**Europe after Maastricht : interim report : report, together with the Proceedings of Committee, Minutes of Evidence, and Appendices : first report [of the] Foreign Affairs Committee.**

HOUSE OF COMMONS SESSION 1992–93

# FOREIGN AFFAIRS COMMITTEE

**First Report**

# EUROPE AFTER MAASTRICHT: INTERIM REPORT

Report, together with the
Proceedings of the Committee, Minutes of Evidence
and Appendices

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*Ordered by* The House of Commons *to be printed*
*4 November 1992*

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The Foreign Affairs Committee is appointed under SO No 130 to examine the expenditure administration and policy of the Foreign and Commonwealth Office and of associated public bodies.

The Committee consists of 11 members. It has a quorum of three. Unless the House otherwise orders, all Members nominated to the Committee continue to be members of it for the remainder of the Parliament.

The Committee has power:

(a) to send for persons, papers and records, to sit notwithstanding any adjournment of the House, to adjourn from place to place, and to report from time to time;

(b) to appoint specialist advisers either to supply information which is not readily available or to elucidate matters of complexity within the Committee's order of reference;

(c) to communicate to any other such committee its evidence and any other documents relating to matters of common interest; and

(d) to meet concurrently with any such other committee for the purpose of deliberating, taking evidence, or considering draft reports.

The Committee has power to appoint one sub-committee and to report from time to time the minutes of evidence taken before it. The sub-committee has power to send for persons, papers and records, to sit notwithstanding any adjournment of the House, and to adjourn from place to place. It has a quorum of three.

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The membership of the Committee since its appointment on 13 July 1992 is as follows:

Rt Hon David Howell, *Guildford* (Chairman)

Mr Dennis Canavan, *Falkirk West*
Mr Mike Gapes, *Ilford South*
Mr David Harris, *St Ives*
Rt Hon Michael Jopling, *Westmorland and Lonsdale*
Mr Jim Lester, *Broxtowe*
Mr Ted Rowlands, *Merthyr Tydfil and Rhymney*
Rt Hon Peter Shore, *Bethnal Green and Stepney*
Rt Hon Sir John Stanley, *Tonbridge and Malling*
Mr David Sumberg, *Bury South*
Mr Robert Wareing, *Liverpool West Derby*

The cost of printing and publishing this Report is estimated by HMSO at £10,944.

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# FIRST REPORT

## EUROPE AFTER MAASTRICHT: INTERIM REPORT

**The Foreign Affairs Committee has agreed to the following Report:**

### Work of the Committee

1. When the Committee was re-established in July 1992, we decided to continue the inquiry begun by the Committee last Session into Europe after Maastricht, on which the Committee made a brief preliminary Report in March 1992. With that Report the Committee also published the evidence it had thus far received on the Maastricht Treaty (including a long memorandum from the Foreign and Commonwealth Office) and a note of its discussions in Bonn, Paris and Brussels, which it drew to the attention of the House in the context of the forthcoming debates on the European Communities (Amendment) Bill.[1]

2. Our inquiries this session will look forward, beyond the issues associated with ratification of the Treaty, and examine the future shape of the European Community. We shall be reporting more fully to the House later in the Session. We have decided, however, to report to the House immediately eight memoranda we have so far received in this inquiry, most of which examine the issue of subsidiarity, which has become one important aspect of the debate in all European countries as they decide whether to ratify the Maastricht Treaty.[2] We should emphasise that, although this interim report deals primarily with evidence on subsidiarity, other central issues arise from the Treaty which will deserve our urgent attention. Subsidiarity as such is not the only matter which will determine the future character of the Community. For example, the political and institutional processes towards monetary union will have a considerable impact upon the nature of the Community.

3. We have so far taken oral evidence in this inquiry from the Foreign and Commonwealth Office and from some of the legal experts who have submitted memoranda to us.[3] That evidence, which is published with this Report, expands and clarifies some of the memoranda we have received. We also, during the summer adjournment, took evidence from the Foreign Secretary, before the Birmingham Summit of EC leaders, called by the Prime Minister following the turmoil in the money markets which led to the UK withdrawing from the European Exchange Rate Mechanism on 16 September 1992.[4]

### The Birmingham Summit

4. The Foreign Secretary described three elements in the Birmingham Summit's approach to the problems demonstrated by the Danish people's rejection of the Maastricht Treaty on 2 June 1992 and the slender majority in favour of the Treaty in the French referendum on 20 September 1992. These were:

- greater openness in the way the Community conducts its business, including meetings of the European Council;
- subsidiarity, including possible changes to the procedures of the European Commission and the Council of Ministers as well as a review of past Community legislation; and
- making a better job of explaining the Community to its citizens.[5]

All these points were covered in the declaration by heads of government issued at the end of the summit.[6] The declaration also reaffirmed Governments' commitment to the Maastricht Treaty, stressed the rôle of the European Parliament in the democratic life of the Community and reaffirmed that national parliaments should be more closely involved in the Community's activities.

### Subsidiarity

5. The evidence we have received from academics and lawyers with experience in the European Community demonstrates some of the difficulties involved in making the principle of subsidiarity work in practice. It also draws attention to the links between subsidiarity and some

[1] Second Report from the Foreign Affairs Committee, Europe after Maastricht, HC (1991–92) 223-I & II.
[2] See list of Appendices.
[3] Ev 29 October 1992.
[4] Ev 12 October 1992, HC (1992–93) 205-i.
[5] Ev 12 October 1992, Q 3.
[6] The Birmingham Declaration, 16 October 1992.

of the other matters covered in the Birmingham declaration. Heads of Government envisaged that at the Edinburgh meeting of the European Council, towards the end of the UK Presidency of the Community, ways would be found of applying the principle of subsidiarity in practice. Our evidence suggests that this will be difficult to achieve. We draw the House's attention in particular to the following points that were put to us:

— Subsidiarity is best understood as a political or constitutional convention, rather than as a legal mechanism[1];

— Evidence and opinion as to the extent to which Article 3b of the Treaty about subsidiarity extends to policies within the exclusive competence of the Community are conflicting and open to further debate.[2]

— Challenges to Community actions before the European Court of Justice on the basis of Article 3b of the Maastricht Treaty about subsidiarity are unlikely to succeed[3];

— Amendments to the practice and procedures of the Commission and the Council will be necessary if subsidiarity is to be effective in ensuring the minimum interference by the Community in the affairs of member states[4];

— Most decisions about new Community actions stem from the Council of Ministers or require its approval. Adherence by the Council to the principle of subsidiarity is crucial[5];

— Adapting the procedures and practices of Community institutions (as planned at Birmingham) to apply the principle of subsidiarity in practice should be understood to represent only a first stage in its application. Our witnesses suggested that the Community must go much further than this if subsidiarity is genuinely to become the benchmark by which the balance of power in the Community is regulated.[6]

— Without some new institutional mechanism for enforcing subsidiarity, it may not be effective. Ideas put to us included: Council procedures to test all proposals for new legislation against the provisions of Article 3b of the Treaty;[7] or requiring new initiatives to be approved by national parliaments[8] or to be vetted by an independent subsidiarity committee.[9]

— Decisions taken at the Edinburgh summit about openness, subsidiarity and increasing public awareness of the Community will need to be followed by more radical reconsideration of the balance of the powers in the European Community before the next Intergovernmental conference in 1996[10].

**Denmark**

6. We also asked our witnesses about the probability of meeting Denmark's requests for changes to or clarifications of the agreements reached at Maastricht without formal amendment to the Maastricht Treaty (which had been ruled out by Member States at the Birmingham summit) and whether meeting Denmark's wishes would require a further ratification procedure in Member States or amendment to the European Communities (Amendment) Bill in the United Kingdom. Denmark's final proposals, aimed at winning support for the Treaty in a further referendum in 1993, were not available when we took evidence, but their probable terms were known.[11]

7. Witnesses confirmed to us that the Treaty will fall unless it is ratified by all member states.[12] A central difficulty in achieving Danish ratification would appear to be Denmark's insistence on changes which will be legally binding.[13] How this can be reconciled with the deci-

[1] See eg Appendix 6, para 23.
[2] Ev 29 October 1992, Qs 100–104, 148-50; Appendices 2, 4, 6 and 8.
[3] See eg Appendix 6, para 22, Appendices 2 and 4; and Ev 29 October 1992, Qs 116–7, 146, 147.
[4] See eg Appendix 6, para 23, Ev 29 October 1992, Qs 107–111.
[5] See eg Appendix 7, para 11.
[6] See Ev 29 October 1992, Q 148.
[7] See eg Appendix 1.
[8] See eg Appendix 1; Ev 29 October 1992, Qs 150, 151.
[9] See eg Appendix 2.
[10] See eg Appendix 7.
[11] See Ev 29 October 1992, Q 66.
[12] Ev 29 October 1992, Q 140.
[13] "Denmark in Europe" 30 October 1992, p.4; Ev 29 October 1992, Q 83.

sion of the Twelve in the Birmingham Declaration that the Maastricht Treaty should not be amended is unclear.

8. Our evidence shows that a firm conclusion about whether Denmark's proposals can be implemented without amendment to the Treaty is unlikely to be possible until at least the Edinburgh European Council meeting on 11 December.[1] Foreign Office officials explained that the options under consideration included a new Declaration attached to the Treaty, a new Protocol, or some other sort of free-standing agreement between Member States which might not modify the Treaty itself.[2] The precise effects of any of these on the ratification process in the United Kingdom or on the passage of the European Communities (Amendment) Bill are not known.[3] However, there are obvious difficulties posed by the fact that the Danish proposals, with possible amendments, have to be acceptable to the Danish Government, the Danish Parliament, the Danish people and, of course, the other eleven members of the EC. There are consequent problems of synchronisation, especially as the Danish referendum will probably not be held until Spring of 1993 at the earliest.

**Information about the Treaty**

9. In Denmark and in France, before their referenda, the Governments made available to the general public the full text of the Maastricht Treaty. In the UK the Treaty was (eventually) published by the Government in May 1992 and is on sale to the public at a price of £13.30.[4] The Government is shortly to issue a booklet about the Treaty aimed at the general public. In response to a request from the Committee, the Government has also agreed to make available to the House, before the Committee stage of the European Communities (Amendment) Bill, a further document, in straightforward English, explaining the Government's interpretation of the Treaty [see Annex]. We welcome this and believe it is overdue. We hope that this document, and the evidence we have published, will assist the House in understanding the terms of the Treaty.

[1] See Ev 29 October 1992, Qs 84–91.
[2] See Ev 29 October 1992, Qs 69, 80, 88.
[3] See Ev 29 October 1992, Q 90.
[4] Cm 1934; the EC edition of the text is also on sale in the UK at a price of £6.50. The full text of the Treaty has also been published in the national press.

**Annex**

**Letter, dated 12 October 1992, from the Clerk of the Committee, to the Secretary of State for Foreign and Commonwealth Affairs**

**Maastricht Treaty**

On behalf of the Foreign Affairs Committee, may I thank you and your officials for giving evidence on 12 October.

At the conclusion of the meeting, the Committee went briefly back into private session to discuss your evidence about the Maastricht Treaty. The Committee have directed me to write to you today about your replies to questions from Sir John Stanley and other Members of the Committee about the information booklet the Government plans to issue interpreting the Treaty.

I am directed to convey to you the Committee's request that, in addition to any information booklet prepared for the general public, the Government should make available to Members of both Houses of Parliament, as soon as possible and in any event before the European Communities (Amendment) Bill is brought back to the House, a statement setting out the Government's interpretation, in straightforward English, of the provisions of the Treaty, to amplify the text published in Cm 1934.

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**Letter, dated 19 October 1992, from the Private Secretary to the Secretary of State for Foreign and Commonwealth Affairs, to the Clerk of the Committee**

**Maastricht Treaty**

The Foreign Secretary has asked me to thank you for your letter of 12 October.

As he mentioned when he gave evidence on 12 October, the Government have already made available to the Committee (last January) a Memorandum on the Maastricht Treaty. Nevertheless, he is glad to comply with the Committee's request for a further document, in straightforward English, explaining the government's interpretation of the provisions of the Treaty. We shall ask the Treasury to contribute on the subjects where they lead.

We shall aim to have this with the House as soon as possible, but certainly before Committee Stage is reached.

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# PROCEEDINGS OF THE COMMITTEE RELATING TO THE REPORT

WEDNESDAY 4 NOVEMBER 1992

Members present:

Mr David Howell, in the Chair

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|---|---|
| Mr Dennis Canavan | Mr Ted Rowlands |
| Mr Mike Gapes | Mr Peter Shore |
| Mr David Harris | Sir John Stanley |
| Mr Michael Jopling | Mr David Sumberg |
| Mr Jim Lester | Mr Robert Wareing |

The Committee deliberated.

Draft Report [Europe after Maastricht], proposed by the Chairman, brought up and read.

*Ordered,* That the Chairman's draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 9 read and agreed to. Annex read and agreed to.

*Resolved,* That the Report be the First Report of the Committee to the House.

*Ordered,* That the Chairman do make the Report to the House.

*Ordered,* That the provisions of Standing Order No. 116 (Select committees (reports)) be applied to the Report.

[Adjourned till Wednesday 18 November at Ten o'clock.

# LIST OF WITNESSES

# LIST OF APPENDICES TO THE MINUTES OF EVIDENCE

HOUSE OF COMMONS SESSION 1992–93

# FOREIGN AFFAIRS COMMITTEE

# EUROPE AFTER MAASTRICHT

## MINUTES OF EVIDENCE

Monday 12 October 1992

*Rt Hon Douglas Hurd, CBE MP, Mr Len Appleyard CMG, Mr Michael Arthur CMG, Mr Martin Eaton and Ms Glynne Evans CMG*

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HOUSE OF COMMONS

SESSION 1992-93

# FOREIGN AFFAIRS COMMITTEE

# EUROPE AFTER MAASTRICHT

## MINUTES OF EVIDENCE

Monday 12 October 1992

Mr Tom Dewdney Third, CBE, RN, Mr Ian Appleyard CMG, Mr Rodney Galsworthy CMG,
Mr Martin Eaton and Mr Colyer Fergusson CMG

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# MINUTES OF EVIDENCE

TAKEN BEFORE THE FOREIGN AFFAIRS COMMITTEE

MONDAY 12 OCTOBER 1992

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Members present:

Mr David Howell, in the Chair

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|---|---|
| Mr Dennis Canavan | Mr Ted Rowlands |
| Mr Mike Gapes | Sir John Stanley |
| Mr David Harris | Mr David Sumberg |
| Mr Jim Lester | Mr Robert Wareing |

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**Examination of witnesses**

RT HON DOUGLAS HURD, CBE, a Member of the House, Secretary of State for Foreign and Commonwealth Affairs; MR LEN APPLEYARD CMG, Political Director; MR MICHAEL ARTHUR CMG, Head, European Community Department (Internal); MR MARTIN EATON, Deputy Legal Adviser; and MS GLYNNE EVANS CMG, Head, United Nations Policy Unit, Foreign and Commonwealth Office, examined.

**Chairman**

1. Foreign Secretary, good morning and thank you very much indeed for coming before this Committee when Parliament is in recess and when, as we know, you have an extremely trying and challenging schedule. We are very grateful to you for giving us time this morning to discuss both the forthcoming European summit at the Birmingham National Exhibition Centre and some of the outlines of our inquiry into the burdens on, and the role of, the United Nations in its various activities around the world which the Committee is looking at throughout the autumn. Before proceeding, could I ask you whether you would introduce those who come with you? Mr Arthur we know.

*(Mr Hurd)* Mr Appleyard is the Political Director.

2. Who is known to some of us, but I think it is the first time he has been before this Committee, and I hope it is not too terrifying.

*(Mr Hurd)* Mr Martin Eaton who is the Foreign Office Deputy Legal Adviser.

3. Foreign Secretary, could we begin with what is coming up this very week on Friday, the special European summit which has been called by the British Government in its presidency role. Could I ask you just to sketch for us what you think the main agenda preoccupations of that summit are going to be and, dare I even ask, what you would hope to see emerging from it?

*(Mr Hurd)* When there is a special summit, there are always topical things that tend to crowd into it and that I think will also happen at Birmingham. There are two immediate issues, both of great importance, which are separate from the original purpose of the summit. One is the Uruguay Round, the GATT talks, where there are discussions today in Brussels, and it is hard, I think, to exaggerate their importance. That will certainly in one form or another be discussed at Birmingham. Secondly is Yugoslavia and in particular the humanitarian crisis. I think and believe that both of those will be discussed. Then there will be the two areas for which the Council was originally designed. There is the economic and monetary area and there is the political area. On the economic and monetary area, everyone, I think, is now accepting the definition of the Finance Ministers when they met in Washington that this should be an occasion for reflection and analysis rather than for attempting reform of the existing structures. The reasons for that in the present situation are, I think, fairly obvious, but there will be this reflection and analysis and possibly the commissioning, indeed probably the commissioning of further work. On the general side, the aim of the presidency, as set out in the letter which the Prime Minister has sent to all attending the summit, has three elements. One is greater openness in the way in which the Community conducts its business and under that heading there are various ideas which I have collected on my rounds which others are putting forward, which we are putting forward. Secondly, there is subsidiarity where we believe that out of Birmingham should come a clear declaration, clearer than hitherto, clearer than, for example, was made at Lisbon, and an instruction or request to the Council, the Foreign Affairs Council, to produce, based on that declaration, definite conclusions at Edinburgh. As far as this subject is concerned we see Birmingham and Edinburgh as twin summits, linked summits, with work commissioned and work reported on and agreed at Edinburgh. Finally, we think that the Community should spend some time on the task which is clearly necessary as to how we as national governments and how the institutions of the Community are to do a better job of showing the citizen that we have listened to his and her concerns and that the Community, not just the Treaty of Maastricht, but the Community operates for the benefit of the citizen, and not for the obliteration or the erosion of the national identities or the weakening of national powers. So those are, broadly speaking, the aims of the summit and what the presidency hopes to achieve from it.

4. Foreign Secretary, how will these products, as it were, be packaged? Are we talking here about

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[**Chairman** *Contd*]
addenda to the Maastricht Treaty or are you talking about a future agenda for Edinburgh when you speak of these aims? Are these things that all 12 countries will agree to or have we here the makings of yet another treaty to run alongside the present Treaty? I think there is a good deal of interest in how these highly desirable aims of openness and subsidiarity and so on are going to be packaged and whether the Maastricht process has to be reopened.

*(Mr Hurd)* Openness and explanation obviously do not require changes to the Treaty; they require changes in practice, procedures and style. As regards subsidiarity, there is an article in the Treaty of Maastricht, 3(b), which does not come into effect obviously until the Treaty is ratified. What was set in hand actually already at Lisbon and what we wish to carry forward at Birmingham and Edinburgh is operating this principle, showing how this principle will operate in practice. The Commission, under the impetus of Jacques Delors has already done a lot of work on this and he is considering it again today in advance of Birmingham and I hope that he will explain to us at Birmingham how far they have got. They are already amending their procedures so that before ideas are discussed in the Commission on their merits, there is a preliminary discussion as to whether they are actually necessary, whether action at the Community level is necessary for this purpose, however desirable the purpose. The Council of Ministers has to do the same and I would hope that between Birmingham, where we will be, I hope, enjoined to do this, and Edinburgh, where will have to report, the Council of Ministers likewise will put this principle into its procedures because it is perfectly true, as defenders of the Commission and journalists report, that a lot of the action which needs to be affected by subsidiarity comes from the Council rather than from the Commission, the different councils, the different councils dealing with different things, and then the Parliament also, the third institution, needs to tackle this and we will be discussing this with Dr. Klepsch. Now, we have the article in the Treaty, so as far as subsidiarity is concerned we are not talking about further articles of the Treaty or changing the Treaty, but we are talking about showing how procedures of the institutions are going to apply this, what the tests are going to be, the criteria, and what examples there are of how this works on past legislation and on present proposals. So it is under the heading of "Subsidiarity, procedures, criteria, examples". You have not asked me about the Danish situation, but that of course is another element which interlocks and really your question about form, the Treaty amendments, applies, I think, more absolutely, more clearly to the Danish question of how we handle that between Birmingham and Edinburgh than it does to this question of subsidiarity.

**Chairman:** Well, we want to come to the Danish issue and their White Book which the Committee has only just seen in detail in a moment, as indeed we want to come to the delights of EMU and ERM, although not in detail because another sister Committee will be looking at these things this afternoon, so I think we can concentrate on these political reforms and how they fit in and that is really where we might usefully go now.

**Mr Harris**

5. The political reforms are excellent, but it is, do you not accept, Foreign Secretary, very, very late in the day to be talking about these issues? Here we have Parliament after all having given approval in principle to Maastricht and now we still have to flesh out subsidiarity? Last week's events, do you not accept, show that there is alarm about Maastricht in the Conservative Party, let alone in the country as a whole, and we have had the Danish referendum? Do you, therefore, accept my contention that it is late in the day to be talking about these excellent ideals and will they not be seen rather as a panic reaction to what has happened following the Danish rejection in the referendum, the French near-miss, and all the controversy which has now boiled up over Maastricht?

*(Mr Hurd)* It seems to me, Mr Harris, that I have actually been talking about it virtually nonstop for a year at least, which is why we have an article in the Treaty. I do not say it was done single-handed by the British but we have an article in the Treaty of a kind not imaginable in the Treaty of Rome, and certainly not present in the Single European Act. We have it because the British and the Germans said it must be there. Because of some of the events you mentioned—the Danish referendum, the French debate, the debate in this country and the debate in Germany—we have now a much clearer realisation among the partners with whom we deal. You only have to study what the President of the Commission said in public on this matter to see how the importance of this issue has come up in his mind. After the Council discussion last week we continue to see in the British press headlines about Britain been totally isolated, but in fact on this issue which the Committee is now talking about the Germans are very strong and have put in a very strong paper. The Danes, as we saw from the Foreign Minister on television yesterday, are very strong. We are strong; we have been strong for a long time. The President of the Commission is strong. Nobody in opposition—there are degrees of enthusiasm that I found when I did my rounds last week, but no-one is saying this is wrong, this is absurd. There are caveats and that is why we need discussion, but you have to take the tide when it flows; it is flowing now and we intend to take it.

**Mr Rowlands**

6. You say, Secretary of State, that you are very strong, but it seems to me from what you have told us already that you are ruling out any possibility of actually improving the wording of Article

**[Mr Rowlands** *Contd*]

3(b) itself. I read with some interest Mr Martin Howe's submission from the Society of Conservative Lawyers in which he says that effective implementation of the principle of subsidiarity requires the visions of basic definition in Article 3(b), otherwise any structural protocol or declaration designed to implement it will rest on unsound foundations. You seem to be implying that all you are going to do is issue a series of declarations on these unsound foundations of the original Article?

