. He and she could push the initiative which has somewhat shifted to the Member States back to the Court, in order to strengthen legal suprantionalism against political intergovernmentalism. The Court might have to compensate for the deficiencies the Member States left even after Maastricht in the developing a concept for a true European constitution giving shape to the role of the European citizen[197].

2. *The prominent role of the »individual» in the European »Community»*

The moment has come to reconsider the role of the individual in the European legal order, the role and function of an individual who is not entrepreneur, but social citizen. First of all there is no European social citizen[198]. It is one constitutive element of the Treaty that the individual is dealt with in relation to the four freedoms. He is the one who benefits from the four freedoms, as a consumer, whose choice is increased in the Internal Market or as a worker, who is given the right to work wherever he or she wants in the Community.

The Court of Justice has recognized the legal position of the Consumer under Art. 30[199] though it is not yet clear whether and to what extent rights flow from that legal status; it has stretched the notion of worker beyond its meaning and has contributed considerably to develop and to improve the position of students[200] in Europe and the role of the woman[201]. These efforts should be tied together in order to develop a notion and a concept of the private individual under European law. A new impetus for the re-consideration of the individual might strikingly enough derive from consumer protection. For years consumer protection was a neglected subject spelt out in two policy programmes and a number of declarations of the Council[202]. In a market-orientated integration process, consumer protection must gain importance beyond the attention given to it in the national context. This is all the more

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[196] We do not believe that the non-availability of a group actions substantially restrains access to justice, cf. H.-W. Micklitz, Organisierte Rechtsdurchsetzung, loc.cit.

[197] This has already been the case in the sixites, when the Court held the construct together, cf. J. H. Weiler, The Transformation of Europe, loc.cit. 2425. Today the situation is different due to the erosion of the principle of enumerated powers. And rumour goes, that the landmark decisions are not in the pipeline.

[198] Cf. Th. Hoogenboom, ..for non-EEC nationals, cf. Symposium: The Status of Non-community Officials in Community Law, contributions published in European Journal of International Law, 1992, 1 et seq.

[199] Cf. Case C-362/88, Judgement of 7. 3. 1990, ECR EuZW 1990, 667 - GB-INNO.

[200] Cf . Case 293/83 - Gravier v. City of Liège ECR 1985, 593 et seq. and Case 295/90 - Erasmus ECR 1990,

[201] Cf. S. Raasch, Perspektiven für die Gleichberechtigung im EG-Binnenmarkt '92, KJ 1990, 62 et seq.; H. Dieball, Gleichbehandlung von Frau und Mann im Recht der EG, AuR 6/1991, 166 et seq.; N. Reich/H. Dieball, Mittelbare Diskriminierung teilzeitbeschäftigter Betriebsratsmitglieder, AuR 8/1991, 225 et seq.;

[202] Cf. First Consumer Programme, OJ No. C 92, 25. 4. 1975; Second Consumer Programme OJ No. C 133, 3. 6. 1981; for the present state for development, cf. K. v. Miert, Verbraucher und der Binnenmarkt, Drei-Jahres Aktionsplan, EuZw 1990, 401 et seq.

true as the Member States delegated their competence away to the Commission and the Community, more as a pretext then as a real policy. Step by step the Community developed consumer protection rules. Now the Member States have to realize that consumer protection by its integration into the Treaty of Maastricht has even obtained quasi constitutional status[203]. Seen against that background it is no longer surprising, that legal doctrine is devoting more and more attention to the envisaged or the already adopted European rules and directives[204]. Consumer protection has become the red herring for the proponents of the Ordnungspolitik, which proves in a sense that consumer protection at the European Community level has already become an instrument for the furtherance of the Community legal order. The Commission grasps the nettle when it tries to use the consumer to compensate for the difficiencies resulting from mechanisms of law-enforcement which is bound to the territory of the Member States[205]. What is needed, is an entirely new European theory on the position of individual rights in the Treaty in order to comply with the third dimension of the subsidiarity principle: The shaping of the dividing line between the individual and the »state», i.e. the European Community as an institutional body, build to integrate markets but in a process of transition to encompass the individual.

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[203] Cf. E. Steindorff, loc.cit. with reference to the amendment of Art. 23 of the German Basic Law; references may be found in Ch. Joerges, The Maastricht Treaty, loc.cit.

[204] Cf. E. Steindorff, Quo vadis, loc.cit. and P.-Ch. Müller-Graff, loc.cit.

[205] Cf. Mainly P. Sutherland, loc.cit.