*(Mr Hurd)* No, what we are going to do is put it into effect. I believe even if the Article were not in the Treaty the political impetus of putting this into effect, for changing the way in which the Community approaches proposals for legislation, would remain. We need the legal underpinning of Article 3(b), but the political imperative would be there anyway.

7. You are not going to change Article 3(b)?

*(Mr Hurd)* No, we are not going to change Article 3(b). We believe that Article 3(b) provides a good legal underpinning. What we are intending to do, even in advance of ratification, is to modify and change the way in which the Community takes its decisions so as to tackle one of the main anxieties, not just in Britain, that the Community tries to do too much; and tries to set its hand for quite good reasons and often under pressure from interest groups (including British interest groups) to detailed intervention in the life of the citizen and the nation state. I think we would be doing that even if we had not succeeded in getting Article 3(b) in the Treaty, but Article 3(b) provides what we believe is a good underpinning.

8. You think it is not an unsound foundation?

*(Mr Hurd)* No, we believe it is a good foundation.

**Mr Sumberg**

9. Foreign Secretary, you outline as one of the aims of the summit that you must show the citizens of Europe that their concerns have been noted and that they must be shown the benefits of the Community. Would you not agree that most of my constituents, and most of yours I imagine, have a totally wrong view of Maastricht, they do not understand it, they are desperate for explanation, they are desperate to be told what those benefits are and that there is an urgent need to do it? Perhaps you would like to tell the Committee the sort of thing you have in mind and, in particular, to amplify the announcement you made at the Conservative Conference about informing the population of the benefits of the Treaty and where the Government sees the way ahead?

*(Mr Hurd)* Certainly. I think a number of our constituents are desperate for further information. I think it is not entirely easy to estimate what proportion, but there is certainly that concern, first, and it is reasonable that it should be met. What we propose (and the decision to go ahead will not be taken until next week) is that there should be a booklet (which is ready) which would be available to the public which deals not just with the Treaty but with the way in which the Community takes its decisions; how that would be changed with the Treaty; what is meant, for example, by the pillars which experts have talked about for a long time now. I am sure you are right, the idea is not widely widespread. Under the Cabinet Office rules that guide all governments, we cannot push this through letterboxes in every household as is often suggested because Parliament has not approved the relevant legislation, and we would be open to criticism and it would be beyond the rules. What we can do within the rules is to make this available on demand and at various points where people expect to find public information, like libraries and colleges, and that is what we plan.

**Mr Lester**

10. Foreign Secretary, you have talked about the discussions both in Birmingham and in Edinburgh as being linked. You have talked, excluding the Danish situation which we can explore in more detail, about statements which will clarify existing elements within the Treaty of Maastricht. Do you really think that there will be no new declarations or protocols agreed by the Council which would invalidate the ratification which has already taken place by France, Greece, Ireland and Luxembourg? Will they have to go back and have a further ratification on what might have emerged as a result of the discussions at these two summits, or do you think that the long process of ratification—some countries which have already jumped the hoop and others which are still on the way—is going to keep anything like a timetable if we are re-negotiating protocols and bits of the Treaty over this long, extended period?

*(Mr Hurd)* I entirely understand that point. On the matters we have been talking about up until now, the questions of openness and subsidiarity and better information, that does not require any ratification. When we come on (if we are going to come on) to the Danish question that is where the question really arises. The Danes have put forward in their White paper (which the Committee has seen a summary of and so have I) a number of options. They intend to focus discussion in Denmark in the next few weeks on these options. They hope that out of that discussion will come (before Edinburgh) a Danish Government view. They hope that they can persuade all their partners to agree at Edinburgh a broad framework which will enable them to put the case to the people again in Denmark in another referendum. All that still lacks precision, and therefore lacks precision on the answer to your particular question. I would hope that as a result of their initiative, their White Paper, the discussion which they have now launched in Denmark, the discussion which will now follow among the Twelve, with the help of the presidency which will be forthcoming we will be able to identify at Edinburgh a framework of ways in which the Danes can be helped to ratify;

[**Mr Lester** *Contd*]

because it is our view, the British view, that the adherence of Denmark, the ratification of Denmark, is absolutely essential and that they cannot be excluded from this process. It is worth saying that again because every now and then the idea crops up in other Capitals that somehow it would be possible to proceed without them and that is not our view.

**Chairman:** Our questioning is taking us on to Denmark, and perhaps we could go on to that.

**Mr Wareing**

11. Foreign Secretary, it was obviously a very important statement which was made on television yesterday by Mr Elleman-Jensen where he made the statement that there was no question of a referendum being held in Denmark on the present basis of the Maastricht Treaty, that in fact there would have to be something rather different. Now, you have said that at Birmingham you are looking for a declaration, I believe it was, but in fact Mr Elleman-Jensen has said that he wants to see set up a set of rules on how and when decisions in common can be taken. I want to ask you how you believe that we can help the Danes over this problem because quite clearly they will have to be helped if the Maastricht Treaty is to mean anything at all and they have got to have another referendum in order to put the Treaty into effect and yet Mr Elleman-Jensen was in a sense rather critical of the British Government in one of the statements he made. He criticised Britain for their attitude over co-operation. He said that there was a suspicion that the United Kingdom is trying to re-nationalise—and I am sorry to use that word to a Conservative Foreign Secretary—to re-nationalise on co-operation and what I think he meant was that he referred to environment and that has been very much in the news over the weekend, that in fact the question of the protection of wild birds has come up, the question of air pollution and Mr Elleman-Jensen made a distinction between those areas which were areas of European co-operation like the environment and those areas which were areas of subsidiarity and he mentioned education and health, although there were even areas of that such as the common acceptance of examination qualifications which he felt were areas of co-operation. I wonder whether the Foreign Secretary would like to comment on those points made by the Danish Foreign Minister.

*(Mr Hurd)* I think, Mr Wareing, you have wrapped up a good deal in one bundle.

12. I tried!

*(Mr Hurd)* Your first question is how do we help the Danes. The sequence is, I think, this: that at Birmingham we will not be directly addressing, we will not be directly tackling the Danish problem. At Birmingham we will, however, be, I hope, adopting, the Heads of State and Government will, I hope, instruct the Council of Ministers on the questions we have been talking about in this Committee up to now, principally on subsidiarity. We will instruct them, we will give them precise instructions as to the work which has to be done by Edinburgh. Meanwhile the debate in Denmark will proceed on the basis of their White Paper, their eight options, and it will, I hope, come to a specific proposal, or proposals. Therefore, these two things, the work set in hand in Edinburgh and the discussion in Denmark, will interlock and come to a discussion at Edinburgh out of which, I hope, will come an agreement which will help to allay anxieties across the Community and be of particular assistance to Denmark. As regards subsidiarity, it needs to cover the procedures of the three institutions, how they actually set about sifting out proposals to see which of them go through the sieve of subsidiarity and are proposals where the Community actually needs to take action as the Community and which do not and where, however desirable the objective, they can be met by national means and that will be of help to the Danes. There will be then discussion—of course there will be discussion—about what goes through the sieve and what does not and different countries will have different views on that, of course. That is why it is not going to be possible to wrap it all up in one meeting and there will be views. As regards the environment, there is a European interest and there are matters on which there should be European rules. There are other matters where my own view is that subsidiarity should apply so we come to the one, wild birds, which I read about in the newspapers today. We do not actually believe that on the question of shooting of wild birds the Commission is proposing to take us to court because there is in fact a discussion going on and agreement within reach on that particular point of the shooting of wild birds and also the designation of the specially protected areas, the SPAs, so there is discussion going on, but my own personal view is that these are not things which the Community ought to put its hand to in the form of detailed regulation. I do not think so. They are desirable objectives and how they are actually carried through should be, I believe, a matter for national governments acting in the light of national traditions and national feelings.

13. I just wondered, on the question of instructions being given to the Council of Ministers, that one of the points that was made by the Danish Foreign Minister yesterday was on the question of openness. He suggested that the public should be, as it were, admitted and there should be in fact open meetings of legislative sessions of the Council of Ministers. Well, is the British Government in favour of that, particularly in the light of the need to give the British people more information about what Maastricht really means to them?

*(Mr Hurd)* I am certainly in favour, we are certainly in favour of more openness and one of the things I have been discussing as I did my rounds in Lisbon and Madrid and The Hague and Brussels and so on last week was precisely this and there are various ideas for greater openness. People are

[**Mr Wareing** *Contd*]

not keen to see the negotiating sessions which the Council undertakes carry on in public because they think reasonably that you would never get an agreement and that if people are forced to make their concessions in public they are not going to make them. What you then get is negotiating in corridors and speech-making in public and that would actually slow things down very considerably, so they have a point there. We have to respect that, but there are various ideas and I do not want to be pinned down on them this morning because they need to be negotiated, but there are various ideas which different people put forward as to how the Community can meet your point and can show that it is not just a group of people trying to conceal what they are up to, but that it is trying to show that it is proceeding on objectives which are public and in ways which need not be concealed.

**Sir John Stanley**

14. Foreign Secretary, may I return to the key issue of public understanding of the Maastricht Treaty? You said earlier that the Government were at some future date going to produce a booklet of an explanatory nature and this apparently is not going to be immediately available. I do not understand the reason for the delay. Could you also consider the possibility of providing something in addition to simply an explanatory booklet which, from what you said, may be fairly heavily glossed and for the Government to do what two major Sunday newspapers did yesterday which is to publish an intelligible version of the Maastricht Treaty? The present documentation is largely unintelligible and, as has been confirmed, it has not even been read by members of the Cabinet and there is a critical need for the Government to produce and to have available an intelligible version of this Treaty. Will the Government produce one?

*(Mr Hurd)* The booklet will get the go-ahead unless there is some unexpected set-back at Birmingham. As the Committee knows, the Prime Minister has always said that the process of ratification here depends on greater clarity from the Danes which we now have and on good progress at Birmingham. I have set out what are our aims at Birmingham. If, as I explained, that goes reasonably well, then we will press ahead with the booklet and there need not be any great delay in that because, as I say, the work has been done. I have also explained the limitations on its distribution under the rules. We have put out the Treaty of course. I do not want to open ourselves to the charge of presenting it in a way which is not true. It is complicated and I have been a little reluctant to, as it were, simplify it for your purpose, Sir John, because I know exactly the minefield you then run into with people saying, "It isn't like that; you're cheating". You are perfectly right, the Treaty, the actual text even if published alongside the Treaty of Rome and the Single European Act, is still pretty obscure to the citizen. I am perfectly ready to look again at that and see if in addition to the booklet I have mentioned we could, without running into the minefield, give further information; we have, of course, to the House and the Committee; I do not think we are under any charge of neglecting information there. Whether we could actually devise something which is a bit more sophisticated than the booklet but for the wider public, I am perfectly ready to consider it.

**Chairman:** There are obviously very complex questions of the timing that unfolds, particularly in light of what you said, Foreign Secretary, about the Danish situation, and this House of Commons is going to be caught up in this timetable in a very complex and bewildering way. Mr Canavan would like to ask some questions on this.

**Mr Canavan**

15. I understand that there is to be a paving debate in the House in the next few weeks probably with a view to the Government re-introducing the Bill which received a Second Reading just before the Summer Recess. What exactly will the House be asked to approve in this paving debate?

*(Mr Hurd)* The paving debate had its origin, I believe, in exchanges between the Leader of the Opposition and the Prime Minister before the recess. It was felt, understandably, that since we had the Second Reading Debate in May the situation changed and a lot had happened, and before the Bill was put to a committee stage (albeit the whole House) it should have an opportunity to express itself again on the principle. No date for that has been fixed. As you say, Mr Canavan, it looks as if it will be soon after we get back, and no motion has been set but clearly the point of it is to enable the House to express again a view on the principle of the Treaty.

16. The Treaty, as it stands, has been rejected by the people of Denmark; it missed rejection in France by a mere whisker; there is growing doubt abut it in this country and elsewhere. Now you are telling us that the Government is determined to proceed with this paving debate and to re-introduce the Bill before any compromise or Maastricht Mark II has been agreed either by the Danish Government or by the Danish people. You are asking Parliament to buy a pig in a poke, are you not, while at the same time denying the people of Britain the right to have a say by means of a referendum?

*(Mr Hurd)* Parliament will decide these things. This is the crucial centre of our own constitution. Parliament will decide these things. Parliament will decide, after all that has happened, whether we are going to proceed with the ratification of the Treaty or whether we are in effect going to destroy it. This argument went on, as someone has already referred to, at our own Party Conference, but rather more languidly at the Labour Party Conference. There was, I understand, a discussion of some kind, but it is quite right that the House of Commons should tackle this problem. I cannot see much point in hanging about on it. Things are

[**Mr Canavan** *Contd*]
becoming clear; the Danish position is becoming clear. I do not think many people and certainly I would not favour hanging around doing nothing in this position of uncertainty until everything was totally cleared by everybody else. I do not think it would be in fact, because they would naturally say, "Well, what are the British doing? We can't be expected to dot our Is and cross our Ts when they are just sitting on their backsides doing nothing". I think that the time has come to ask Parliament to look at this again. There is one point you made, Mr Canavan, which is often made: the Danes technically did not, in their first referendum, kill the Treaty. The Danish Government, after their referendum, came to us and did not say, "The Danish people have rejected the Treaty and therefore we cannot ratify"; they said, "The referendum has gone against the Treaty; we need time to consider the options". So technically they did not kill the Treaty, although obviously a lot of the debate and anxiety and change which has taken place since then takes account of what the Danish people did.

17. You yourself said a few minutes ago, Secretary of State, that ratification by Denmark is absolutely essential?

*(Mr Hurd)* That is right.

18. But we do not know yet what the Danish compromise is going to be, yet in a few weeks you are going to be asking the British Parliament to approve of something in principle when we do not know what we are going to be approving of, because it will not be agreed at the earliest until the Edinburgh summit in December.

*(Mr Hurd)* Mr Canavan, in life if everybody waits for everybody else to complete a process it will not be completed. We have to make a judgement. We did not put the matter to the House in June or July. We have to make a judgement and the House has to make a judgement as to when is the right moment to proceed. It is clear that ten Member States either have ratified or are on course to ratify without substantial difficulty. It is clear that with one Member State, Denmark, its government is seeking to find a way of ratifying it. It is seeking to find a way: I am not overstating the argument. The question for us, as the other main remaining Member State, is whether in these circumstances we wish to proceed or not. That is something that the House of Commons will have to decide.

19. Some of the Danish options would require an amendment to the Treaty. It would become a Maastricht Mark II, rather than a Maastricht Mark I, and so we would have to start from scratch again and bring that new agreement to the House of Commons, would we not?

*(Mr Hurd)* I think if you listened carefully to Mr Elleman-Jensen yesterday and to the Danish Prime Minister you would see how their own intentions are focusing on questions of addition and clarification, rather than re-opening the existing text.

**Chairman**

20. I do want to come on that question of addition, but can I put Mr Canavan's question in a slightly different way: given our parliamentary procedures here, which may be different from other people's, would it be right to distinguish between debating the principle, or re-debating it in a paving debate where, as you say, matters of judgement have to be made, and the actual detailed business of processing the legislation here which could lead towards implementation of the Treaty which might come later? Is it right to distinguish between those two processes, or do you see them all as one?

*(Mr Hurd)* Obviously one does follow the other but they are separate processes. The paving debate is not technically a matter of the Bill at all, because the Bill has had its Second Reading. We have agreed to the request (at any rate, of some people in the House) that there should be such a debate, and that will be held first. What I cannot tell the Committee is when the Government would suggest that the House return to the Committee stage, because no decision has been taken on that yet. It obviously will be a long process because a lot of amendments will be tabled, quite rightly. I think our parliamentary process will be more thorough and more detailed probably than that of any other country, and will cover a wider range. The Government has to recognise that and prepare for that. That does affect the question of timing but, as I say, no decision has been taken on that and what would be suggested to the House.

**Chairman:** Let us look at this question of add-ons, protocols, supplements and all the rest of it.

**Mr Lester**

21. I think, Chairman, we have really gone into those in considerable detail already. Looking down what the Danish Government suggested in their White Book it appears the only one that is feasible is the possibility of introducing riders to the Maastricht Treaty which will become effective by all 12 Member States. Most of the others do in actual fact involve re-negotiation of the Treaty or a breaking of the agreement, when you have just said that it is vitally important that all 12 Members should be party to the Maastricht Treaty. They suggested that the other 11 could do it and they would stay out, they would join the European economic states and so on, changes to the Treaty as a whole, so the only one that seems feasible is the fact that they could introduce riders which would satisfy some of the fears of their people and then seek a further referendum. You have already dealt with the question of amendments to our own Bill because we cannot propose those until we actually know the timing of the Bill and how that fits in with the existing ratification, so the problem, as one sees it, is how one negotiates as far as Denmark is concerned and until that is completed,

[**Mr Lester** *Contd*]
then the whole thing in terms of any protocol is very confused.

*(Mr Hurd)* I think that is right. The Danes, having taken their time up to now producing their White Paper, obviously had a lot of discussion and now want to move with reasonable speed. The timetable I mentioned to the Committee shows that and I cannot really pre-empt, and I do not think the Committee can pre-empt, very successfully that Danish discussion which has to take place now within a relatively small number of weeks as to where in their options they are actually going to focus their own proposal, but we want to help them. We are not in the least attracted by the idea of a new treaty without them and we know that the present Treaty cannot be ratified without them, so we want to help them if there is going to be an agreement and we will do our best to do that. What one cannot be sure of until they have focused their own proposal is exactly what form that help needs to take.

**Mr Rowlands**

22. It is not the form, Secretary of State. Three or four times you have said to us that now the Danish position is clear, but frankly, from listening to you, I am not at all clear how substantive a change the Danes are seeking to introduce apparently not to the Treaty itself. Can you lift something of the veil of negotiations, if you like, as to tell us exactly what of substance the Danes are after? Might they, as one press report suggests, have to have an opt-out provision on citizenship, for example? Is it just subsidiarity pluses that the Danes are after and on that basis they feel they can go back to the Danish people? Can you give us some real substance to this argument and discussion as to exactly what the Danes are seeking to change?

*(Mr Hurd)* I think what is clear, Mr Rowlands, is that the Danish Government intends to ratify if it can. Now, that was not automatic after the first referendum, but that is what is now clear. They have set out their difficulties and various options. Some of these are purely Danish points and some of them, like subsidiarity, are general points which are general right across the Community. On the question of citizenship there is a general point here that the provisions in the Treaty about citizenship are an addition to and not a substitution for national citizenship. That is one point where the argument has clearly gone astray. The debate in France turned to a much greater extent on this point than the debate in Britain has and so did the debate in Denmark, but it is important here also and it came up at our Party Conference. It is very important that all of us, not just the Danes, should be clear, and there should be no question of contradiction in this, that the provisions in the Treaty about citizenship provide for an addition, not in any way a dilution of national citizenship, but there are other points like that which are general and which may be specific points for Denmark, say, defence because Denmark is not a member of the Western European Union and has a particular attitude on that which is not the same as ours because we are members of the WEU. So there will be general points which we must find a way of meeting right across the Community and there may well be specific Danish points which affect the particular position of Denmark; there will be both.

23. Are these issues, general or specific, going to be dealt with by declaration, by different protocols because that does affect our own Bill itself? In the Bill that was given Second Reading there is a specific reference to the Maastricht, the European Union Treaty signed on the 7th February 1992 together with other provisions of the Treaty, et cetera. If you are going to add to this Treaty a variety of declarations or whatever the case may be, does it not mean that either this Bill has to be revised and amended or a new Bill introduced?

*(Mr Hurd)* I do not think it will be a question of introducing a new Bill, but that will depend on what type of document to meet the Danish points is accepted by the rest of the Community and there will be a discussion on substance, which I think we have had in this Committee already, and there will be a discussion on your point which is the form, and there are various possibilities and one cannot be precise about them at this stage, but there are various possibilities here which do not reopen the text of the Treaty of Maastricht, but which do add to its clarity, add to people's understanding of how this is actually going to work. It is clear that is what we have to concentrate on when we talk about form, but one cannot say exactly—there are various options—what the legal form will be, but it will be within those bounds.

**Mr Gapes**

24. Foreign Secretary, if the Maastricht Treaty is not ratified either because of what happens in Denmark or what happens in this Parliament, would you accept the view that some people argue that it would mean that matters which were currently based upon or would be under Maastricht based upon intergovernmental co-operation might in fact become part of binding Community rules because of the previously existing treaties which are already in existence?

*(Mr Hurd)* I think that it is certainly agreed probably by everyone in this Committee that there are a whole range of important subjects which are best dealt with by co-operation between governments, co-operation between European governments, and that of course is provided for in the Treaty of Maastricht. If that Treaty fell, it would remain an open question as to how that work together should be organised and there is Article 235 of the Treaty of Rome which enables the competence of the Community to be gradually extended and it has been used for that purpose. I think there is a lot to be said for having a legal underpinning in the Treaty of the co-operative basis of this work. I am talking about the Foreign and Security Policy, I am talking about what one

[**Mr Gapes** *Contd*]
might call the Home Office subjects. It is a good thing from the point of view of Britain that there should be a treaty which says that it is going to be organised on the basis of co-operation because it rules out what otherwise is the kind of argument which we have experienced in the past because of 235.

**Sir John Stanley**

25. Foreign Secretary, I can see the logic of delaying the proceedings on the committee stage of the Maastricht Bill until such time as the Danish decision on a second referendum is known, but I do not understand the Government's reasoning as to why the Government wishes apparently to delay the start of the remaining proceedings on the Maastricht Bill, but to delay them to a point which is certainly going to be before the decision on the second Danish referendum is known. Could you explain why is the Government delaying proceedings on the Bill and what does it hope to achieve during the period of delay?

*(Mr Hurd)* I do not think we are, Sir John. Proceedings as they are now envisaged begin with the paving debate and we will have that, as the Prime Minister said last week or ten days ago, we will have that soon after we come back and we are thinking about what dates it will be now, but certainly that will be soon. Then we will have a long committee stage on the floor of the House. It is bound to be long, not by the Government's decision or because the Bill is long, but because critics of the Bill will want a proper play for their amendments, so that will take a long time. What we have not decided is when that long time will be and that really has not been decided. There has been no decision to delay it, but it has to fit in with the Government's programme and the wishes of the House.

**Mr Lester**

26. Assuming the negotiations, the long, drawn-out negotiations to actually achieve the Treaty must have taken into account many of the Danish Government's fears at the time so that the new White Book is really subsequent to long, drawn-out negotiations to try and deal with those fears, is there not a danger if we go too far in that direction that we are going to see the tail wagging the European dog rather than the other way round?

*(Mr Hurd)* I am not sure your premise is quite right. The Danish Government had the view that Danish opinion had moved on European matters in a way which the referendum showed it had not. What is clear anyway is that since June 2nd the Danish Government have acted, I think, with skill in assembling opinion, listening to what was said by the "yes" people and the "no" people in Denmark, and producing the options in this way, and having the kind of discussions which they have had. Since their referendum they have gradually worked out a new position and, as I have said, we mean to help them with it.

**Chairman:** It is not just the Danish opinion that, as it were, is clouding the purity of Maastricht but there is the whole question of the changing monetary situation, and that will be dealt with technically and in detail by another Committee this afternoon, but I think we would like to understand your views about how monetary union, which is the central feature of the existing Maastricht text, is going to influence discussions at Birmingham and, indeed, afterwards.

**Mr Sumberg**

27. Foreign Secretary, the Treaty for European Union had as one of its principal aims economic and monetary union, which the Chairman has mentioned, and when it was signed 11 out of the 12 members were all members of the ERM, since when we are no longer a member and neither is Italy. If you look at the convergence criteria it does link in, of course, to the exchange rate mechanism. Would you not therefore agree that a state which had suspended its membership of the ERM and allowed its currency to flow, which we now have, would not satisfy those convergence criteria in the run-up to the third stage?

*(Mr Hurd)* There is not, legally speaking, a link between membership of the ERM and ratification of the Treaty. If there were, of course, Greece would not be speeding ahead with ratification in the way she does, because she is not a member of the ERM. As regards EMU, there are I think two relevant facts: one is the convergence conditions, which you have mentioned, which are very tight; and, secondly, there is the British opt-out, which means that we are not committed to stage three of the single currency unless and until the British Parliament so decides. Those two things, I think, mean that there is not, and there is not regarded by anybody as being a legal link between ratification of the Treaty and entry into economic and monetary union. Could I just add this: partly for that reason but partly for more general reasons which applied even in 1990, I have never thought that whether we joined the ERM or whether we suspend membership in 1992 or whether we ever re-join a similar set-up is something on which the Foreign Secretary and the Foreign Office should lead. It is not essentially a function of foreign policy, although it obviously makes waves across into foreign policy. It must be a central question of economic policy and it must be something which is dealt with on economic grounds, and that is how it is handled inside the British Government. That is why the Chancellor's declarations, for example, to your sister Committee today are the key. I do not really want to duplicate, let alone introduce any nuance inadvertently.

28. I accept that, of course, but let me just press you on the order of things, the chicken and the egg situation. Would Britain have the opt-out clause, as you say? Would you agree with me that there can be no question of debating that opt-out clause by Parliament, from seeking the approval of

[**Mr Sumberg** *Contd*]
Parliament, if Britain is no longer a member of the ERM? I accept your view of the legalities, but in practical terms if Britain is not a member of the ERM could we as a parliament discuss an opt-out clause? Would it be practical to do so?

*(Mr Hurd)* No, it would not.

29. In other words, membership of the ERM is pretty crucial to that economic and monetary union, to which the Treaty relates?

*(Mr Hurd)* Several things are crucial. One is the convergence criteria. I think there are only two Member States, not including Germany, who at the moment meet the convergence criteria. The question as to when the convergence criteria are met is not one for me. Whether the existing timetable of the Treaty is realistic or not only time will show. We are where we are with economies which are showing signs of diverging rather than converging hence the strains on the ERM. The second is our own opt-out, but you are perfectly right, it would not make any sense for a country which is not in the ERM to start putting to its parliament the question of stage three. That is perfectly true. I cannot conceivably see circumstances in which a government would want to do that.

**Chairman**

30. Foreign Secretary, are the Germans not now seeking in effect an opt-out from a single currency and monetary union? How can they do that and have this condition of a Bundestag debate when they have not got a codicil in the Treaty which we so painfully debated?

*(Mr Hurd)* I honestly think that is a matter for them. I have noticed with interest what you have noticed, the proceedings of the Bundestag, but that is a matter for them.

**Mr Lester**

31. Is this something that will come up in Birmingham?

*(Mr Hurd)* I do not know whether it will come up in Birmingham. There is a very strong view that the heads of state and government should not give the markets, which are still in a fragile state, the impression that out of Birmingham there is going to be some great new scheme or change to the existing scheme. It is not actually in anybody's interest to create that expectation, which would be unreal. That is why after discussion the finance ministers of the Community came upon this phrase about reflection and analysis. It would be almost equally unreal for them not to discuss the matter at all, because this is one of the reasons why several Member States came to us and said that we must have a summit. That was when the turbulence was at its highest; now it is past its highest. There is some return to calm, but everybody knows that it is fragile. That is why there is a clear feeling and consensus that Birmingham should not go into questions of how the mechanism might be changed, the circumstances in which Britain or Italy might join, (Spain has not lifted its restrictions), or how countries which have put on temporary currency restrictions might lift them. These will not be gone into.

**Mr Wareing**

32. Although obviously what the Bundestag does is a matter for the members of the Bundestag, what we do over the Treaty of Maastricht affects Germany also. I wonder whether the Foreign Secretary would agree with me that should the British Parliament fail to pass the Treaty of Maastricht, or should the Danes not be able to be successful with a second referendum, that this would lead inevitably to a two speed Europe in relation to European Monetary Union? Would he further agree with me that if this were the case that it would be highly detrimental to the British economy and is an added reason why we should pass the Treaty of Maastricht, despite the problems that there are at the moment in Denmark?

*(Mr Hurd)* I think one cannot be certain that what you say is true, Mr Wareing. The certainties are that if the British Parliament decides not to ratify or if the Danish people say no in a second referendum then there will not be a Treaty of Maastricht and all the different elements in it will evaporate. There is the danger that in different ways, in which monetary is one, a number of states on the continent would say, perhaps after a time, "This is not good enough. The benefits of acting together are such that if the Maastricht framework is collapsed we must create a new one". That is the danger. I do not see it myself in terms of a two-speed Europe because I think there is already in several respects a multi-speed Europe as regards ERM, certainly as regards the Western European Union, certainly as regards the Schengen Agreement on passports and frontiers, so I do not think one should be dogmatic about different speeds. I just come back to a more basic point that it is not in the interests of this country that powerful combinations should make arrangements affecting either our prosperity or our security on the Continent of Europe which would intimately affect us but on which we would have no say. That is my basic philosophy on these matters and it does apply in the financial as well as in the security field.

**Mr Harris**

33. On that very point I wonder if the Foreign Secretary has seen, I am sure he has, the lead story in The Times today which suggests that senior European Commission officials have drawn up a "secret treaty" enabling federal-minded states to pull out of the European Community and set up their own community if the Maastricht agreement is not ratified. Does he have any knowledge of the Commission officials proceeding along in this way or is it, does he think, speculation?

*(Mr Hurd)* It is clear to me that the principals in this, the Federal Chancellor, the President of the

[**Mr Harris** *Contd*]
French Republic, the President of the Commission are not interested in this approach. They have lived through enough, I think, to know that it is a very poor substitute for what is actually on offer which is a Community of 12 going ahead, but whether there are people chattering on these lines in the background, I cannot possibly say. Whether Mr Brock of *The Times* has picked up some conversation which leads him in that direction, I suppose he probably has. I cannot control what people think if they are thinking along the lines as Mr Wareing has sketched, but clearly there is no plan or proposal. On the contrary, it is clear that all those concerned are anxious that the Treaty should be ratified by 12 countries.

**Mr Rowlands**

34. The Secretary of State has shown there is a healthy debate in all parties, but let me put the converse to that which Mr Wareing put to you in this fashion: what is puzzling me more and more as I have been listening to replies and indeed the whole situation is that we are out of the ERM, we have an opt-out provision regarding EMU anyway, there is great uncertainty whether others will be able to follow it, convergence is going to be even more and more difficult and at least only achievable with one or two, so why, therefore, at this stage in the proceedings do we have to import into our own domestic legislation article after article, legislative act after legislative act regarding the EMU, second stage or third stage, into our legislation now? By all means let us discuss it when the time comes and then legislate for it, but why do we have to import it into our legislation now?

*(Mr Hurd)* The deal which was done at Maastricht by the Prime Minister and the Chancellor of the Exchequer was to the effect that we would be part of the discussion, part of the negotiation and we would be in there. The corollary of that of course is that we do need to incorporate, we do need to ratify the relevant parts of the Treaty, but, as Mr Rowlands clearly knows and as I hope everyone knows by now, the achievement of the negotiation was that that was done without prejudice to your decision, and our decision as Members of Parliament whether we go to the final and the crucial stage, but it is a corollary of the agreement that we do ratify what there is, just as it is a corollary of it that others have to accept that we and, in a slightly different form, the Danes have the opt-out. That second thing is actually rather more difficult for them than it is for us.

35. But ratification is an executive act, not a legislative act. It is accepting where we have to legislate for specific areas. Do we have to legislate at this moment in time for EMU, for Stage II or Stage III, and why can we not do that at the time when we make the fundamental decision of whether we are going to belong to it or not?

*(Mr Hurd)* I think that the answer rests on my earlier answer, that the negotiated agreement is that we should be part of the system. That is to say, we should take a full part in discussing its workings and that we cannot do unless we follow through the procedure in the way that we are doing. I do not think there is an alternative.

**Chairman:** I want to spend the last few minutes of this section of our hearing on looking a bit further ahead as to what our aims are, as it were, beyond Maastricht, whether that hurdle stands or not, but first I think Mr Gapes and Mr Canavan have some questions.

**Mr Gapes**

36. Foreign Secretary, you at the beginning outlined the items which are on the agenda at Birmingham and one notable absence from that list was anything to do with the main reason why there is such difficulty getting ratification through which is public concern about unemployment and the general economic problems in Western Europe. Can I ask you is the Government even at this stage prepared to consider pushing that on to the agenda so that something substantive can come out of the meeting?

*(Mr Hurd)* Well, I think it will come out. I think the reflection and analysis I have talked of will not be confined to the monetary side. I notice what the socialist leaders in Europe meeting in Brussels on Friday have said on that and I am sure that the economic discussion I have mentioned will broaden out.

**Mr Canavan**

37. Just a further point on the timing of the article raised earlier by Mr Harris because it is clearly very important and Jacques Delors is quoted as saying that some countries are looking for alibis for delaying the Treaty, that it may well be that others will take the initiative in the world as it is, that we cannot delay and a senior Commission official is quoted as saying that Kohl and Mitterand have agreed in principle that they would try to go ahead with the version of Maastricht even if Denmark or Britain did not ratify. Do you see this as undue pressure on the part of Jacques Delors and his friends on the British Parliament possibly even to try and blackmail us into ratifying Maastricht because the consequences would be dire?

*(Mr Hurd)* No. Jacques Delors has often criticised Maastricht as inadequate from his point of view, but he sees it as an agreed basis on which the Community can then proceed. He is anxious to get it ratified. He draws attention in the quotation you gave, as Mr Wareing did, and as indeed I did in my reply, to the risk that if Maastricht collapses other people will try to seek to form combinations of their own. I think the quotation you have used was made before the Prime Minister made his announcement about our own ratification procedures.

**Chairman:** Can we look at how Europe will or ought to proceed or how you, Foreign Secretary, think it should proceed when we have got over or

[**Mr Canavan** *Contd*]
addressed this very complex problem that Maastricht seems to raise.

**Mr Harris**

38. I want to first of all go back to the question of subsidiarity and ask whether you are confident that your concept of this ugly word, minimum interference, as you put it, coincides with the understanding of other Member States of what subsidiarity actually means. For example, do the Germans not see it in a very different light and they see it as a means of building a federal decision-making process in the European Union?

*(Mr Hurd)* I think the Germans have strengthened their position quite strongly. They were one of the begetters of the article. They and we were one of the begetters of the subsidiarity article. Since then they have put great emphasis on this for slightly different reasons from ourselves, but the concept is the same. They do not want the Community to take upon itself the responsibility for itself inspecting, regulating in detail the carrying out of objectives which Europeans share. This is partly because of their Länder system, and that is perfectly right, but the result is the same so far as we are concerned, that they are strong allies in the search for an effective application of subsidiarity.

39. But are you expecting Birmingham to clear up any doubt about what the word "subsidiarity" means to ordinary people because there is this doubt?

*(Mr Hurd)* Yes.

40. Are you expecting a sort of ringing declaration saying, "This in plain English, plain French, plain German is what it means"?

*(Mr Hurd)* We will try to have a declaration in plain English, which shows what it means, what it means now, what it means even before the Treaty is ratified, and how the different bits of the Community should start putting it into effect. Then the declaration (and this remains to be negotiated) can say that at Edinburgh the different institutions should come back and report to us on how they have carried out this idea.

41. Although we can say it will be plain English, will the others agree that that is what it means in plain English in their language?

*(Mr Hurd)* There we are, the question illustrates the difficulty!

42. Is that what you are after?

*(Mr Hurd)* I understand that. We are trying to get this thought expressed to meet the actual anxieties you are talking about, national identity, (we have not talked about national parliaments but that comes into it), to take the different aspects of this and to set out in terms of a plain document how we think the different institutions should go away and operate them, and then with a report back at Edinburgh on the three things I have mentioned: the procedures the different institutions will follow, the tests to be applied, and the first fruits, the examples of what falls by the wayside as a result. We may not get all these but that is what we are aiming at.

**Chairman:** It is not just a question of setting it out in plain English but deciding who decides what the plain English means when particular cases come up. That is where the worry is. Are we going to leave all this in the future to lawyers and judges in the European Court of Justice and so on, or are we going to get more of a political decision making process in which this national parliament plays a much clearer and more decisive role? I think that is the question Sir John Stanley wanted to pursue. He may want to put it in a different form, but that is the question.

**Sir John Stanley**

43. I was going to ask the Foreign Secretary, as our Prime Minister and President Mitterrand have recently called for a direct involvement of national parliaments in the formulation of Community policy as opposed to being purely reactive at the moment, how does the Government see that involvement by the UK national parliament?

*(Mr Hurd)* One of the changes that has happened, even since Maastricht, is that more and more Member States are speaking in your sort of language, Sir John, and the language you, Chairman, used last week. It is there in Maastricht but it is coming to the fore: that is, the important role of national parliaments. I know that some members of our House feel that the Commission and maybe members of the European Parliament regard national parliaments as a sort of endangered species which ought to die out or pass on and their places be taken by the European Parliament; but that is clearly nonsense and runs against our whole idea of what the Community should be. It is not easy for governments to dictate to national parliaments how to operate in this. This House would resent it if we started to do that. There are various ideas, and one is that everybody, including the Commission, should pay more attention to national parliaments. I do not know how that would be received this end. It is something the House would want to think about. It is something the Commission is thinking about: how you could have a more direct link Commission-Commons or Commission-Lords. Of course, the basic decisive body in the Community is the Council and not the Commission. That is why the Council as well as the Commission has to brisk up its proceedings and its tests on subsidiarity if it is to make any sense. I would think that the House of Commons has a reasonably tight grip on ministers who go to Council. It is true in Denmark, but it is not true elsewhere. If national parliaments across the Community want to establish themselves clearly as part of European decision-taking, they have to work out their own grip on their own ministers. No names, but I think of Ministers who are certainly not conscious of any particular grip at the moment as they come and go. Then there is the

[**Sir John Stanley** *Contd*]
question of links between national parliaments on these matters, and links between national parliaments and the European Parliament. There was the Assizes in Rome of which I do not think, Chairman, you came away with a particularly rosy view; maybe that was because it was wrongly run. The principle of talk and discussion between national parliaments and the European Parliament must be a right one. These are some of the ideas which, under this very important heading we have, and we are encouraging other people in other countries to come forward with similar ideas, and particularly national parliamentarians.

**Mr Sumberg**

44. Foreign Secretary, I just want to press you briefly on this minimum interference. It seems to me that it is not so much a question of: is it written in plain English, or whatever, but its legal enforceability. Will you be satisfied after Birmingham or after Edinburgh with anything less than a declaration that is capable of being legally enforced and legally challenged in the European Court so far as the doctrine is concerned?

*(Mr Hurd)* You are a lawyer, but I am not sure that I entirely agree with you. I think what is needed, as I think you said, Mr Chairman, is the political will: so before it gets to the lawyers, the proposals which fail subsidiarity are actually knocked on the head before they are adopted; so you do not have to go into the business of challenging them after. This is not going to be very easy to do retrospectively, although we shall try; but it should be easier to do if the Commission, particularly the Council, the political decision-taking body has procedures and tests in place which enable it to take these decisions.

**Mr Rowlands**

45. As part of all determinations, for example?

*(Mr Hurd)* The procedures of the Council are something that are being discussed at the moment. It is a crucial point for exactly the reasons you have given.

**Mr Sumberg**

46. I accept that all your views on the political process are exactly mine, but in the ultimate will that legal sanction exist? Do you want to see that legal sanction or will you be satisfied with anything less?

*(Mr Hurd)* I think, as I have said in answer to an earlier question, we believe and we are advised that Article 3(b) as it stands now, not always as it is reported because we improved it in the final stages by getting the last paragraph taken away from the previous paragraph, applies to all the work of the Community and not just to the areas of shared competence. I believe that it is a good legal underpinning of the principle.

**Mr Gapes**

47. Could I take you back to the question of the role of parliaments. You said that the decisive body of the Community was the Council and not the Commission. Is not one of the problems that Ministers come back to this Parliament and they report on the deals, the compromises and the fudges that they have worked out and then it is too late for us to actually have a decisive influence? At the same time the European Parliament does not have sufficient power to do it at that level either, so we have what we call a democratic deficit. It is very nice for ministers meeting in secret to do these things because there is no adequate accountability at either end?

*(Mr Hurd)* I have always found in my present job and in my last one that I was actually required to explain and account more precisely for European decisions, the machinery was brisker and more effective than for domestic ones. The legislature is never going to feel, particularly an energetic legislature, that it has ministers absolutely there every hour of the day, because it will not. Parliaments have to choose what they are going to concentrate on. I feel that the way in which this Parliament controls and deals with European decision-making, to put it mildly, is at least as brisk and thorough as that which it does with domestic.

**Chairman:** A final question, Foreign Secretary, before we move on on the presidency. Our presidency is turning out to be a little more interesting than perhaps we had originally planned.

**Mr Rowlands**

48. Foreign Secretary, you could have planned this presidency on the assumption that you would be out of the ERM etc. etc.

*(Mr Hurd)* You are correct.

49. Tell us, considering it is the Danes' next turn in January, is it the hope and expectation of the presidency, the Government's presidency that in fact with the combination of Birmingham and Edinburgh you will have basically signed and arranged whatever additional declarations, whatever additional protocols are going to be added to the Maastricht Treaty to make it acceptable not only to the Danish people but to Europe and to Britain as well in the British Parliament? Is that a likely achievement of the combination of Birmingham and Edinburgh or are these matters going to run into the Danish presidency?

*(Mr Hurd)* It is an objective, Mr Rowlands, and I think it is a reasonable objective and we will do our best to reach it. The Danes will take over the presidency, there is no earthly reason why they should not, and it is very important that they should, but since you are asking about the presidency, could I just say that the course of events has not upset the need for the agenda we set out in July. The GATT negotiations are, to be honest, Mr Chairman, much more important than anything we have been discussing this morning. They

[**Mr Rowlands** *Contd*]
hang in the balance today, this week. A GATT agreement would be much the most important spur which the Community, the United States, the world could give to helping the recession, much the most important spur. It hangs absolutely in the balance. Enlargement we have not discussed today, but again it is crucial and I think we will have great difficulty in getting enlargement in the foreseeable future if the Treaty is not ratified. The Single Market we have not talked about today, but again it is crucial. This is the part of the European policy which is there and it is there just for the finalising, for the taking, and we have to complete that by the end of the year and I believe we shall do so. There are other matters we have not discussed today, but those are three absolutely crucial ones together with getting an agreement on the future financing of the Community. These are four crucial points which we set out when we started in July which we have made some progress on and which remain the essential parts of our agenda.

**Mr Canavan**

50. But the British presidency seems to have been lurching from one crisis to another and the agenda almost inevitably has been dictated by these crises. Are there any items on the original agenda which have suffered by being set back, by being abandoned or postponed because of the rearranged priorities on the agenda?

*(Mr Hurd)* I just answered that question, Mr Canavan. I set out four things all of very great importance to Europe: the GATT agreement; enlargement, first of all, to include the EFTA countries which have applied; completion of the Single Market; agreement on future financing. Those are four things on which we have made some progress in discussions, despite the events you mentioned and which at Edinburgh we hope to make further progress on. The GATT actually will be decided for the time being, yes or no, much earlier than Edinburgh. As I say, it hangs in the balance this week.

**Chairman**

51. Now, Secretary of State, if we could take a deep breath and leave Maastricht and all its works and turn to the developing role of the United Nations which is the subject of an inquiry this Committee is launching upon, resting our questioning very much on the Secretary-General's paper, *Agenda for Peace*. We also have a very helpful memorandum from your office, the Foreign Office, and a list of other papers. I think you are going to be joined at this stage by some new colleagues.

*(Mr Hurd)* Yes. Can I introduce Glynne Evans who is in charge of our United Nations policy and that is it.

52. Foreign Secretary, may I begin with a general question. A view emerges that the United Nations today is over-burdened with over 11 military or UN-blessed operations around the world and under-financed. You have made some very interesting comments about how you think the United Nations might develop to carry all these new burdens. How do you see this debate continuing and what are the main issues in it?

*(Mr Hurd)* The UN is certainly increasingly burdened. To say over-burdened is to suggest it should not be doing some of the things it is doing, but I think if you look at the peace-keeping operations now in place, it is hard to question the need for them. That it is under-financed is absolutely clear. It is owed $1.5 billion in outstanding assessed contributions and the Secretary-General is entirely right in saying that these debts, this underpayment, has to be dealt with if he and his operations are to have any hope of success, but there are wider issues which I have tried to tackle, Mr Chairman, and about which the Committee may want to ask questions, but as the Cold War came to an end, the number of disputes which the UN could reasonably be asked to intervene in has very substantially picked up and this trend may continue. It is very hard for the UN to say no to pressing requests of this kind. It means a greater degree of intervention in the internal affairs of countries which would not have been thought conceivable 20 years ago. It means demands for money and, to some extent, men which the UN has difficulty in meeting, and this is the strain, this is the point which I have been trying to draw attention to.

**Chairman:** Thank you for that introduction and I wonder if we could bridge the discussion between what we were talking about earlier and the UN's role by looking at regional conflicts and particularly the regional conflict in the former Yugoslavia where the UN is now involved, but the EC thought it had a role either as an agent of the UN or indeed an independent role in its Community garb.

**Mr Sumberg**

53. Foreign Secretary, I am looking at your memorandum which you kindly sent us and paragraph 8, headed "Preventive diplomacy", highlights the role of the EC Monitoring Mission in the former Yugoslavia and states that such "preventive diplomacy is far more effective than the most successful peacekeeping or peacemaking operation which inevitably must follow the outbreak of violence". I wonder if you would like to tell the Committee what you think the Monitoring Mission in the former Yugoslavia has so far achieved because it is a criticism made that this form of preventive diplomacy has totally failed there given the scale of the fighting, given the horrendous stories that we hear, and I wonder if you would like to set out perhaps for the Committee what its successes have been since it has been established.

*(Mr Hurd)* The Monitoring Mission is a relatively small part of the total EC effort. The Monitoring Mission is a number of individuals, unarmed individuals, who are stationed mainly in

[**Mr Sumberg** *Contd*]

Croatia and whom I have seen in action, and other Members may have too, and they are creating the kind of conditions in Croatia, village by village, which enable people to go back to their homes and to enable the UN force in other parts of Croatia to contain what might otherwise be a disastrous breakdown of the ceasefire and we mention them in the memorandum because they are part of the effort, but they are only part of it. The framework we now have for trying to achieve or to help people of Yugoslavia to settlements is an EC/UN framework and it is now very elaborate and energetic, with David Owen, Lord Owen, on behalf of the EC, and Cyrus Vance, on behalf of the UN, working day in and day out in the republics and in Geneva to bring people together and stop the fighting. We have moved to that and after a period during which we simply tried to achieve ceasefires, and we did on paper but they were not implemented in practice. We came to the conclusion at the London conference in August that what was needed was a continuous effort and a framework. You are perfectly right that that has not yet produced in Bosnia the stopping of fighting or the conditions of a political settlement. It has produced, together with sanctions, a powerful debate in Belgrade and some signs of movement as between Serbia and Croatia and may lead to demilitarisation. There are other examples of progress which is beginning alongside, and perhaps more stark in the coming weeks is the humanitarian one in which the EC also is the greatest provider and help, out of which comes the decision of some EC members (Britain, France and Spain alongside Canada) to send troops to escort humanitarian convoys. There is political and humanitarian effort, both of which Member States and the Community as a whole are deeply involved with.

54. You see the deployment of those UK troops purely to escort those convoys and nothing further than that?

*(Mr Hurd)* That is their mandate.

55. You do not see the danger of them being drawn into the fighting? How do you see that being prevented? They may start with that objective, I accept, but the danger is that they will be drawn further into it?

*(Mr Hurd)* Of course, there are dangers. When the other Committee cross-examined the Minister of State about this two weeks ago when the House debated it on the Friday of the recall I think these dangers were admitted. They exist and we have to provide against them as best we can by a proper command structure, by a proper back-up and proper rules of engagement enabling proper self-defence. These are all essential matters for the Ministry of Defence but of course they are of great interest to me as well. It would be possible, I suppose, to have said some weeks ago that these difficulties and risks are so great that we are not going to do anything about it, and we are not going to take part in this enterprise at all. This is a choice which will confront Britain over and over again if my analysis is correct. Over and over again we will be faced with this choice: are we a middle-sized power seeking to retain a seat as a permanent member of the Security Council, seeking to exercise responsible action in the world in a way which I think most of our constituents would want? If we are in this new world then this would involve taking this kind of decision, and not pretending it is risk-free. If we are not then it will be for others. When our troops are deployed the French will still have many more troops in the former Yugoslavia than we have. They have taken casualties already. It will be for them and others to take up the role. There is a particular problem about Germany which does not do this, which, for reasons of its past and its constitution, believes at the moment that it is debarred from making a positive choice, and a somewhat similar problem with Japan; and both those countries, which would purely in 1992 terms be highly qualified to take part, are wrestling with their constitutions and their own policies. I would guess that before a very long time both of them will be able to make a positive choice in circumstances where that seems to be sensible, i.e. to dispose of the past as far as that is concerned. That does not necessarily make our problem any easier. We will have this recurring choice, and it will be very difficult for all governments but that is the nature of the choice.

**Mr Wareing**

56. Is it not the fact that we are now debating this question of military intervention, albeit for humanitarian aid needs, and in this illustration of the fact that preventative diplomacy has broken down, and that this arises out of the premature recognition of the Yugoslavian republics of Croatia and Slovenia, but particularly Croatia, and really in order to save the expense of the United Nations in the future and to save the cost in human lives that we should really be looking for a package, a political solution rather than a military solution, that will recognise the needs of the Serbian minority? It does seem to me that the extremists who have led this conflict in Bosnia Herzegovina are really in the hands of these extremists? They are really the outcome of our failure to give support to more moderate elements. It was notable to me that David Owen, who I had fears of as being appointed to his particular post, nevertheless came out with the expressed opinion that we should be doing all we can now to support the federal government in Belgrade whose Prime Minister, Mr Panic, appears to be in a more reconciliatory mood than some of the people we have had to deal with in that part of the world. I wonder whether the Foreign Secretary would like to say something about that. May I just also say, before he answers, that I have to declare an interest because I recently visited Yugoslavia and Serbia and was assisted in doing so during the recess by the Federal Assembly in Belgrade. I

[**Mr Wareing** *Contd*]
should say that last year I visited under different auspices.

*(Mr Hurd)* I am sure that there is not going to be a militarily composed solution in Bosnia, or Kosovo if it comes to that, or anywhere else. I am certain of that. If that is so, leaving aside the humanitarian problem which is huge, then we have to keep up the pressures and the talks designed to produce political settlement a way in which these different problems, and there are about half a dozen in Yugoslavia, can be peacefully settled. That is what the Owen/Vance, EC/UN framework is about. Of course, that does involve listening to and trying to help those, particularly in Serbia and Montenegro, who are arguing for what we would regard as a saner policy. I have had several discussions with Mr Panic and Mr Owen. What we should not do, in my view, is relax the existing pressures on Serbia and Montenegro, the pressures of sanctions which are clearly having some effect, before we are clear that the saner policies are prevailing. We are not clear of that. What is actually happening now in Bosnia, at the instance of the Bosnian Serbs, is plain contrary to what was undertaken in London by Mr Panic. I am not accusing him of deceit because I do not think that is the right accusation; but what is clear is that he does not control all those who are responsible for continuing the fighting.

**Chairman:** I want to keep the discussion today on the UN involvement, because these other aspects are absolutely crucial but ones I do not think we can spend time on today. You said, Foreign Secretary, that we are bound to be drawn again and again into these sorts of situations where there is a demand for troops under the auspices of the UN to go on being involved in humanitarian work. Dr Boutros-Ghali in the *Agenda for Peace* is suggesting a wider agenda which is not merely peacekeeping and humanitarian work but peacemaking. Could we just ask you about that.

**Mr Lester**

57. Foreign Secretary, could I say before that, when you talked about the United Nations having more responsibility and people not funding it, surely the same thing applies to your own budget in terms of the same numbers and disasters which we were asked to co-operate and assist with, the troops that we are now putting into Bosnia at a cost of £90–100m coming out of your budget. One of the things that has been suggested in the *Agenda for Peace* is that that sort of operation should come out of the defence budget in any national government, which is far more considerable by a factor of about five or ten as far as our own budget is concerned. Should those things not go together in the sense of the increased requirement and where the funding comes from?

*(Mr Hurd)* Well, you can argue this, Mr Lester. I think these kind of activities are a function of our international relations. It is very hard to foresee them in advance on a three-year cycle, which we have for the public expenditure reviews, and, therefore, if whenever something of any size comes up, of course there have to be discussions with the Treasury, whoever carries the load of this budget, so I do not think this question of budget attribution is of huge substantial importance. The basic question which will confront governments from time to time is whether Britain is going to take the risk of involving itself in a particular UN operation or not and the question of finance is of course an important part of that, but I do not think the decision will revolve really on what comes out of the Defence or the Foreign Office budgets. We are very good at this. We have, as Sir John knows, highly professional task forces with a lot of experience in this kind of thing. We are going to be sought after again and again and again and of course we cannot do everything, nor can we leave people indefinitely in places because we have other responsibilities, but this pressure is, I think, already mounting and I think it is going to be quite severe and I think it does require a great deal of thought on our part, but also on the part of the whole international community, as the Secretary-General's *Agenda for Peace* paper proves.

58. The reason for my question about budgets was to try and find out why we seem less enthusiastic about the Secretary-General's proposals for UN peace enforcement units to be deployed following a ceasefire in any conflict. I am assuming we are willing to collaborate with other countries in planning crisis management and intelligence for peacekeeping and a joint training of troops available for peacekeeping duties as proposed at the UN General Assembly by President Bush, but one detects the thinking and the movement of international opinion from peacekeeping to peace-enforcement which is something we are moving towards in both Somalia and indeed in Bosnia and I just thought perhaps it was because of the inordinate costs of these operations, as seen from the costs of Cambodia, the participation in that operation, that makes us less than willing to take a lead in what must be the way in which the UN proceeds.

*(Mr Hurd)* Of course cost comes into it, and I am not denying that. What I was questioning was whether the budget attribution of the departments is the key. Clearly of course cost comes into it. What the Secretary-General was insisting on in Bosnia is that those who contribute should actually pay and it should not fall on the UN budget as a whole. We are talking, we have begun discussions with the Secretary-General's military experts at a high professional military level to establish what UN needs are under the heading of *Agenda for Peace* and how we can best respond to them. We think that this is the stage for some rather detailed discussion on these comments before we start uttering about them so that is in hand. I would not accept that we are laggard in this. If you include the troops we have decided to send to Bosnia, we will be the third largest troop contributor, and that is worldwide. France and Canada come ahead of us. So we cannot be described as

[**Mr Lester** *Contd*]
laggard and when you think of the commitments we have particularly in Northern Ireland which are not parallelled in other countries, I think it is a very substantial effort.

**Chairman:** Well, again it is not just a question of even peacemaking but increasing involvement in internal disputes as well.

**Mr Canavan**

59. Secretary of State, I understand that during a recent television broadcast you said that the United Nations should play an "imperial" role. Was that not an unfortunate choice of phrase or what exactly do you mean by it and is your view shared by other members of the United Nations?

*(Mr Hurd)* It was not a broadcast, but it was actually a speech to the Young Conservatives of West Oxfordshire and nor was it saying that this is what ought to happen. It was saying what is happening and I deliberately used the word "imperial" in the hope, which was justified, that it would make people sit up a bit. That is what is happening. If you go to Somalia today you find the collapse of everything which comes under the heading of "public service" and you find Ambassador Sahnoun, the representative of the Secretary-General, trying skilfully with a lot of non-governmental organisations to substitute for those services. No one will ever call him the Governor of Somalia or the High Commissioner and no one will ever call those others District Commissioners. Because the world has changed, these titles are no longer acceptable, but if you actually think about what he is attempting to do, he is perforce trying to provide some sort of government for that country. You could describe it in different ways, but it is what is traditionally called an "imperial" role. Now, that goes much wider, as you have said, Mr Chairman, than preventive diplomacy or indeed peacemaking. It involves the provision of every public service and that is what the different agencies of the UN with a lot of help from Member States are in fact going to do and that is what they are setting their hand to doing with the help of the NGOs in Somalia, which is the worst case. There are other cases which are teetering, but which have not yet fallen into that position. Preventive diplomacy of the kind we have seen in Mozambique where it has been up to now, touch wood, successful may have rescued that country from some similar situation.

60. Yes, but bearing in mind the exploitation and injustice associated with Britain's imperial past, it would suggest, with respect, it is not the most diplomatic phrase for a British Foreign Secretary to use.

*(Mr Hurd)* We will change places for the time being, Mr Canavan. You be an expert on that and I will be the expert on trying to stimulate discussion on something which is actually happening in the world and which I think is very important, so I do not regret that at all.

**Chairman**

61. You are clearly succeeding in that, Foreign Secretary, but can I ask with this very interesting opening up of minds, does it lead to the thought of UN mandates and trusteeships? Are we beginning to look into a world where the only governing framework available, let us say for the Balkans or for Somalia, will be one which has a UN authority in it?

*(Mr Hurd)* I think Mr Canavan is right to this extent: that as the UN perforce, when all other exercises have failed, perforce takes over this duty, it cannot actually be put back into either colonial terms or even the mandate terms, and I think you are right in implying that. You have to find a new way of describing it and doing it, but you actually have to do it and you have to finance it. Someone has suggested a UN protectorate over Bosnia. Again I do not think that is the right way of describing it and there is a legitimate government in Bosnia, but it is going to need, on the humanitarian side and on the diplomatic side, the kind of help from the international community which will go very far.

**Mr Canavan**

62. Well, whatever justification there might be for intervening in certain situations, is there not a danger here of perceptions, for example, in the under-developed south that there is a new imperialism on the part of the rich north, albeit under the cloak of the United Nations and they might see it differently from us as, for example, many of the Arab peoples perceived the intervention during the Gulf war.

*(Mr Hurd)* What the Arab peoples are urging is greater intervention in Yugoslavia, the Muslim people are urging that, so it varies of course case by case, but it is important that the Security Council, which is the key body here, should operate in cases where the case is absolutely proven. There can be no adventurism on this front, I agree with you, but actually the reluctance of Member States to get involved is very great and they often get involved when the countries concerned, for example, Mozambique, Angola, and so on, actually ask for such help.

**Chairman:** We have talked about peacekeeping, peacemaking, peacebuilding and interventions of the kind which may or may not have a imperialist flavour, but so much of the poor south is going to be driven by appalling suffering and humanitarian motives.

**Sir John Stanley**

63. I would like to ask a question in terms of the specific context of Somalia. Foreign Secretary, I think that most people would acknowledge, you possibly may have a little difficulty in doing so, that the international community response to the Somalian tragedy was needlessly delayed, and that

[**Sir John Stanley** *Contd*]

over a period of a year or more, when the appalling suffering was evident on television screens, newspapers and was totally known worldwide, the international community was not able to produce any real response. I do not single out the United Nations in this, I think it applies equally to governments around the world, and I would have to say our own. I would put it to you that to justify the delayed response in terms of the security position is not a sufficient justification, because the security position when the international community moved was basically no better than over the period when the delay took place. I would like to ask you to share with us your views as to the lessons that have been learnt by the British Government, and possibly the United Nations as well, as to how we can respond more speedily and without the appalling delays that undoubtedly did take place in dealing with the Somalian tragedy?

*(Mr Hurd)* I think this does follow very much Mr Canavan's line of questioning. We must accept that there was excessive slowness, although I think our own part in providing supplies and seeking to get them in was good. Why was there the slowness? Because of the basic feeling in the United Nations that the internal affairs of Somalia were Somalia's business. It had been a colony shared between Italy and Britain; it was independent, and the UN had no basis, as it were, to fight its way in and make sure that the supplies which were being allocated actually reached the people in being. You will find that reluctance because of the background. I think the lesson is that that reluctance has to be overcome soon, but it does involve risks. When I was in Mogadishu it had just been announced that there was going to be not just the 500 Pakistanis that are there now but about another 3,000 troops in the rest of the country arriving from the UN in order to secure that supplies actually reached the people in need up and down the country. We were met by a demonstration against this, organised by the warlords. The British Government is not actually sending troops to Somalia; the Belgian Government is. They face this question: are you actually going to hold back the sending of your troops until there is some semblance of a ceasefire on the ground, or are you going to fight your way in? If you fight your way in, how many of your troops are going to be killed in a country of which Belgium has heard very little until recently? How long are you going to stay there? That is the lesson from Somalia and the lesson I was trying to draw in these speeches, that we have got to be prepared, and we have got to be more active in trying to prevent this situation coming about, but more prepared to take the necessary risks if and when it does.

**Chairman:** Mr Gapes is going to have the last questions this morning, and although they are going to be very much central questions about future inquiries, they are questions about the structure of the UN itself and how best it is going to be equipped to play all these roles we have discussed today.

**Mr Gapes**

64. Foreign Secretary, what is the attitude of the Government to proposals for restructuring and changing the composition of the Security Council? Last month the German Foreign Minister said that Germany should stake a claim for a seat as a permanent member. Would you be in favour of that? Would you alternatively be prepared to move towards a rotation of the British and French seats on behalf of the European Community's political union? Do you support the Japanese membership, and there are a number of other suggestions, and also the whole question of the role of the permanent members and the veto? Is it suitable in the post-cold war world that the British Government will ever want to use its veto again, or will we only do so as part of a European collective foreign policy decision?

*(Mr Hurd)* As you rightly said, Mr Gapes, there are a lot of ideas in this field, and the difficulty about changing the composition of the Security Council is that it involves revising the Charter. That is an extraordinarily difficult operation. Certain ideas, such as the ones you have mentioned, will certainly produce other ideas from people who say, "If it is going to be discussed, we have to be represented. We have to be there. We are not going to allow one, two or three extra permanent members because, clearly, that would be unrepresentative. We have to be there too". This process has hardly started, and would be immensely time-consuming and difficult. So we are not persuaded of the case for seeking to reform the Security Council. We think that would create more controversy at a time when the body is actually functioning pretty well. The corollary though is that the members of the Security Council, particularly the permanent members, have to do a great deal of listening in order to justify their position. That leads on to the second part of your question which we discussed in the run up to Maastricht: this is the question about Europe's views. We and the French achieved what I think is a good outcome, which corresponds to what is actually happening now with Maastricht. The Member States which are also members of the UN Security Council will keep the other Member States fully informed. Permanent members ensure the defence of the positions and interests without prejudice to their responsibilities under the provisions of the Charter. That means that we continue to do our job as the Charter provides but we do try and seek out, before we speak about it, the views of our partners. That is happening all the time. You have a discussion such as we had exactly a week ago in the Foreign Affairs Council at which the permanent members and the elected members of the Council belonging to the Community listened to and saw the views of the others. They are not bound, but in practice in Yugoslav cases this works pretty well, and we are acting in effect on behalf of the 12 although, legally speaking, we are not bound and we certainly could exercise our veto. We have not done so since December 1989,

[**Mr Gapes** *Contd*]
but I certainly would not want to give the Committee any assurance that we would not do so in the future; we have the right to do so.

65. Could I ask you about the item you referred to earlier on when you referred to $1.6 billion unpaid contributions to the United Nations. The Secretary General's report to the General Assembly last month refers to the fact that "the financial foundations of the organisation daily grow weaker debilitating political will and practical will and new and essential activities". What is Her Majesty's Government doing to press those countries which owe money to the United Nations, particularly the United States, to pay their back contributions? Have you got any suggestions as to how this financial crisis at the UN can be resolved?

*(Mr Hurd)* They should pay, Mr Gapes, that is quite right, and we should urge them to do so. When the Committee releases me, I shall go and talk to the Russian Foreign Minister and urge him to do that himself. $524 million is the United States, $138 million Russia, South Africa $49 million, Brazil $33 million, and the Ukraine $17 million. I think those are the principal ones outstanding. All EC members have paid their contributions to the regular budget in full. We have tried, the British try to pay our assessed contributions on time and in full and encourage other members to do the same, but it is very important. People know the background to the American problem and it is the result of an argument between their administration and Congress and I think whatever the result of the election on November 3, the President will have to, and will wish to, tackle this problem and clear it up because I do not think the United States can reconcile its position in the world today with the existence of these debts.

**Chairman:** Foreign Secretary, this has been a marathon session but then you have a marathon job and we are extremely grateful to you for answering our many questions this morning and sharing some of your thoughts about a very complex future both at the European Community and at the United Nations levels and the international order which we grope towards in the future, so could I thank you very much indeed for coming to us during the recess. Thank you, Mr Arthur, Mr Appleyard, Mr Eaton and Ms Evans as well. We are most grateful to you.



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THURSDAY 29 OCTOBER 1992

Members present:

Mr David Howell, in the Chair

Mr Dennis Canavan
Mr Mike Gapes
Mr David Harris
Mr Michael Jopling
Mr Jim Lester
Mr Peter Shore
Sir John Stanley
Mr Robert N Wareing

**Examination of witnesses**

MR MICHAEL JAY, CMG, European Communities Department, and MR MARTIN EATON, Deputy Legal Adviser, Foreign and Commonwealth Office, examined.

**Chairman**

66. Could I begin by welcoming our two witnesses for the first half of this morning's session, Mr Michael Jay and Mr Martin Eaton. I think both of you have had the pleasure, or pain, of visiting us before, so you are familiar with our proceedings. The Committee is conducting an inquiry into Europe after Maastricht—whether that is an appropriate title I do not know—and we are trying to focus in depth on a number of complex technical issues associated with the existing Maastricht Treaty text. Inevitably, our inquiries become intertwined with more immediate issues and there are many sensitive aspects that I think the Committee realises are ones which our witnesses have said are more appropriate for Ministers. Nevertheless, there are a number of facts and technical judgments where we feel that the expertise available to us from our witnesses this morning will, we hope, be very considerable. Indeed, we shall find that out now by questioning and we would like to proceed on that basis. I may also say, Mr Jay and Mr Eaton, if you both wish to come in in reply to a question, please do not hesitate—not talking over each other or interrupting each other but following on from each other. That is the best way to do it, I think. Could we begin on an undeniably sensitive issue but one where I hope we can distil some facts the Danish Government's position. Could you, Mr Jay, tell us what you understand Denmark's proposals to be and what the Danish Government intends to do about these proposals, when they intend to put them to their people and so on? Have you any actual facts reported to you that you can report to the Committee ?

*(Mr Jay)* Thank you, Mr Chairman. The Danish Opposition produced a memorandum at the end of last week which they forwarded to the Danish Government and which, with some amendments, the Danish Government has forwarded to the Danish Parliament, the *Folketing*. The Danish Parliament will consider those proposals tomorrow. If, as I believe is expected, the Danish Parliament accepts those proposals, then they will be forwarded to us as Presidency and to other Member States as formal Danish proposals. It will then be the duty of the Presidency to take forward discussion of those proposals as a matter of urgency among the 12 Member States and our objective as Presidency will be to agree at Edinburgh on a political framework for a solution for Denmark, as all Member States agreed at the European Council in Birmingham should be our aim.

67. Could those proposals, when examined by the Member States, form a separate document or even a separate Treaty to be agreed by the 12 or do they imply a re-opening of the existing Treaty? Let me rephrase that slightly because I realise the difficulties. Is it technically possible just for the 12 to agree another document, as it were a new mini-Maastricht in a way, and say, "This is designed to help the Danes and it sits alongside the existing Treaty"? Is that a procedure which could be adopted?

*(Mr Jay)* The first thing I should say is that there is no mention in the Danish memorandum, the latest version that we have seen, of any proposals for renegotiation. At the Foreign Affairs Council that met in Oslo in June and again in New York in September Member States agreed that they would look for a solution to the Danish problem without re-opening the Treaty. That is the position as far as the 12 are concerned. The negotiations which will take place from now on once we have the Danish proposals will, we expect, be on the questions of the substance of the proposals and on the legal form that any agreement might take, but at this stage it is very hard to be at all sure about what the legal form might be.

**Sir John Stanley**

68. Mr Jay, you said that the Danish proposals would not involve any renegotiation of the Treaty. Can you be a little clearer as to how, then, those Danish proposals can be put into a legally binding form? What mechanism can be achieved without any renegotiation of the Treaty? Surely it must be some form of annex to the Treaty? There must effectively be some form of renegotiation in legal terms if it is going to be legally binding?

*(Mr Jay)* These are just the sorts of questions which are going to have to be considered amongst all Member States when we have the proposals. It is very hard at this stage to say what form those negotiations will take. As I said, there is no suggestion in the Danish memorandum for any renegoti-

[**Sir John Stanley** *Contd*]
ation of the Treaty but perhaps I could ask my colleague Mr Eaton if he would like to add anything?

**Chairman**

69. Yes, I think it would be interesting to have the legal position.
*(Mr Eaton)* The questions of form and content are obviously pretty well inextricably linked, as Mr Jay has already indicated, but it is possible for a free-standing agreement to be reached which does not modify the Treaty of Maastricht.

70. So it is a free-standing agreement. How does it then become a Community document? What would be the word which would describe such a free-standing agreement that was going to have legal force?
*(Mr Eaton)* It would be between the 12 Member States.

71. It would be an agreement between the 12 Member States, just that?
*(Mr Eaton)* Exactly.

**Sir John Stanley**

72. You are effectively saying, Mr Eaton, there would be a supplementary Maastricht Treaty No. 2, in effect? That would not actually touch the first Treaty but would be effectively a small second Treaty, which would be the only way it could be made binding on the 12 member countries?
*(Mr Jay)* I think there are a number of possibilities one can envisage. It is very hard to be precise. We have not been in this sort of territory before and these are precisely the sorts of questions which are now going to have to be addressed by the Member States when we get the formal Danish proposals, but is very difficult at this stage to go beyond what Mr Eaton said.

**Mr Gapes**

73. If the Treaty of Maastricht is not subject to renegotiation and is not, therefore, amended in any way, what would happen if a protocol or declaration was agreed with Denmark and then there arose some form of dispute and it went to the European Court for a judgment? What would the status of that document, declaration, understanding or free-standing agreement with Denmark be in relation to the Maastricht Treaty?
*(Mr Jay)* I think again, Mr Chairman, it is extremely difficult to answer these questions. We are talking here—and it is highly speculative—about the kind of agreement that might emerge at the end of the negotiations which are about to start. It is very difficult indeed to answer these sorts of questions.
**Chairman:** I see that. Obviously we are speculating about an animal the nature of which we do not really know. It is rather hard to describe although we know we will recognise it when we see it.

**Mr Wareing**

74. I wonder if perhaps we can have a little elaboration because we do know the Danes are very interested in the question of the single currency and, indeed, any agreement that there may be about a common defence policy. Would I be right in saying that it would require a separate protocol to deal with Denmark in the case of the single currency, whereas in the case of a common defence policy it would be simply a matter of intergovernmental agreement?
*(Mr Jay)* On the question of the economic and monetary union the Danes already have a protocol which they negotiated during the intergovernmental conference. What is not clear and will need to be for negotiation is the extent to which that protocol meets their needs or some addition to the treaty is needed. Again it is very hard at this stage to know what that extra bit, if anything, would be. As far as defence policy is concerned, there is no equivalent to the EMU protocol. There would need to be some arrangement which met Danish concerns, but again exactly how that would be done will need to be negotiated and will need to be discussed.

**Mr Shore**

75. The present Treaty has a large number of protocols and a large number of declarations in it. As I understand it, both those groups of, as it were, reservations or elaborations of the Treaty are part of the Treaty itself and have legal force. Is it conceivable that one can envisage any new kind of instrument which is not also a legally binding document and, therefore, part of the total body of the Maastricht Treaty?
*(Mr Eaton)* If I could correct you, Mr Shore, on the question of the protocols and the declarations, the protocols are part of the Treaty; the declarations are what the parties who were represented at the conference agreed in the final act of the conference. They are not actually part of the Treaty, so they do have a different legal effect.

76. They have a different legal effect?
*(Mr Eaton)* The declarations and the protocols do have a different legal effect, yes.

77. But those are interpretable by the European Court?
*(Mr Eaton)* Yes, but obviously they have a different status.

**Chairman**

78. Could you elaborate on that a little. It is a fascinating concept to non-legal minds like mine. The protocol is part of the Treaty and, therefore, has to go through the ratification process and so on, but the declarations you could just add on or subtract at will? They are separate, free-standing things, are they?
*(Mr Eaton)* The protocols are stated in the Treaty of Rome to be an integral part of the Treaty and, therefore, they have that status. They

[**Chairman** *Contd*]
have Treaty status. For example, the protocol giving the United Kingdom the right to decide later on whether or not to opt into Stage 3 of the EMU, that is a part of the Treaty. It has Treaty force. The declarations are different. They are matters of interpretation which the Member States who were represented at the conference agreed and in due form put down in the final act. They are agreed documents, they are statements of intention, of interpretation, and they perform various functions. They are, as I said, as a matter of international law, statements made in connection with the adoption of this Treaty which are of importance. They have an interpretative weight but they are not Treaty documents. That is the difference.

**Mr Lester**

79. So really what we are saying as we fish in the dark is that the negotiations with the Danish Government might result in either a declaration or a protocol, or is there anything else? If it was a protocol would that mean that the existing Treaty would have to be ratified all over again by those who have ratified it so far or are in the process of doing so, or could it be added on during that process and would it mean our own European Communities Bill would have to be withdrawn?

*(Mr Jay)* I think these are very difficult questions to answer. Until it is clear what the document that comes out at the end of it will be it is very hard to know what the implications will be for other Member States as far as ratification is concerned or for us as far as ratification is concerned.

80. If the options include a free-standing agreement which is neither a declaration nor a protocol, there are three options presumably?

*(Mr Jay)* I think there are those three options. There are also combinations of that. We are in a situation we have not been in before when Denmark has asked for special arrangements to cover certain concerns and the Community has to meet together and decide how these concerns should be met and how they should be embodied in some agreement. But there are a number of options which are theoretically open. It is very hard at this stage to say what form the Community will decide and Denmark will decide is the right one. That in turn will depend in part on what arrangements are reached on the issue of substance on which the Danes seek special agreements. So I think it is terribly difficult to speculate on the sort of agreement that might be reached at Edinburgh or thereafter and the implications of whatever agreement is reached.

81. So it could well be that it would not be negotiated or readily available to be negotiated by Edinburgh? It could go on beyond?

*(Mr Jay)* It was agreed at Birmingham that the Community would aim to reach a political framework for a solution at Edinburgh and that is what we shall be aiming to do, but precisely what the political framework would entail, how far there would be agreement on issues of substance, how far that will incorporate agreement on the legal form an agreement will take, remains to be discussed in the six weeks between now and the European Council in Edinburgh.

**Mr Gapes**

82. Mr Jay, you said that the Birmingham statement of the 12 ruled out any renegotiation and I think it is in the first paragraph where the 12 say that. If, however, there were a Danish proposal for a new protocol, that would presumably, from what you have just said, involve a change in the Treaty, so whether we call it a renegotiation or not it would actually involve some change to the Treaty. Would that then require, for example, Ireland to have another referendum or France to have another referendum in order to ratify what would then be a slightly different Treaty from what we currently have before us?

*(Mr Jay)* What the implications would be for ratification in other Member States will depend on what the agreement is that is reached. As I said, the Danes have not asked for, and the Community have ruled out, renegotiation. There has also been agreement that the Treaty will not be re-opened, so what we are talking about is clarifications, additions to the Treaty, the form of which is not clear. I think it is extremely unlikely that whatever is agreed will involve the sort of effect on the Irish constitution which would require Ireland to have a further referendum, but beyond that it is very difficult to go at this stage.

**Sir John Stanley**

83. Could you confirm that whatever is the form in which the Danish package is written it is fundamental and effectively non-negotiable as far as the Danes are concerned that their package should be legally binding on the 12 member countries?

*(Mr Jay)* That is what they say in their memorandum.

84. Could you also confirm, therefore, that as a point of law, as far as this country is concerned, the only way that Danish package could be made legally binding on the United Kingdom would be by the passage of appropriate legislation through both Houses of Parliament?

*(Mr Eaton)* No. Whether legislation is required depends on whether the international obligations engaged—if we are assuming that this would be a Treaty engaging us internationally—require any change in our legislation or not. It is not every treaty that requires a change in legislation.

85. As far as the proposals that have come forward from the Danes are concerned, do you not judge that those proposals are ones that would, in fact, require some amendment of the existing draft legislation to ratify the first Maastricht Treaty?

*(Mr Jay)* I do not think it is a judgment we can make at this stage. That depends on what happens

[**Sir John Stanley** *Contd*]
in the discussions over the next few weeks and what the outcome of those discussions is.

**Chairman:** That is very interesting. Thank you.

**Mr Canavan**

86. In your letter to Mr Garel-Jones you stated that: "The [Danish] memorandum is unlikely to be acceptable as it stands to member states, and some of them may make this clear. We may therefore have a difficult negotiation ahead of us, which could play awkwardly with the Paving Debate and the reintroduction of the Maastricht Bill." Would you care to elaborate on that? Which Member States do you have in mind and what particular objections do you think they would have to the Danish memorandum as it stands at present?

*(Mr Jay)* That was an internal Foreign Office memorandum which was offering some very preliminary comments on the document which was received at the end of last week, the document produced by the opposition parties in Denmark, and I would not wish to comment or elaborate on what is an internal Foreign Office document.

**Chairman:** I think the Committee understands that but we have to ask the question.

**Mr Harris**

87. Just to go back to Sir John's question and the answer to it, is it not clear that everyone is going to bend over backwards to try and avoid the need for any modifications to legislation or to ratification procedures, and that surely must be the starting-point in considering how to accommodate Denmark? Is that not basically your objective in the Foreign Office and presumably the objective of other governments who want the ratification process to be completed?

*(Mr Jay)* I think that is right, Mr Harris. The conclusions of the European Council at Birmingham made clear that all Member States wanted the Community to go forward as 12 and that means that a solution has to be found to the Danish problem which all 12 Member States can accept. That is the objective which we all are now seeking but exactly how we are going to get there remains to be discussed in the weeks ahead.

88. Now a brief further question perhaps to Mr Eaton as the Legal Adviser: are you confident that the legal mechanisms are there to avoid opening up the whole package on ratification? You have touched on some ways in which it could be done and you are confident it can be done, so that provided the right decisions are made and they fit in with those mechanisms, those mechanisms are available?

*(Mr Eaton)* Yes. I think in the Community we have often had quite difficult matters of this kind to deal with and we have never found ourselves unable to find an appropriate legal form to embody what politically the Member States wish to do.

89. You would not, of course, use the word "fudge"?

*(Mr Eaton)* Certainly not!

**Sir John Stanley**

90. Could I ask for clarification on this. Given that it may be the Government's intention to bring the Maastricht Bill back to the House of Commons before the Edinburgh Summit at which this political framework for the Danish package is going to be agreed, could you confirm, therefore, that there must be the possibility at least, from what you have both said, that the legal consequences of giving legal effect to the Danish package might require a quite substantive amendment by the Government to the Maastricht Bill after the Committee stage starts?

*(Mr Jay)* I do not think I can confirm that, Mr Chairman.

91. As a possibility?

*(Mr Jay)* It depends on what happens with the negotiations and also what form of agreement with the Danes we reach at Edinburgh or thereafter. I do not think I can speculate now on what the implications of that could be.

**Sir John Stanley:** There must be a possibility though, surely?

**Chairman:** But the witness has said he does not want to speculate and we must respect that.

**Mr Shore**

92. Could I ask a simpler question. Have the Danes indicated, either in their memorandum or in other ways, how they are going to go about the business of getting the consent of their own people and have they indicated yet a date when they hope to achieve this?

*(Mr Jay)* They have said in their memorandum that they plan that a new referendum will be held once discussions in the Community on the arrangements for meeting their concerns reach a satisfactory result. That is clearly stated in the memorandum. As far as I am aware, they have not stated exactly when they would hope such a referendum would be held but we understand that would certainly be during the course of next year; exactly at what point next year I do not know.

**Mr Canavan**

93. So the final say, then, will not be with the Danish Government, with the Danish Parliament, it will be with the people of Denmark and the referendum to be held possibly next spring. What happens then if the people of Denmark say no? Are we back to square one? Would there be Treaty problems and what would that mean as far as the British Government's legislation is concerned?

*(Mr Jay)* I think that is a problem we would have to meet when the time came.

**Mr Wareing**

94. If I can go back to the Edinburgh Summit, I think you said this would only prepare the political framework for a solution, which suggests there will be a legal form of negotiations after 12 December and, therefore, am I right in saying, it could be some considerable time before the Danes are in a position to put anything at all to their people in a referendum? And could you explain to us what you mean by a "political framework" in this context?

*(Mr Jay)* The discussions over the next few weeks will be about the substance and, we would expect, the form of any agreement to meet the Danish concerns. How far that will have got by the time we get to the European Council at Edinburgh it is hard at this stage to say. I think a political framework for a solution would, we hope, include some indications of what the legal form should be. I think it is inevitable there will be some work to be done after Edinburgh before final texts are agreed, but at what point thereafter the Danes would be able to put the document to their people in a referendum it is hard at this stage to say. Some have talked of the first half of the year, some have talked around the middle of the year. I think that will depend obviously in good part on the progress that is made.

**Chairman:** I think we should move on to some other aspects of the post-Maastricht situation.

**Mr Gapes**

95. One of the issues that has been under discussion within the Community and from our own Government over recent months has been the whole question of opening up the institutions of the Community. What, in your view, are the arguments for and against the Council meetings being more public, for example by publishing minutes or texts of proposals under discussion before they are adopted?

*(Mr Jay)* The main reason why the Government has been keen to promote a more transparent Community in the weeks leading up to and at Birmingham was the sense that in many countries of the Community there had been the view that the Community was opaque and that the decision-making process was not sufficiently clear. That is why we sought and got conclusions at Birmingham which asked Foreign Ministers to look before Edinburgh at how this might be done. That work is now going on in Brussels, in meetings of the permanent representatives, and there will be discussions in the Foreign Affairs Council before Edinburgh in the hope of reaching agreement on how Community institutions may be opened up. A number of proposals have been put forward. I think all these proposals recognise that it would not be right to open the process of negotiation and seeking a compromise to public scrutiny but that, short of that, there may be scope for opening up some of the proceedings of the Council to the public with a clearer publication after Council meetings of minutes and memoranda, publishing the way in which people have voted during discussions. These are some of the ideas which are being discussed. They will not all be acceptable to all Member States. What comes out at the end is hard to say at the moment. That is as far as the Council is concerned.

96. Can I press you on that. It was reported that our Government wished, in fact, the meeting in Birmingham itself to be more open and was not successful on that occasion. Is there any real prospect that there will be agreement in Edinburgh, given that the same unanimity is required, the same support from all of the 12 is required, given the concerns you have just expressed?

*(Mr Jay)* I hope so, Mr Gapes. You are right that the Prime Minister would have liked one session of the European Council at Birmingham to be in open session in order to show that the commitment to openness was genuine but he did not get the necessary approval from all his heads of state at Birmingham. But there was agreement at Birmingham that there should now be a hard look at ways in which the operations of the Council could be made more open. The Commission produced some proposals themselves for making their operations more open. These are now being looked at and I hope it will be possible to reach an agreement at Edinburgh which will show clearly that the Community institutions are prepared to make their operations more transparent than they have been in the past.

**Chairman**

97. Presumably, just reflecting on the concept of an open Council meeting, what we are talking about is allowing the press in plus any members of the public who happen to be passing by? In other words, are we really talking about anything more than a glorified press conference?

*(Mr Jay)* I think we would be talking about discussions in the Council, say in the Foreign Affairs Council from time to time, taking place with the press present, but I think it would be different from a press conference because it would be a discussion amongst all 12 Member States.

98. Under the beady eye of the television cameras and the reporters with their notebooks?

*(Mr Jay)* Indeed.

**Chairman:** With that we turn, unless any colleagues have questions on that prospect, to the arcane issue of subsidiarity, where we really want to plunge as deep as we can, share as deeply as we can your thoughts on what this means now and what it might mean in the future.

**Mr Wareing**

99. I wonder whether you could confirm that Article 3b applies only to policies where the Community does not have exclusive competence. In the Article itself, the very last sentence says: "Any action by the Community shall not go

[**Mr Wareing** *Contd*]
beyond what is necessary to achieve the objectives of this Treaty." I wonder whether you could explain that last sentence to me, please?

*(Mr Jay)* Could I ask Mr Eaton to answer that question, please.

**Mr Lester**

100. Subsidiarity already!

*(Mr Eaton)* I would answer your question, Mr Wareing, that the final paragraph of the Article, which is also its final sentence, does indeed apply to any action by the Community, as it says, and that means any action within areas of exclusive competence as much as outside them. I wonder if it might help if I gave a brief analysis of the Article just to explain what the three parts of it do?

**Mr Wareing**

101. That would be very helpful.

*(Mr Eaton)* It does contain three elements. The first paragraph places an absolute limit on Community action. In other words, it says that the Community only acts within its competence and that answers the question, "can the Community act at all?" The second paragraph answers the question, "should the Community act?": given that it can, should it, and that, as you have already pointed out, applies to areas which do not fall within the Community's exclusive competence. Then the rule in the third paragraph really answers the question, "what should be the intensity or the nature of the Community's action?", and that applies whether or not the action is within the Community's exclusive competence.

102. Who would decide what actually fell within the exclusive competence of the Community? What is the mechanism for that?

*(Mr Eaton)* I think there are a number of areas which are generally recognised to be within the exclusive competence of the Community and that term is, I think, best understood by looking at those areas. They are the common commercial policy, which deals with the external trade policy of the Community, the common agricultural policy, the common fisheries policy, so far as conservation is concerned—structures is slightly different—and the common external tariff. The distinguishing feature of those policies is that by the Treaty itself the Community is required to put into place a comprehensive body of rules covering all that field. Any area which is outside those areas in our view is not an area of exclusive competence. Of course, within those other areas there are specific rules which have been adopted by the Community in specific areas, where Member States cannot act inconsistently with those rules. In some areas, such as the Single Market, there are a good deal of such rules but that does not turn the Single Market into an area of exclusive competence.

103. I wonder then what would happen if the Commission or the Council at any time reviewed past legislation by the Community and came to the conclusion that these fell outside the exclusive competence of the Community, that directives in these particular areas, for example, that have been passed by the Community on to Member States would be best dealt with by the Member States themselves within the competence of Member States rather than exclusively within the competence of the Community. How could that be altered? Is it possible that they would be altered and, if so, would that require a new treaty?

*(Mr Eaton)* I think it is entirely possible, Mr Wareing, if the institutions of the Community so agree, that matters which have previously been regulated by a Community instrument could be regulated differently in a way which, for example, gave more leeway to Member States to adopt their individual rules or even to be repealed altogether. It is really exactly the same situation as national legislation; that which can be adopted can be repealed.

**Chairman**

104. But does that require a new treaty? Can we just, without speculating, have a practical example? Let us suppose, and I do not know if it has been suggested, we are going to consider the repatriation of certain aspects of agricultural support policy to nation states, and I do not know whether that is on the cards or not, but if we were, would that require, because it is very much the exclusive competence of the Community, would that require a new treaty?

*(Mr Eaton)* I think if you are talking about that sort of thing, the agricultural market organisation, as I have already said, that is one of the areas where the Treaty itself requires a comprehensive organisation of the market by the Community, not by the Member States. So I think that probably would, and I am of course speculating, require a treaty amendment. But there are many areas where the Community has chosen to act in exercise of powers which it has where it is not actually required to act and where it could decide to act differently.

**Mr Gapes**

105. In your view, has the Birmingham Declaration in any way affected or altered the definition of subsidiarity in the Treaty?

*(Mr Jay)* Perhaps I could answer that, Mr Chairman. I think what the Birmingham Declaration has done has given an impetus to the process which was started with the agreement on the Article in the Maastricht Treaty, taken further by the agreement at the Lisbon European Council and further again by Birmingham. It has given a further impetus to the commitment by all the institutions and all Member States to make a reality of subsidiarity. I think it is more a question of a determination to put it into effect than to change the definition and by putting it into effect we are talking about action by the Commission and action by the Council to make sure that the Community institutions respect the principle of

[**Mr Gapes** *Contd*]
subsidiarity during the course of the ordinary conduct of Community business.

106. Would you, therefore, agree with Martin Howe of the Conservative lawyers who sent us a paper which says that the "Declaration does not impose any hurdle on Community action additional to the inadequate hurdle already present in Article 3b"?

*(Mr Jay)* I think the answer to that question must be yes, we would agree, but we would not necessarily agree with the premise that Article 3b is inadequate.

**Sir John Stanley**

107. In the subsidiarity context, do you consider that we do or do not as yet have a definition as to what is for Community action and what is for national action?

*(Mr Jay)* I think that we are now in the process of putting into effect the effective operation of the principle of subsidiarity on the lines that I have outlined and the Commission already in every proposal it puts forward to the Council justifies it, has undertaken to, and is justifying it on the grounds of subsidiarity. The Council, in discussions which are going on in Brussels at the moment, is considering ways in which it too can ensure there is a proper subsidiarity test which is applied for each piece of Community legislation which comes forward. A procedure and criteria for deciding that are now under discussion in the Council and we expect decisions on those, to be taken at Edinburgh. That is as far as subsidiarity is concerned. I think it might also be worth mentioning in this context that the Maastricht Treaty articles on competence were, in our view, useful in codifying and clarifying the degree of Community competence in the areas covered and in some important areas, including the areas of education and culture and health, constraining the competence of the Community by stating clearly that certain things, in particular harmonising measures in those areas, were clearly outside the competence of the Community and remained within the competence of the Member States. Therefore, I think the answer, both in the way in which subsidiarity is now being taken forward and the way in which the Maastricht Treaty clarified questions of competence, is that the sort of system that you mentioned, Sir John, is on the way now to being put in place.

108. You say that it is on the way to being put in place?

*(Mr Jay)* Yes.

109. That was very helpful what you have said, but as of now your answer would indicate clearly to me that there is not yet a definition in place as to what is for national action and what is for Community action. You will of course be aware that the Prime Minister in the debate we had in the House on the 24th September said that such a definition would be provided and indeed would be provided before proceedings recommenced on the Maastricht Bill. Could you, therefore, tell the Committee what further steps are going to be taken to ensure that the House does indeed have that definition of what is for national action and what is for Community action before the Bill is brought back to the House of Commons?

*(Mr Jay)* I would not want to stray into the territory of when the Bill might or might not be brought back to the House of Commons, Mr Chairman, but I would like to repeat what I said that very good progress is being made in translating the principle of subsidiarity into practice and I think that that work was given impetus by Birmingham and is being taken forward now urgently in Brussels with a view to agreement at Edinburgh.

**Sir John Stanley:** My question was not in relation to the timing of the Bill. My question was what further steps are going to be taken before the Bill comes back, regardless of when that is, to provide the House with the definition to which the Prime Minister referred on September 24.

**Chairman:** I do not think Mr Jay can tell us when the Bill is coming back. What perhaps he could say in answer to Sir John is what further steps are to be taken.

**Sir John Stanley**

110. That is my question.

*(Mr Jay)* The steps are those which are now under way as a result of the further impetus given by the European Council, the steps that are now under way in the Community institutions in Brussels where there are weekly meetings of permanent representatives and meetings of the Foreign Affairs Council designed to take forward the work on procedures for subsidiarity, criteria for subsidiarity, in order to reach agreement on those at Edinburgh as was agreed at Birmingham.

111. So we can expect an agreed definition in the subsidiarity area before the Bill returns?

*(Mr Jay)* We hope that decisions will be taken at Edinburgh as agreed at Birmingham on putting into place procedures and criteria for subsidiarity.

**Mr Lester**

112. Could I just ask you also to confirm subsidiarity in reverse, that many times Community members have come forward and pressed the Commission and pressed the Community to act in areas, for instance, immigration and asylum, which is not required in any treaty other than in the Treaty of Maastricht where it is trying to make this issue an intergovernmental issue?

*(Mr Jay)* I am afraid I missed the first few words of your question, I apologise.

113. Member States have jointly asked the Commission to act outside any Treaty that is required in various areas which are not covered

[**Mr Lester** *Contd*]
under the Treaty where it has been decided the twelve nations can work better together.

*(Mr Jay)* Indeed. I think that is one of the most important aspects of the Maastricht Treaty, that it does for the first time formalise co-operation amongst Member States outside the framework of the Treaty of Rome and which is outside the jurisdiction of the European Court of Justice and in which the European Commission does not have exclusive right of initiative in the two areas of common foreign security policy and justice and home affairs. I think all Member States accept the crucial importance of closer co-operation in those two areas, but there was agreement at Maastricht that they should remain outside the competence of the Community. We now have for the first time a way of taking that co-operation further forward outside the constraints of Community institutions.

**Mr Wareing**

114. Mr Eaton was quite clear, I think, on one area that is certainly exclusively within the competence of the European institutions and that was the area of trade and common external tariff and competition policy. Does he, therefore, envisage that in the future the Commission will assume a role not unlike that of the Inter-State Commerce Commission in the United States because, if he does, it seems to me we have to deal with one of the problems that creates hostility inside Britain towards the European Community, namely, directives which appear to control, for example, the ingredients which go into our foodstuffs—the sort of pint which is delivered over the bar of a public house, that sort of thing. Does he see in future that there will be, as it were, a demarcation between those directives and rules of the Community which are concerned, rightly, with inter-state commerce within the Community and those which are not, so that in fact perhaps the poor British public can still retain their traditional sausage, for example?

*(Mr Eaton)* If I may answer that, with regard to common external policy, which is what I was talking about as being one of those areas of exclusive competence which is dealt with in Article 110 and following of the Treaty, that is to do with the trade policy of the Community with other countries. So, for example, it is the Commission that is negotiating on behalf of the Twelve in the GATT negotiations. Of course, it does so under a mandate from the Council; it does not do so entirely at its whim. But that is the external side of it. I think the other part of your question was really talking more about the intra-Community trade, the Single Market which, as I said, I would not regard as being in an area of exclusive competence, although it is an area which is very full of regulations. There it seems to me that regulation is certainly needed—and often quite detailed—to the extent that it is necessary to remove distortions of competition and to remove barriers to trade so that there is for example a common definition of the height which a headlamp on a car has to be above the ground so that you cannot have one Member State refusing to let a car manufactured in another state in because its headlamps are the wrong height; that has to be quite detailed. But when you come to the sort of thing you were talking about—national predilections as to how their sausages ought to be—that is quite clearly something which does not have to be regulated. I think in fairness to the Commission they did withdraw some time ago a projected sausage definition.

115. There was a case in the United States where it was argued by one of the states that the terms and conditions and wages of window cleaners should be determined within the state and it was argued that, if in fact the window cleaners were cleaning the windows of a factory whose produce went into the commerce of the United States, therefore the United States should be in a position to regulate the terms and conditions of wages. What I am suggesting is that it could be that the area of terms and conditions of work, despite the non-acceptance, for example, of the Social Chapter by the British Government, could become within the legitimate competence of the Commission under the Rules as interpreted by Mr Eaton. Am I right?

*(Mr Eaton)* I think that would be very unlikely. It seems to me the Rules I have been talking about are rules to make it possible to move about the Community, to exercise the four freedoms. But could I say that one of the important things about the third paragraph of Article 3(b), about which we were talking before, is that it will enable the questions of the form which legislation takes to be addressed, and the whole point will be to aim for the lightest form which is appropriate, which will achieve the objective that you want. So if you can do it by a recommendation you do not go for a directive; if you can do it by a framework directive, you do not do it by a detailed directive, and so forth. I think that is going to be very important across the board.

**Chairman:** I think Mr Wareing is suggesting, rightly, that there is no end to the absurdities of economic zealots in telling us what is necessary for the Common Market and the Single Market, they have to be somehow restrained. That is another problem.

**Sir John Stanley**

116. Though subsidiarity clearly has an important policy dimension as far as the European Community is concerned, it is also a legal concept. Would you agree, therefore, that ultimately in legal terms its enforceability will lie with the European Court of Justice?

*(Mr Eaton)* Yes.

117. That being the case, it has been put to us in other evidence that the ultimate ability of the European Court of Justice to uphold the principle in legal terms might not be a very strong pillar on which to rest on two grounds. First, because on almost any issue of Community policy, though it may be very apparent to the national governments and national parliaments concerned that these are

**[Sir John Stanley** *Contd]*

purely national matters, it will invariably be possibly to erect some form of Community argument that there is a Community dimension to it, and therefore there is a legitimate case for it to be dealt with in Community terms. The second point that has been put to us is that the European Court in practice is unlikely to take a different stance on subsidiarity to other European institutions, most particularly the Commission and possibly the European Parliament, if either or both of those feel strongly that this is a matter of Community policy rather than a matter of national policy. Would you like to respond to those points which have been put to us?

*(Mr Jay)* May I make a couple of points and then ask Mr Eaton to come in? The first point, perhaps, is that, as Mr Eaton said, the subsidiarity clause is ultimately justiciable before the European Court of Justice but we would hope by putting into practice procedures at an earlier stage of the legislative process. that is, when legislation is going through the Commission or going through the Council, we would ensure subsidiarity tests were respected and, therefore, that the need for a proposal to go for a test by the European Court of Justice would be less; the procedures which had been put in place by the Commission and the Council before that would render it unnecessary. The second point, and Mr Eaton will correct me if I am wrong about this, it seems to me that the European Court of Justice has always been affected by what it has seen as the intention behind the drafters of the Treaty and by putting the subsidiarity article clearly in the Treaty and by backing that up at a series of European Councils and stressing the importance of it, that constitutes a shift in direction, if you like, which the European Court of Justice is likely to take account of in future judgments.

*(Mr Eaton)* I would entirely agree with those points and particularly the second one. Some are willing to predict categorically what the Court will do. I would not wish to do that. I think it will depend upon obviously the individual cases and I would think that past practice of the Court on other rules is not necessarily a good guide to what it will do when it has a new rule in front of it.

**Chairman:** Could we just switch the spotlight to how the subsidiarity might affect the workings of the Commission?

**Mr Canavan**

118. Earlier this week the Secretary of State gave evidence to the scrutiny committee, the European Legislation Committee, and in his evidence he referred to the recent fall in the amount of legislation being put forward by the European Commission and he cited this as evidence that the principle of subsidiarity was being accepted and applied by the Commission to its activities. Could you tell us what is the real reason for this fall in the amount of legislation being put forward by the Commission? Is it not simply due to the fact that most of the legislation which is required to implement the Single Market has now in fact been concluded?

*(Mr Jay)* I think that may be one element, Mr Canavan, but I think the figures are instructive that in 1990 162 legislative proposals were put forward, in 1991 there were 145. The Commission announced at the beginning of 1992 that they intended to put forward 118 pieces of legislation and so far, with only two months to go, they have only put forward 48. Now, I think that the trend, as it were, down from 162 to 145 to 118 may be the result of the falling-off of Single Market legislation, but I think that the extent to which the Commission have not come forward with legislative proposals during the course of this year is a reflection of the importance they attach to not putting forward proposals which would offend against the principle of subsidiarity. I think that was the point the Foreign Secretary was making when he gave evidence to the scrutiny committee.

119. What changes has the Commission introduced to adapt its procedures and practices so that the principle of subsidiarity becomes an integral part of the Commission's decision-making?

*(Mr Jay)* I think it has done two things. Firstly, it has tightened, and is tightening, up its own procedures within the Commission so that when a proposal comes forward up to the Commission through the Directorates-General they are examined much more carefully than they have been in the past as to whether there is a real need for this piece of legislation to come forward. Secondly, when it passes that test, when the piece of legislation is presented to the Council, it has, and will have from now on, a clear justification as to why that piece of legislation is justified on the grounds of subsidiarity. Those are the two areas in which the Commission is working to implement the principle.

**Sir John Stanley**

120. Could you just give us a quick view as to how you would envisage the European Parliament, on the one hand, and national parliaments, on the other, being brought in on the question of deciding whether matters should be taken at the Community level or at the national parliamentary level?

*(Mr Eaton)* If I may start off, Sir John, as far as the European Parliament is concerned, it is one of the institutions involved in the legislative process and it is clearly bound by, as all the institutions are, Article 3b. Therefore, when it considers proposals under the consultation procedure or the co-operation procedure, it will be as much bound to examine the question of subsidiarity and to be guided by it in deciding whether or not to put forward amendments, for example, as the other institutions are, so the European Parliament will certainly have its own input into the process. As far as national parliaments are concerned, that obviously varies from country to country, but I am sure that here, as the Secretary of State announced on Monday to the scrutiny committee, there will in

[**Sir John Stanley** *Contd*]
future in the explanatory memoranda which government departments put forward to the committee covering legislative proposals for scrutiny, there will automatically be a statement about the view of the Government on the question of subsidiarity in relation to that proposal and we would certainly expect the Committee to do its customary thorough job on looking into that and making an input where it felt right.

**Chairman**

121. That is a bit late in the day, is it not? Surely the input of the national parliaments, I imagine we would expect, would be rather earlier in the proceedings before something had been cooked up as a directive or regulation requiring legislative approval. Will it not get a chance to come in earlier than that?

*(Mr Jay)* Could I answer that, Mr Chairman? We hope that national parliaments will be involved as early as possible in the Community legislative process and there are two ways which have been proposed by the Commission for doing that which we think, depending on the views of national parliaments themselves and this Parliament here, might be sensible. The first was that the Commission has undertaken at Birmingham to consult more widely, including consulting Member States, before proposals are put forward and that process of consultation would give national parliaments a chance to put their views forward on pieces of legislation before they are formed in the Commission. Secondly, the President of the Commission has proposed that the Commission's work programme, which is looking ahead to legislative proposals for the year ahead, should be produced two or three months earlier than it normally is in order to allow national parliaments to debate it before it is taken forward in the Commission itself and both these ways will give national parliaments, it seems to the Government, a chance to have an input at an earlier stage than has been the case up to now.

122. Is it envisaged, and again I am asking for interpretation of the Treaty, that if a national parliament heard that some proposal was going forward from the Commission, but came to the view that this was very much a matter for the nation state and not for the Community institutions and, therefore, expressed a strong opposition to it going forward, would that amount to a veto? Would the national parliaments be able to stop, or any individual national parliament be able to stop, a proposal going forward for Community processing?

*(Mr Jay)* I would imagine this would happen during the scrutiny process. When the Government puts forward an explanatory memorandum which includes a justification or which includes a paragraph on why this piece of legislation does or does not meet the subsidiarity criteria, then that would be the chance at which the scrutiny committee and the House would give its own judgment on that and that would inform the Government's attitude in the negotiations in Brussels.

**Mr Canavan**

123. Could you tell us, Mr Jay, what progress is being made in this country and in other Member States as to how the membership of the Committee of the Regions will be selected? Will there be in any country any form of election either direct or indirect and can we have a particular assurance that as far as this country is concerned, there will not simply be a repetition of the discredited political patronage appointment system which has been associated in the past with quangos and so on?

*(Mr Jay)* On that last point, Mr Canavan, I do not think I can go further than the Foreign Secretary went to the scrutiny committee the other day when he said that there had as yet been no decisions on how members of the Committee, British members of the Committee of the Regions would be appointed. I think in fact that so far little progress has been made in the Community as a whole on establishing the Committee of the Regions. It was agreed at Lisbon that there should be meetings of personal representatives of heads of government in order to make recommendations on the structure and the functioning of the Committee of the Regions, but that has not yet met mainly, I think, simply because the delays in the ratification process has pushed this rather on to the back burner, but it remains, certainly as the Foreign Secretary said, the Government's clear resolve to ensure that the appointments, the British appointments to the Committee of the Regions are made in time for the Committee to be up and running once the Maastricht Treaty is ratified.

124. Has the British Government yet ruled out the possibility of members of the British Government actually being members of the Committee of the Regions?

*(Mr Jay)* I think I would have to ask ministers to answer the question on how they may intend members of the Committee of the Regions to be appointed, Mr Chairman.

125. What exactly will the Committee of the Regions do? Will it be in the main purely advisory or will it have any role, for example, in vetting proposals for legislation to see if they comply with the principle of subsidiarity?

*(Mr Jay)* It will be essentially consultative and will need to be consulted under the terms of the Maastricht Treaty on new proposals in a number of areas which have a particular regional dimension, for example, education and culture, public health, cohesion and trans-European networks. But the Committee may be consulted by the Council or by the Commission in other areas too where that is considered appropriate or, indeed, it can issue an opinion on its own authority on a regional issue where it judges regional interests to be involved. It is essentially consultative.

**Chairman**

126. Could we look at the European Court of Auditors, which under Article 188a of the Treaty

[**Chairman** *Contd*]
before us is upgraded to become a full Community institution. How do you see this working? Will this European Court of Auditors carry out value for money inquiries like our own national Audit Office? Will it examine Community spending and have hearings on objectives of policy and whether they have been achieved? How do you see it working?

*(Mr Jay)* Under the existing Treaty, Article 206 of the Treaty of Rome, the Court of Auditors is expected to examine whether the Community's revenue and expenditure has been properly carried out and whether the financial management has been sound. It produces an annual report on the implementation of the Community Budget, for example, and the annual report also includes examination of the value for money of Community expenditure so it does already have a role in value for money inquiries, but the upgrading of the Court of Auditors into a full Community institution, which is one of the things which we were very keen to get and did get in the Maastricht Treaty, is a recognition of the importance which certainly the British Government attaches to a stronger role for the Court of Auditors in just these sorts of area. The Maastricht Treaty makes explicit, for example, the Commission's responsibility to implement the Budget with regard to the principles of sound financial management and, as I say, gives an enhanced status to the Court of Auditors itself. One extra factor is that the Court will now be required to provide the Council and the European Parliament with a statement of assurance on the reliability of the Community's accounts and on the legality and regularity of underlying transactions. That too will be an advance on existing practice. More detailed questions on the Court of Auditors, Mr Chairman, I think should be addressed to the Treasury who are mainly responsible for its operations.

**Chairman:** Thank you very much anyway for those useful comments. There are some questions on citizenship which features very much in the Treaty.

**Mr Lester**

127. Could you explain please exactly what is meant by citizenship of the Union and could you confirm that it adds on to existing national rights and takes nothing away?

*(Mr Eaton)* Yes, I can, sir. It is a condition precedent to be a citizen of the Union that a person should first be a national of a Member State and there is a declaration to the Maastricht Treaty which reaffirms that it is for Member States to decide who are their nationals. So every national of a Member State is entitled to the rights that are given by the Maastricht Treaty attaching to citizenship of the Union and those rights are set out in detail in the Treaty in Articles 8a, 8b, 8c and 8d. They are, first of all, the right of free movement and residence in the Community, subject to the conditions already laid down in the Treaty itself, and in the measures taken under it, such as the Right of Residence Directives. That would include such matters as the condition of sufficient resources in certain cases. Then, secondly, there is the right to stand as a candidate and vote in municipal and European, but not national, elections in a Member State of which you are not a national. In other words, if you go and live in another Member State you may vote there. Thirdly, there is consular protection by the authorities of another Member State in a third country. Fourthly, there is the right to petition the European Parliament and to go to the Ombudsman who is a new appointment.

128. Will these provisions affect—and how will they affect—Gibraltar, the Channel Islands and the Isle of Man? Will their citizens also be citizens of the Union?

*(Mr Eaton)* That is a question really of whether, because of the first part of my original answer, they are nationals of the United Kingdom. For European Community purposes the United Kingdom has made a declaration, because of the admitted complication of our nationality laws to its partner countries about who are our nationals and who are considered to be our nationals for the purposes of freedom of movement of workers in the Treaty, and that does include British dependent territory citizens who derive their states from a connection with Gibraltar but it does not include the citizens of the Isle of Man and the Channel Islands who are Manxmen and Islanders.

**Chairman**

129. On citizenship of the Union may I ask a perverse question which has been put to me: would a citizen of the United Kingdom and a British subject be free not to be a citizen of the Union were this Treaty to become the full law of the nation?

*(Mr Eaton)* They are rights that are given. You are perfectly entitled not to take them up.

**Chairman:** I have heard such suggestions.

**Mr Shore**

130. Can either of our witnesses tell us of any past situation, or any past experience, in which a citizenship has been created by any body other than a state? Does not the whole topic of the creation of a citizenship presuppose the existence of a state and are we not in fact dealing with something which is hoping to become a state if it is not already a state, the European Economic Community state?

*(Mr Jay)* Let me make two comments on that, if I may, Mr Chairman. Firstly, as Mr Eaton said, whatever the grandeur of the words in the Treaty, the reality is that it gives certain very limited rights, some of those which already exist under the existing Treaty and some which are created under the Treaty of Maastricht. Secondly, there can be no addition to the rights accorded to European citizens under the Treaty of Maastricht except, I think I am right in saying—Mr Eaton will correct me if I am wrong—by unanimity and the consent

[**Mr Shore** *Contd*]
of all Member States. There is, in other words, a gap between the reality and the appearance.

**Mr Gapes**

131. Can you tell me if this European citizenship will in any way affect the rights of the citizens of the 48 countries of the Commonwealth in this country to vote in British elections or the rights of the Irish Republic citizens to vote in general elections in this country, whereas other EC nationals are only able to vote in local elections? Will it in any way present difficulties for the right to travel and the right to work for Commonwealth citizens resident in this country who have the right at the moment but find it quite difficult sometimes going to and out of this country because they do not have British citizenship?

*(Mr Eaton)* As far as your question about the suffrage is concerned, no, it will not affect that at all. We will continue to maintain our legislation on that and Commonwealth citizens who already have that right will retain it and, similarly, with the Irish Republic citizens. I think your other question was really about the freedoms of movement within the Community which belong to UK nationals for EC purposes who do not necessarily include Commonwealth citizens. Now, if those Commonwealth citizens are British citizens, yes, they will be included, but otherwise the question of whether they can move or not will depend upon the legislation of the state to which they want to move. This whole question of lawful third country residents and whether they should be given some enhanced status is something that is under consideration in the fora which already work on immigration and co-operation between Member States, the forerunner, that is, of the justice and home affairs pillar of Maastricht, and that is under consideration, a relaxation of this, and some common rules which will make it easier, but I do not know that anything has yet emerged from that.

132. Is there any proposal to bring forward some views for a collective Community decision at Edinburgh or in the near future?

*(Mr Eaton)* I am not aware of one and in any case if we are talking about an immigration issue, that will not be a Community decision; that will be a decision of the twelve.

**Sir John Stanley**

133. On the discussions about the future financing of the Community, is it the intention to try to conclude those discussions at the Edinburgh Summit?

*(Mr Jay)* Yes, that is the aim which the Government has stated, the aim to reach an agreement, a political agreement, on the future financing negotiations at Edinburgh.

134. Could you also tell us whether it is the position of any of the Member States in the Community that they will not ratify the Maastricht Treaty unless there is agreement on the Delors II financing package?

*(Mr Jay)* Not as far as I am aware, Sir John, not as far as I am aware.

**Chairman**

135. Just a final question. Mr Eaton mentioned earlier the GATT. Can you just tell us as a matter of fact, is a member country of GATT amongst the 100 members, namely in this case France, in a legal position to veto a deal? Can you help us with that?

*(Mr Jay)* I think one needs to go back a little bit and to consider what the circumstances would be to bring a GATT agreement to a conclusion. At the moment what is going on are negotiations between the Commission on behalf of the European Community and the United States on the question of agriculture. If and when a satisfactory agreement is reached on that issue, the agricultural issue will then be folded into the negotiations taking place in Geneva, so that an overall agreement will be put together covering all Member States of the GATT and it will be the overall agreement, therefore, that will need to be put to the Member States of GATT for agreement at some later stage, but exactly when that would be is hard to say.

136. And under the GATT rules or under the GATT treaty, whatever it was, one Member State could then put a stop to it, could bring a halt to it by vetoing it at that point, could it not?

*(Mr Jay)* I am not certain what the position would be as far as the GATT is concerned. As far as the European Community is concerned, there would need to be a discussion in the Council at some stage on the package so the Council could give its agreement to it, but exactly what the circumstances of that would be, the nature of the decision I think would depend again on the form of the agreement that was reached.

137. But it would have to be a unanimous decision of the Community in the Council?

*(Mr Jay)* It would depend on the legal base and that in turn would depend on the nature of the agreement, as I understand it.

**Chairman:** Mr Jay, Mr Eaton, you have answered some very difficult questions in difficult areas not only with great skill, but also you have been informative. Indeed some may say skill and being informative are contradictions, but in this case you have defied the contradictions and done both, so we thank you very much indeed on behalf of the Committee for coming and sharing with us this morning some of your thoughts on these complex issues. We are most grateful.

**Examination of witnesses**

MR JEREMY LEVER, QC; PROFESSOR JOHN USHER, University of Exeter; MR CHRISTOPHER VAJDA; and MR FRANK VIBERT, Director, European Policy Forum, examined.

**Chairman**

138. Could I welcome the witnesses this morning, from my left, Mr Vibert who I think has been with us before and we are very delighted to see again, Mr Vajda whom we welcome, Mr Lever who has also been with us before, and Professor Usher. I think I am right in saying that you all were in the earlier session we have just completed so you will have a flavour of what our interests are and indeed I would like to, I think the Committee would like to, pursue some of the issues already raised this morning. Could I also thank you not only for coming this morning, but for your excellent and very informative memoranda and some of our questions will spring from those, but I think our immediate questioning will spring from what we have just heard which indeed raises subjects covered in your memoranda anyway. Could I also suggest that if any of you wish to come in on top of any question or around any question, please do not hesitate to do so. We like to keep this with the maximum opportunity for witnesses to contribute as they wish. Could I begin with the obvious question which protrudes from the last session which is interesting the Committee and that concerns the status of any agreement or declaration or protocol that might emerge from the Danish proposals, how they will be made binding, such arrangements, and whether they would or would not require in fact amendments to the existing Treaty? That really is a puzzle for us. I do not know, but perhaps, Mr Lever, I could start with you or anybody who would like to volunteer.

*(Professor Usher)* If I could jump in first, sir, in that case, quite simply, as I understand it, if it is desired to make any arrangement with Denmark legally binding, there is no alternative but to use some treaty or quasi-treaty form, whatever name you use. There is absolutely no other way of making the thing legally binding unless one were simply to do it as a matter of secondary legislation and I do not think the Danes would regard that as in the slightest bit acceptable. You then have the second question where if you have got to do something which is either a treaty or under another name of the same effect as a treaty, then do you either formally amend what is already there or do you add something to it? My impression is politically it seems to be generally thought that you cannot touch what is actually there, so you have got to add something to it, although of course the legal effect of adding something to it might be exactly the same as actually amending it. Having said that, I do wonder how far some member States will be willing to take on anything that amounted to a substantial change in what is there unless they really amounted—how can I put it?—almost to procedural things. For example, Denmark already in reality has opted out of economic and monetary union but nonetheless is theoretically bound by an overall obligation to proceed that way, whereas we have express exclusions from that as well. I cannot see that in the real world it makes terribly much difference if the Danes are given a few more words in that area because, if they already have a condition precedent about having national approval first, I do not think it makes terribly much difference if you formally exclude them from the basic obligation as well. But you still have the new Treaty and to produce any domestic legal effect it has to be ratified in the normal way by all the Member States.

139. I think that is very interesting. Can I switch to Mr Vibert because you are one of the authors of a fascinating series of protocols which the British might wish to have and presumably there would be other countries which would have a few things to throw into the pot. Can you see your protocols, which I think come from the European Policy Forum, which you and others have drafted being wrapped round or added to the existing Treaty without changing the nature of that Treaty and therefore demanding amendments to it?

*(Mr Vibert)* I think the question one is wrestling with is, how does one give practical effect in relation to our proposals on the subsidiarity provision in the Treaty? Clearly one way of giving effect to them is just a declaration and then the question is, well, what status would a declaration have? I think the general legal opinion would be that the declaration has less legal standing than a protocol and, therefore, we have opted for the protocol. The question is, at what point does it become politically impossible to add? That is a political judgment. There are going to be some resistances to the Danish opt-outs. I think predictably one aspect which will concern the Commission, and some Member States is whether precedents might be set by Denmark which would be seized upon by new applicants, for example, such as Norway whose application is expected shortly and Sweden. So one is entering into a very difficult area of what is politically possible. But I would say at this point nothing is impossible politically and we should go for what we want.

*(Mr Lever)* I think there are two quite separate problems. One is to arrive at a solution that is politically acceptable to all twelve Member States. The other is the legal complications that will be caused by the national constitutional requirements. Now, a declaration would not cause any difficulty because, as was explained to you earlier this morning, a declaration is not legally binding, it is merely a declaration by the Member States either of an aspiration or of the way that they see things—something of that sort. It is not law at all. A pro-

**[Chairman** *Contd]*

tocol is hard law and the fact that it is tucked away in protocol and not in the body of the Treaty does not really affect its legal force. There are clearly problems in a number of Member States once you start to alter the law and constitutional issues are raised. For instance, if they were all soluble in this country, they would not necessarily be soluble elsewhere. I am not sure that we can help you further than that. It is clearly greatly pre-occupying the minds of both the diplomats and the constitutional lawyers to try and find a way round this problem. In the last resort it may be that the Danes may be advised that they would be better off in the Free Trade Area than in the Community, that they might get the advantages they wanted without the disadvantages that they do not want, and that might be the ultimate solution, but that would clearly be very regrettable unless that was the way the Danes wanted to go.

**Sir John Stanley**

140. Can I come back to the legal implications of the Danish position? I know this is a question that lawyers always are very reluctant to answer but can I try you? Would you agree that there is no reasonable room for legal doubt that, if the Danes fail to ratify the Maastricht Treaty, that Treaty can have no legal effect?

*(Mr Lever)* I have been asked that question before and I have not been able to see the basis for legal doubt—but lawyers are capable of arguing almost anything. I cannot myself see how, if one of the Member States says "We are not willing to amend the agreements we have all entered into earlier and which are binding on all of us", as a matter of law the others can say "That's too bad, you are outvoted." That is why I ventured to suggest it would be a political question and that it would be suggested to the Danes that it was not really very sensible, if the other eleven did want to go forward and they did not, that they should stand in the way, and that there might be an acceptable political solution that involved their moving back into the Free Trade Area.

*(Professor Usher)* Could I suggest that, whilst I agree entirely with what Jeremy Lever said, one can at least as a legal theorist at any rate make a distinction between the bits of the Maastricht Treaty that amend the existing Community Treaties and the bits that add something totally new. The bits that amend the existing Community Treaties should not be forgotten—economic and monetary union, despite the use of the word "union" is actually printed out as part of the European Community treaty. As far as amendments to the Community Treaty are concerned, it clearly cannot be amended except by the consent of those currently parties to it. On the other hand, in so far as you add on new co-operation, shall we say, in areas of justice and home affairs, I can see no reason why a smaller number of states could not do that between themselves if they felt like it. Indeed, dare I suggest we already have a precedent with the Schengen agreements which were originally between France, Germany and the three Benelux countries, though I believe Italy, Spain and Portugal have acceded as well. The Schengen Convention, in fact, deals precisely with many of the matters listed as being matters of inter-governmental co-operation in the justice and home affairs section and, indeed, deals with something which will be Community law under Maastricht, that is, the question of a common visa policy under Article 100c.

*(Mr Vajda)* If I could come in in relation to what Professor Usher said about the amendment of the Treaty of Rome, it is set out in Article 236 of the Treaty of Rome as it currently stands that "The amendments shall enter into force after being ratified by all the Member States in accordance with their respective constitutional requirements."

*(Mr Vibert)* On that point, I think it does make a difference as to what part of Maastricht one is talking about, as another witness said. For example, the co-decision procedures—I find difficulty in seeing those coming into effect unless there is ratification by all. On the other hand, inter-governmental co-operation could go ahead. It seems to me there is another distinction which I think the British Government has made between failure to ratify and notification that ratification will not take place. There is a distinction there which I think may be important.

*(Mr Lever)* I think it is terribly difficult to extract what is amendment and what is new and to have the institutions of, can one say, the enlarged Community administering one set of rules for one set of Member States and another set of rules for another set of Member States. I accept that there is a theoretical distinction but I see the greatest difficulty in using that as a way out of this particular problem.

*(Professor Usher)* I agree that it is a great difficulty that you use the institutions to apply one set of rules for one group and another set for another group. I suggest, however, that is precisely the result that Maastricht itself will lead to if it goes through in areas of social policy and economic and monetary union.

141. Could I just ask one more question on the legal aspect of the Danish position? Assuming for the moment that the Danish package goes ahead and, as we have heard from the Foreign Office officials this morning, it is a non-negotiable element of the Danish position that that is made legally binding, the Danish package, on all twelve Member States, and you have seen, as we have seen, what are widely reported details of the Danish package and we can, I think, reasonably assume that most, if not all, of those will be finally included, would you agree that if that is the case it could not be made legally binding in the UK unless there is an amendment either to the existing Maastricht Bill or conceivably the introduction of a further Bill to incorporate in legal terms the Danish package into UK law?

*(Mr Lever)* I think that Sir John is right, but I would be very reluctant to give you a firm opinion without going away and thinking carefully and

[**Sir John Stanley** *Contd*]
then if you wanted one, we would certainly be able to give you an opinion in writing about that. I think what you have said is right, but it is an important question and I would not want myself to say definitely yes without going away and thinking about it.

**Chairman**

142. Of course yes, but I think Mr Eaton this morning was finding out that some treaties, many treaties do not require parliamentary legislation to validate them. It so happens that Maastricht does because it says in the Treaty itself that it must have, so presumably it is just possible, in trying to elucidate Sir John's question, for a chunk of agreed material to come along in the Community to be called a treaty addendum or a new treaty and for someone to rule, the Community to rule, that this particular treaty does not require ratification by the parliaments of the Member States. Is that possible?

*(Mr Lever)* I suppose that all that has got to be ratified by Parliament is that which will effect the incorporation of Community law into our national law and if the Danish changes do not affect what is to be incorporated into our national law, then it will not require a parliamentary vote.

*(Professor Usher)* There is a precedent for that of course in the Single European Act where we did not give domestic effect to the title which deals with political co-operation.

**Mr Gapes**

143. If, as Mr Lever has suggested, the Danes are told, "Too bad, you have to go off to a free trade area", what would that mean for the countries that have already ratified the Maastricht Treaty? Would it mean that the Maastricht Treaty could then come into effect on the basis that Denmark is no longer a member of the Community or would it mean that they would have to go back and have another referendum in France and another referendum in Ireland regardless of whether there was a Danish protocol that caused that or a Danish withdrawal that caused that?

*(Mr Lever)* I did not want anybody to understand that I was suggesting that the eleven would eject Denmark. There is no power to eject a Member State. My suggestion was that that might be seen by all as a solution. As to the fact, if it were a fact, that Denmark chose to leave the Community and go back into the free trade area, that would have to be agreed between all Member States, because no Member State can be thrown out and no Member State, as a matter of international law, can just leave, as a matter of international law. Whether then that would require, under the constitutions of the other Member States, a new ratification, I cannot say. I do not think it would require fresh parliamentary approval because it would not affect the domestic law. It is simply that a group of people who would otherwise have been governed by Community law would no longer be.

*(Professor Usher)* There is a precedent, can I just say, where Greenland of course has already been negotiated out by Denmark. My recollection is that we did not alter our domestic law at that time.

*(Mr Lever)* I think that is right.

*(Professor Usher)* I could be wrong about that.

144. Could I press you on this because I am more concerned about what it means for the status of the Maastricht Treaty. Given that the Maastricht Treaty was supposed to be signed by twelve countries, if one of those countries either because of choice or because of an inability to get agreement is unable to do so, then does that mean, even if the Danes have withdrawn from the Community, that there would then need to be another negotiation process or another IGC in order to re-ratify or change the Maastricht Treaty? Will it then require the domestic decision-making in Ireland and France, and potentially somewhere else, on the same basis?

*(Professor Usher)* Could I try to leap in and I will try and suggest one? Basically we suggested you need all twelve to agree to something and then the domestic ratification insofar as you are actually amending the existing Community Treaties. Now, if it were negotiated that Denmark should leave the existing Community Treaties, then Denmark would no longer be a party to it and, therefore, the consent of the eleven to change it would, I would have thought, suffice.

*(Mr Vibert)* I think there is actually a further complication where we have to look at things like qualified majority voting and so in fact one would have to reopen the Treaty.

*(Mr Lever)* I agree with that.

**Mr Wareing:** I just wonder whether there are not in fact elements within the Treaty that are not really necessary to the Treaty. Are there not in fact some issues, for example, the development of economic and monetary union, which do not require the Maastricht Treaty at all? If the Maastricht Treaty did not exist, the Member States could still in fact make progress towards economic and monetary union and this may be conceivable for some of the states within the European Community if there is a split, for example, on the question of the single currency.

**Chairman**

145. Is that right because the European monetary system was not in the Treaty?

*(Professor Usher)* Yes, sir, that is right and indeed, if I might say so of course, sir, the first stage of economic and monetary union has already begun without the Treaty, I think, in 1990, as I recollect, from the early legislation which claimed to be giving effect to it. You are quite right to say that the European monetary system not only did not have the Treaty, but it is not even formal Community law. It is a resolution of the European Council which falls into a rather grey area.

**[Chairman** *Contd*]

However, as you probably know, the European Court, in its famous opinion about the compatibility of the original version of the European Economic Area Agreements with the EC Treaty delivered last December, roughly at the same time as Maastricht was being finalised, the European Court did declare that the Community already had the objective of economic and monetary union. My own guess, as I think I put in my written evidence, is that looking at it simply as a legal theorist, and there are obviously horrendous political problems, but looking at it purely as a legal theorist, really the only thing you could not do in economic and monetary union under the existing Treaty structure is to create a new body, like the European Central Bank, which had legislative power. There is no way, as I understand it, you could actually delegate discretionary legislative power to an institution which is not recognised by the Treaty itself. Leaving that on one side, the rest of it, there is nothing to stop you redefining what the ecu is as far as I can see.

*(Mr Vajda)* Just following on there, of course there were two monetary unions within the Treaty, and there still is one, between Belgium and Luxembourg and of course there was one between this country and the Republic of Ireland. Neither of those is, so far as I am aware, affected by any provision in the Treaty of Rome, either the creation of such a union or the dissolution of such a union.

**Chairman**

146. Could we switch a little from Denmark, which is obviously the hot issue, to subsidiarity where all the papers laid before us, certainly Mr Lever's, Mr Vibert's, Mr Vajda's and Professor Usher's, have all got some very interesting observations to make. Perhaps we could just start by asking whether you heard Mr Eaton's description of the provisions of Article 3b and how that struck you. Mr Lever?

*(Mr Lever)* Yes, I did not disagree with what he said and I do not think that he suggested to you that the legal safeguards viewed purely as such were powerful. In fact I think he accepted that in the round Sir John's formulation of the problem was very fair. In order to be sure we are not being just insular British lawyers, Christopher Vajda and I did a little more research and we looked at the German Basic Law, the German constitution, which has a subsidiarity clause in it, and like the Maastricht Treaty it applies in the area of shared competence or legislative powers shared between the Federal Republic and the Länder. The Article is Article 72. The second part of that Article provides that the Federal Republic can legislate "so far as there is a need for federal regulation because"—and then it sets out three possibilities. One, a matter cannot be regulated effectively by the legislation of a single Länder. Two, the regulation of a matter by the law of one Länder could harm the interests of other Länder or the entire Federal Republic. Three, it is required for the preservation of legal and economic unity, in particular if it is required for preserving uniformly minimum standards beyond the territory of one Länder. We then checked with the standard German textbook on constitutional law and there is an early case decided by the Constitutional Court that says, "Yes, this is a legal principle, it is capable of being given legal effect to, but in practice this has proved difficult and the Federal Constitutional Court will allow legal review only in so far as the federal body has disregarded the limits of its discretion or has misused it. The judgment whether there is a need for federal legislative action is a question for the Federal Republic." That was an early case. It seems to have been the only case, because people then felt there was not much use in taking the matter up. So then we went and looked at what the French were saying about this to see whether they took a different view and the best statement of the French view of the position we have yet found is that "... the success of legal proceedings based on the principle of subsidiarity remains very hypothetical, the applicant needing to prove manifest error or misuse of powers against the background that the Community enjoys a wide margin of appreciation in the circumstances." The point that the French jurists made, which we did not make to you and which perhaps should be made, is that there is not provided by Maastricht any more than by the German constitution the possibility for somebody who thinks that the principle has been infringed, or is going to be infringed, to take the measure to the European Court of Justice before it becomes effective, as one can do with an international agreement entered into by the Community where anybody who says "I am not happy about the legality of that" can go to the Court in advance for an advisory opinion. That is not going to be possible if one thinks that the principle of subsidiarity has been infringed and that seems to Christopher Vajda and me to be another reason why it would be wrong to regard these as being very effective legal guarantees that the principle will operate in practice as a very important constitutional principle.

*(Professor Usher)* I am intrigued to hear Jeremy Lever's statement of the German law because you may be interested to know it is virtually word for word the same as what the European Court said in those cases where it found itself looking at what it called the evaluation of a complex economic situation. In other words, in seeing whether there is contravention of fundamental principles of Community law the Court must confine itself to examining whether the exercise of discretion contains a manifest error or constitutes a misuse of powers or whether the institution did not clearly exceed the bounds of its discretion. Having said that, my view essentially is that the Court would be highly reluctant to go in on substance. What I think can be legally controlled is procedure. There at least a court can check whether on the face of it an inquiry has been made into whether the principle of subsidiarity is complied with. Increasingly, of course, that is already happening. I think I mentioned to you in my written evidence a recent

[**Chairman** *Contd*]
Directive on Tourism made under a very general provision, Article 235, where they carefully state in recitals "bearing in mind the need to comply with the principles of subsidiarity." So they have already started printing it and what I think a court can check is, on the face of it, or indeed even on the record, looking at the Council minutes, to see what Ministers really thought they were doing on the face of it or on the record. You can, I think, expect that there should at least have been a conscious consideration in good faith of the appropriate level of action, if I might bid for Mr Delors's prize. I do not think you can go any further than that if the court would come in on substance.

**Mr Lester**

147. Have you had any thoughts on how enlargement would affect the principle of subsidiarity if one takes in the current applicants to the Community? You have a lot more countries to deal with.

*(Professor Usher)* Could I leap in again just for a moment. One of the fundamental problems of subsidiarity is its conflict with what we were told at the time of the Single European Act was the fundamental aim of ensuring a level playing field, that is, removing disparities in national legislation. Of course, it is one of the original Community objectives and remains a Community objective to remove distortions of competition and differences in national legislation that may affect, for example, the cost of production, which have been held consistently at least for the last twenty years to justify Community action because they distort conditions of competition. That is why the Community got into the environment, into consumer protection, and even into equal treatment of men and women. In very recent legislation about contracts of employment they simply baldly say, "Differences in national legislation distort conditions of competition, therefore we can act." If a sufficient majority of participants in the Council meeting at the time being in good faith take that view, I do not really think the court can interfere.

*(Mr Lever)* I think that Mr Lester has a point, if I may respectfully say so. Presumably the larger the Community becomes, the more likely it is that the proposed action will not have a pan-Community, a European, dimension in the enlarged sense and it is more likely that a more limited group of Member States will be able to take the action or do so with greater effectiveness. Therefore the principle of subsidiarity, at least as a constitutional and political principle, should become even more important, the larger the Community becomes.

*(Mr Vibert)* I think in the context of enlargement I assume one of the concerns of new applicants, mainly among the smaller states of Europe, is that they will not get trampled on by the larger ones. I am not sure that subsidiarity is going to be a great defence in that context. What is going to be much more important is how the decision rules work, what are the necessary majorities, and so on. So I do not see their main concern being subsidiarity. I wonder whether it is permissible to come back to the Foreign Office evidence. There was one very important point which struck me in the Foreign Office evidence; that is the question of these shared competencies or what is an exclusive Community competence. The Foreign Office listed a number of things I would agree with as falling within the category of exclusive Community competence, such as common commercial policy, which was one cited. But I would say that, of course, one of the problems with the clause is that there is not an agreement on what is shared and what is exclusive Community competence. I think if one asked the Commission their view, they would include the single monetary and exchange rate policies of the future, for example, and I think what is of very great importance at the moment, since stage three is still some way off, is whatever is necessary or essential to the establishment of the internal market. That, of course, is a very huge potential swathe of powers. So it is a question of what is shared and what is exclusive Community competence. It is potentially a very difficult issue on which one sees very, very different views. It makes one also rather sceptical—other doubts I share—about the legal force of this clause. I would say further that the Commission's view is that this distinction between shared and exclusive powers, in their view justifies a hierarchical view of Community powers and law and institutions. That is a view which I am personally very much opposed to because that is not subsidiarity, in my mind; that is subordination.

**Chairman**

148. If the lawyers cannot assure us that the legal system can ever settle these matters, how will the politicians ever settle these questions which you have described in a dispute as to what is shared competence, what is exclusive competence and even if there is a hierarchy who does what and at which level of the hierarchy? Are we looking forward to an endless debate rather than a Community over the next 100 years or is it possible to think of a constitutional structure that could settle these matters?

*(Mr Vibert)* I think one is looking towards a very long debate, but I think that what constitutions can do is to set out processes and institutional powers and I see these being key to the intent of subsidiarity rather than the justiciability of the intent.

*(Professor Usher)* Could I say that there is a problem of course in trying to think of a fixed list of what is Community competence and what is national competence. In the early days of the Community certainly there was a very strong strand of academic and indeed judicial opinion that the Community could only do precisely what you found written in the Treaties, but in fact the judicial attitude, and the legal commentators obviously followed, is that actually the relationship between Community competence and national competence is one which changes as the Community develops, so by definition you are not

**[Chairman** *Contd*]
really going to have an easy division. It is one which the Court itself thinks changes as Community law develops.

*(Mr Lever)* It is a frame of mind, subsidiarity, and with the resurgence of nationalism for a number of reasons it is possible that the institutions will have learnt a lesson and that the national politicians will be more sensitive and that the principles of subsidiarity will become a habitual way of thinking for them. It is also possible that the fright that people have had will be short-lived. It is important to remember that the principle of necessity and proportionality which is embodied in the third paragraph of Article 3b applies even where the Community has exclusive competence so that is a limitation on the exercise even of exclusive competence, and as indeed the first paragraph equally applies in all cases.

**Sir John Stanley**

149. Continuing on subsidiarity, could I just come back to what the Prime Minister said in the House on September 24 when he said this: "So we need a definition, a settled order of what is for national action and what is for Community action. We need clear criteria by which Community proposals will be judged. When we are satisfied that such a system has been put in place and when we are clear that the Danes have a basis on which they can put the Treaty back to their electorate, we shall bring the Maastricht Bill back to the House of Commons". What I would like to ask you is that in this clearly legally very challenging task of establishing this definition of what is for national action and what is for Community action, do you think that it is possible to simply stick to defining certain principles as to whether something should be dealt with nationally or whether something should be dealt with by the Community with all the risks which I think even the Foreign Office officials have acknowledged that it is likely on almost any single issue, however minor, however locally based, it will always be possible to erect some Community case as to why in fact there is a Community policy issue which is here and, therefore, it should be dealt with by the Community? Would you feel, therefore, if subsidiarity is going to have any real legal effect, rather than just simply dealing in principles, you have actually got in practice to deal with it by subjects and, for example, saying that roads are not going to be dealt with nationally and that agriculture will continue to be dealt with on a Community basis and clearly there will be some sort of rough edges there between those two attempts to categorise by subjects, but is this perhaps the only possible way it is going to be able to give legal force to this principle of subsidiarity?

*(Mr Lever)* I very much agree with you that when one is thinking about the application of the principle, it is very difficult to do so in generalities and one needs to settle down and look at the detail in depth and when you get to roads it may well be that not all roads are equal. Some roads are, as in the United States, federal highways and others are state highways. I think it is possible to enunciate principles, but I do not think they are principles such that if you fed them into a computer and you then put into the computer a piece of legislation and asked, "Does it comply with the principle of subsidiarity?", the computer, however skilful it might be, would be able to say, "Applying the principle, yes", or "Applying the principle, no". That is why I venture to suggest it is a frame of mind and having got beyond being a frame of mind, it becomes very largely a matter of detail and we gave you an example in the area of competition law of where we thought that the idea of subsidiarity could be made real without destroying the unity of the Community and that is just an area which we happen to know about, but there must be other areas where similar detailed analysis could be done in order to realise the principle.

*(Mr Vajda)* I think also it depends very much on the political agenda because if one looks at the original Treaty of Rome in 1958 there is no mention of environmental policy at all in the Treaty because nobody was interested in the environment or at least not as interested as they are today. One sees a progression by the time of the Single European Act where there is an interest and there is pressure on the Community to do something in the environment and it then becomes Community competence, although it is shared with the Member States. Again in social policy we see there is again pressure at the Community level for the Community to do something. There is always a sort of ebb and flow where a particular policy comes to the fore and then there is pressure by some people that action should be taken at Community level, so I think that it will be very difficult to say that roads, for example, should always be for Member States because things change and new policies come to light and we say, "We did not think of this five years ago, but really today the only way to solve it is to do it at Community level".

**Mr Wareing**

150. This idea of a settled order that the Prime Minister came up with I feel is very vague and that in fact what is more likely to happen is that the European Community will progress, the European Union will progress by judicial review and that in fact cases will come before a court or a body, and that is a point I am going to come to, to determine how a conflict between a Member State and the Union shall be resolved and I wonder whether you would like to pass an opinion on whether the Court of Justice in Luxembourg, which after all is itself a Community institution, can in any circumstance be envisaged as likely to say, "Well, this is a matter of subsidiarity and is within the competence of a Member State rather than the Community", or do we need to set up some other institution or institutions? Might the Committee of the Regions, for example, be an embryonic form that has to be consulted in future to determine what is the function of the Community and what is the function of the Member States?

[**Mr Wareing** *Contd*]

*(Professor Usher)* I will have a go on that and perhaps start off by making a political comment about lists and then give one illustration of what has actually happened in one area and then come to what is the appropriate level to try and control it. First of all on lists, dare I, as a mere lawyer, make the political comment that if you are going to have settled lists of who does what, you are really talking of federalism, I would have thought, some kind of formal federal structure. Having said that, let us take one area where even the Commission seems to be talking about giving powers back to the Member States and so on which is the environment. Now, the Community actually got into that long before the Single European Act because the presidents and prime ministers meeting in the European Council, I believe, in 1972, with our Prime Minister present even though we were not actually then a member, unanimously decided (a) they had got to do something about the environment and (b) that if it was going to be done, it should be done on a Europe-wide basis and not just by states alone and the Commission was instructed to come up with a programme, some of which has been implemented, but always, until the Single Act, unanimously. In other words, everybody agreed to do it. So it is all very well to complain that you are being done for Blackpool beach but nonetheless the legislation under which the action was brought has been agreed to unanimously by the then Member States. Furthermore, having got political unanimity, even though it did not change the Treaty, in 1985–86 you find judgments of the Court just before the Single Act came into force holding that protection of the environment was a fundamental objective of the Community; in other words, if in effect over a consistent period of years all the Member States have formally decided that was what they were going to do and have done it, the Court drew the conclusion that it had then become a Community objective despite the fact that the Single Act amendments had not yet come into force. On the question of the appropriate body, it really depends where you think control is appropriate. My own view is that the only real way you can exercise control is at the level of making the legislation rather than afterwards, and that at a minimum level you can, I think, at any rate require conscious consideration, but whether, as other people suggest, for example, we should have bodies like the French Constitutional Council which can look at legislation before it goes through—that might be one way. What I certainly cannot see is anybody outside the Community structure being used, that would be regarded by the European Court as a contravention of the fundamental principles of Community law.

*(Mr Vajda)* If I could follow up from that, I agree one has to look at it at two levels. One has to look at the political level and then only look at it at the legal level, if you like, as a long stop. One has, as I say, a long stop because there have been a series of cases in the Court of Justice where the United Kingdom has challenged certain action by the Commission on the basis of being based on the wrong Treaty Article. The purpose of that challenge was to say that these were things that had to be done unanimously rather than by majority voting. Without going into too much detail, in essence the United Kingdom has lost most of those cases and the Court has said, "No, the Community chose the right legal basis". That is why I think it is an illustration of how one must regard, if you like, the legal side of it very much as a long stop; it is not necessarily going to be foolproof.

*(Mr Vibert)* I think in relation to how the Court of Justice might behave one does have to look at how the United States Supreme Court has behaved. There have been periods of judicial activism and periods of judicial restraint. I think one might expect rather similar behaviour from the European Court of Justice. I think that we fear periods of non-restraint by the Court, periods of legal activism, which is of concern to people interested in constitutions and also the fact that, if you look at Community bodies—the European Parliament, the Court of Justice and the Commission—all acting together, they all have an interest in extending the territory of Community law and Community competence. So the question is, how does one set up countervailing influences to that? The Council of Ministers is one countervailing influence. My suggestion in the protocol has been that national parliaments need to be more actively involved, even, I would say, in an area of exclusive Community competence.

*(Mr Lever)* But some people might put it differently in answer to Mr Wareing's question, which was "Can you envisage any circumstances in which the Court would interfere and give decisions that measures were invalid because they infringed the principles of subsidiarity?". The only circumstances in which I can envisage that becoming a significant force would be if the Court had become politicised and we had got a state rights court. In the absence of that, then I agree with Mr Vibert; but in a sense that would be even more a politicised court than the Court which we have at the moment which tends to support Community enlargement, not in a geographical sense but in a functional sense.

**Chairman:** I would like to pursue the national parliaments issue with Mr Vibert in a moment. Mr Lester?

**Mr Lester:** In terms of the political judgment on subsidiarity, would you not agree that in terms of some of the Community action it has been because of the political desire of individual countries who feel they might have difficulty nationally carrying out policies, particularly on the environment, certainly on immigration and asylum, to give the Community competence in order for them to be able to say "The Community are demanding it" in order for them to do it. So there is a reverse political judgment which is often made.

**Chairman**

151. Can I pursue with Mr Vibert his point about the role of national parliaments? Could you expand on that?

**[Chairman** *Contd]*

*(Mr Vibert)* I think there are two thoughts behind the suggestion that national parliaments should have a larger role in this. First of all, it is a question of institutional motivation. One has to look for institutions with a countervailing interest, not in expansion of Community activism and law, which also have an interest in keeping decisions close to the people, and national parliaments are an obvious body—the most obvious body. I do not think, for example, a regional assembly will be necessarily the right alternative, both because not every country has a regional articulation and because one knows that some regions will be going really as pressure groups for more money from Brussels. There will be a strong aspect of that in such a body. So I think national parliaments are the logical ones and ones with historical legitimacy and, therefore, one should look to some kind of role for them. One then gets the question, at what point should they intervene and then I think the important thing is that they should intervene early in the process, so that they are not faced with finely honed draft directives. That is why I suggest that the subsidiarity recital, as the Commission calls it, should be considered separately and the justification for Community action should be looked at by national parliaments. Now, the way in which this would happen is obviously technically quite complicated. It could be a committee of the House, this one or another one. It could be a servant of the House in the way Sir John Bourn is a servant of the House. There is also a question of how national parliaments would liaise if they were all examining a draft of a directive and wanting to exchange views on whether they saw it as justified at all. There is also a difficult question of the relationship between the parliament and the government, because they are not the same, and there may be a parliamentary view which is not the same as the government view. So these are all difficult areas. I would be the first to admit that I think these are things which should be explored and it was rather unfortunate, to my mind, that Maastricht did not explore these. They should be explored on a technical and professional basis for the next constitutional round.

152. I would like in the remaining few minutes to turn to some other issues. Do my colleagues want anything more on mainstream subsidiarity questions? Now is the moment. No. Shall we just expand a little on the observations of the earlier witnesses on citizenship of the Union? May we have your expert opinions, gentlemen, on what this adds up to, whether it is really true to say that it merely adds rights and does not in any way subtract from the existing rights of citizens in the different countries?

*(Mr Vibert)* If I may say so, that is precisely the problem of the additive nature. If one takes them on their own merits, what they say, I think, is that it is a limited list and I personally do not have any problem with that. The problem is that citizenship as a concept is an expansive concept and people will say that citizenship embraces economic rights, social rights, environmental rights—the list is long. Your question is, is one opening a door for the Commission to say there is such a thing as European citizenship or citizenship of the Union which includes a whole lot of other things? Are there possibilities for the Court to interpret it in that way? The judicial interpretation of citizenship is that it is in the province that is submitted to the Court of Justice. I think there is a very real question as to how far Community law should extend beyond the economic sphere in areas related to the social order in Member States. That is a very difficult area again, but I think it has not been fully thought through. So these are concerns. They do not concern me as they are, but there are legitimate concerns as to how they may be developed.

**Mr Shore**

153. I think the citizenship clause has to be read in conjunction with Article N of the Treaty which contains the pledge to hold a conference of representatives of governments of Member States again in 1996. It says specifically this: "to examine those provisions of this Treaty for which provision is provided in accordance with the objectives set out in Articles A and B". Quite significantly, in Articles A and B are included the Union's identity on the international scene which very much relates of course to one of the pillars, and then the other pillar, "to strengthen the protection of the rights and interests of the nationals of its Member States through the introduction of a citizenship of the Union", and then ending up with, "to develop close co-operation on justice and home affairs". These three things are not conclusive evidence, but they do seem to me to be indicative of the minds of those who drafted the Treaty that they were looking in establishing the citizenship as something for getting your foot in the door and with particular relevance to Articles A and B that they will be looking to the 1996 review by the governments to an extension of those rights in a serious way.

*(Professor Usher)* Could I say that the first thing I always like to note on the citizenship of the Union is that despite its terminology, it is correct to say it is put in the Community bit of the Treaty which means presumably that there was a deliberate intent of those who negotiated the Treaty that these should be legally-enforceable rights and not just something vague which may or may not flow from this intergovernmental co-operation, but it does lead to all sorts of intriguing thoughts if bits of the Union can be inserted into a Community Treaty. Having said that, myself I actually do not think the citizenship of the Union is very much more than the expression used throughout the original Treaties of "nationals of Member States" which means in effect the same thing; they are the people given rights under the original Treaties and they are given a few more rights under this. What does intrigue me is something outside Maastricht which is the Schengen Agreement between originally five, now I think eight, Member States which purports to regulate how what it calls "citizens of the Member States of the Community" shall,

[**Mr Shore** *Contd*]
amongst other things, cross the frontiers of those states; an agreement between some states which purports to deal with the citizens of all states.

*(Mr Lever)* I think Mr Shore's point is that whilst it may not be at the moment very significant legally, (it may have very little more significance than the Community flag), it is an important political statement and a peg on which one may expect in due course legal rights and duties to be put, and I think that is right, and that is why the 1996 round will be very, very important and we never want to go through the experience we have gone through over the past 18 months when, I think, even quite well-informed people did not know what had happened until they were presented with a rather fat volume.

**Chairman**

154. I think the issues you have raised with us are so huge we would have to embark on many other hours of discussion even to get a hold of them, but we have not got very many more hours, so perhaps I can say on behalf of the Committee we are extremely grateful to you all for coming along at short notice this morning. Are there any sort of final guidance or steers you would just like to give the Committee as we plunge on into this subsidiarity jungle and try to prepare a report to the House? Does any one of you wish to add anything which we have perhaps missed in our questions?

*(Mr Lever)* I would like to commend to you the provisions establishing the office of ombudsman which I believe should not be, as some people have suggested it may be, purely symbolic, and which I think will promote subsidiarity in a sense of enabling the man in the street to be closer to what is being done than at the moment, so I myself am a strong supporter of that change which has been made to the Treaty rather ironically at the suggestion of the Danes. It is a very good idea and I shall be very sorry if for any reason that is not carried through because of wider problems.

*(Professor Usher)* Could I just add one little point on subsidiarity? Virtually all the discussion this morning has been on the basis that subsidiarity is about a relationship between the Community and the Member States. Of course others have an idea that subsidiarity relates to regions as well which is one reason why I think the Committee of the Regions is so important.

**Chairman:** Well, that raises huge additional issues as well. On that note, can I thank all four of you very much indeed again for your memoranda, for coming at short notice and for dealing so patiently with such inexpert questions, and of course I speak for myself because my colleagues' questions are very expert! Thank you very much indeed.

# APPENDICES TO THE MINUTES OF EVIDENCE

## APPENDIX 1

**Memorandum submitted by Frank Vibert, Director, European Policy Forum**

### Introduction

The Committee has asked for a memorandum on the implications of the Danish referendum, subsidiarity, the exact nature of European Union and citizenship of the Union, and enlargement of the Community. This note deals briefly with each of these topics in turn.

### 1. The Danish Referendum

**Full Steam Ahead?** There are some Member States that may wish to see the Maastricht Treaty ratified as quickly as possible and implemented by the other Members, if necessary without Denmark. This would be quite wrong. First it would set a precedent of ignoring the views of the smaller Members of the Community on constitutional matters which would be very damaging to the Community over the long term and a particularly damaging signal to potential new Members which are mainly smaller states in Europe. Secondly, the negative vote on Maastricht in the Danish referendum should not be seen in isolation. Rather it is part of much wider public misgivings in Europe, including in Germany and the United Kingdom, as well as those expressed in the large negative vote in the referendum in France. These reservations must be addressed. Thirdly, there is no overwhelming practical reason to rush ahead without Denmark. The existing Treaty base remains intact and closer inter-governmental co-operation on foreign and home affairs can move ahead. Enlargement negotiations can also progress. By contrast, if improvements can be made to Maastricht it is worth taking the time to do so.

A variant of the 'business as usual' approach would be for the Member States to agree to a series of ad hoc 'opt outs' for Denmark (perhaps in the form of a special protocol) and for other Members to proceed ahead with ratification as originally planned. This too would be unwise. It would suggest that the reservations held by a large body of opinion in Europe can be ignored and would aggravate a feeling that the institutions of the Community are not responsive to the people.

**Abandon Maastricht**? At the other end of the spectrum there will be some who argue that the Maastricht Treaty should be abandoned. This too would be wrong. Integration in Europe has reached the point where constitutional issues have to be addressed in a systematic way. Checks and balances, a rules based system and decentralised processes are all needed. The existing Treaty base of the Treaty of Rome and the Single European Act not only fails to provide such a system but is deeply flawed when viewed as a constitutional arrangement. There is an absence of effective checks against centralising processes and the Treaties ascribe powers to the central bodies of the Community such as the Commission and the Court of Justice which are unsuited to the broader agenda of co-operation in Europe which is now possible and desirable.

Maastricht is only a stage on the road to a fuller and better constitutional settlement for Europe. In evidence I gave to the Committee in January 1992 I characterised the Treaty as 'unstable'. Nevertheless it is a start. It contains elements not present in the previous Treaty base which can be useful in working towards more clearly articulated decentralised arrangements to be negotiated at future IGCs. There is an opportunity now to clarify the positive elements in the Maastricht text.

**The Scope for Interpretation**. Between the two extremes of abandonment or pressing ahead regardless of public opinion, there is scope for an interpretative protocol that could be added to the Treaty by the European Council, perhaps at its meeting in Edinburgh[1]. The purpose of such a protocol would be to respond to public misgivings by underscoring those elements in the Maastricht Treaty that are most relevant to a decentralised European Union. Those elements that could be underlined in a protocol are noted next under the rubric of subsidiarity. A draft protocol which puts these points in rather more legalistic form has been issued by the European Policy Forum and is attached to this memorandum.

### 2. Subsidiarity

The intent of the provision of Art.3b in the Maastricht Treaty is that the Community should not try to legislate collectively in areas that can perfectly well be left to Member States. The formula is subjective and open to a variety of interpretations. The question however, is whether it can be made to work.

[1]There is a case for the protocol to be agreed as an inter-institutional agreement between the Council, the Commission and the European Parliament. However, two of these three bodies (the Commission and the European Parliament) have a strong self interest in more powers being exercised at the Community level. Their impact as parties to any protocol would therefore likely work to dilute the decentralising content.

Two approaches can be taken towards practical implementation. One approach is to try to identify areas of legislation (past and future) which would be ring fenced, declared inappropriate for Community action and reserved for Member States.

**Areas of Legislation**. Areas of past legislation that might now be repatriated to the Member States might include for illustrative purposes some aspects of:

: the CAP, where income support for farmers could best be targeted in response to their own social concerns by Member States individually, as a distinct and separate matter from the question of levels of agricultural trade protection in the Community;

: environmental policy, where the Community has strayed well beyond what is necessary to prevent lax environmental practices by one Member State causing damage to another Member State or interfering with a free and open market and,

: health and safety standards where the Community has exceeded what is necessary to ensure that competition is not distorted in the Community to advance a bureaucratically determined vision of what is good for people.

At the same time there are limits to trying to demarcate subject areas. Many will be appropriate both for action by individual Member States and by Members acting collectively (for example, competition policy). In addition, demarcation can be a tool of those wishing to establish a legislative hierarchy in the Community (with Community institutions in charge of a superior level of legislation) rather than seeing collective action simply as complementary to what can be achieved by Member States acting on their own.

**Subsidiarity as Process** The second approach to making subsidiarity work is to put the emphasis on getting institutional powers and processes right. Over the long run this is much the more important aspect since views of tasks appropriate for government and views of what is best done collectively in the Community can and will change.

In order to make Community processes correspond to the Maastricht principle of subsidiarity, the key element is not the interpretations that the Court of Justice may give in this area. Rather it is the behaviour of the Commission and the procedures of the Council of Ministers that are crucial.

The Court of Justice is likely to prove a weak reed as a defence against over-centralisation because the definition in Art.3b is subjective, because particular cases may be highly political, because it may be difficult for the Court in such areas to declare the action of the Commission or Council to be 'unreasonable' and because, in the final analysis, the Court too has an interest in the extension of Community jurisdiction and legislative reach. At best it could be invited to give an opinion that Art.3b does in its view place a burden of proof on the Commission and Council to demonstrate why a legislative area cannot be left to Member States.

The Commission's role is critical because it has an overwhelming self interest in extending the reach of Community powers and building its own role in the process. In my previous evidence to the Committee I drew attention to the Commission proposals at Maastricht which would have taken it a long way towards fulfilling its aspirations to become a government of Europe. Now, in response to the change in the political climate, it shows an interest in the repatriation of some functions. However, this is likely to prove a tactical retreat to be reversed on the first possible occasion rather than a permanent change of heart.

The crux of the problem lies with the Commission's powers as the initiating body in the Community and in its so called 'guardian' role. The most direct way of dealing with the problem would be to amend Article 155 in the Treaty of Rome to modify these powers. This was not done at Maastricht. The onus of getting subsidiarity to work in practice therefore lies on the Council.

There are three possible procedures that could be introduced. The first would consist of a 'self denying' declaration by the Commission under which it would initiate proposals only when expressly requested by the Council acting in consensus. It is most unlikely that it would agree on its own accord to make such a declaration. However it might find it difficult to ignore a Council instruction to act in this manner. A second approach would be for the Council to instruct the Commission to justify any initiative by a separate and specific reference to Art.3b. (A so-called fiche de subsidiarite). This by itself is likely to prove only a weak restraint because of the subjective interpretations possible under Art.3b. The third approach would be for the Council to inform the Commission that it will reject any initiative unless a high (say four fifths) majority of the Council agrees that the initiative meets the intent of Art 3b. In other words Member States accounting for 20 per cent of the votes in the Council could block an unsatisfactory Commission interpretation of Art.3b. Each of these approaches is included in the draft protocol attached.

Because of the over-riding importance of getting processes right, any Council protocol must go beyond simply identifying areas where legislation should be repatriated to putting in place procedures along the lines of those mentioned above and incorporated in the draft attached.

There are two other important features of the Maastricht Treaty where the provisions negotiated could be applied in a decentralising manner in order to reinforce the practical application of the subsidiarity principle. These are the declaration on the role of national parliaments (declaration 13) and the economic principles referred to in the provisions on EMU including Declaration 18 on the costs of Commission proposals. Both features should be elaborated in any protocol.

*Declaration on the Role of National Parliaments.(Decl.13)*

Declaration 13 states that 'The Conference considers it important to encourage greater involvement of national parliaments in the activities of the European Union'. This declaration could be elaborated by the European Council in two ways.

The first way would be to make clear that in relation to stage 3 of EMU and in particular in relation to Art. 109j4 and protocol 10 which envisage a single currency to come into use automatically, the Member States which might be subject to these provisions would seek the approval first of their national parliaments. The analogy would be to Britain's 'opt in' provision.

The second way would be to involve national parliaments in the process of determining whether legislation is needed at the Community level. In addition to the Council led procedures described above for the application of the principle of subsidiarity, national parliaments would also be given an essential role in approving any initiatives for Community legislation under consideration by the Council.

National parliaments work with different procedures and traditions. Their precise relationship to their governments also differs. Their degree of effectiveness is not the same. Nevertheless they share a common self interest in not yielding their prerogatives without scrutiny. They remain an essential bulwark to ensure that legislation is approved and enacted as close as possible to those affected by it. They are an important guarantee that approaches to public policy will reflect the diversity of views in Europe. They can provide assurance that feelings of national and regional identities can be harnessed productively rather than be inflamed by the sense that political processes in the European Union are remote. The European Council could endorse the principle of their involvement in the application of subsidiarity and convene an expert group representing national parliaments to work out the procedures, including how regional assemblies, where they exist, might also be involved. This approach too is reflected in the draft protocol attached.

*Economic Principles in the EMU provisions*

An important reason why constitutional issues in Europe had to be addressed in the Maastricht Treaty was because the previous Treaty, the Single European Act, did not attempt to take up the issue of the centralisation of powers in the Community and the need for institutional checks and balances. In particular, problems arise from the unqualified language of Article 8a, 'The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured,' coupled with the Commission's power of initiation in Article 100a subject only to qualified majority voting by the Council.

These provisions have worked to the benefit of the Community in removing internal market barriers. However, they have been used by the Commission to initiate legislation in areas not strictly necessary for a free internal market, to regulate in unnecessary detail, and to risk undoing the benefits of deregulation at the national level by regulation at the Community level. They provide a way for the Court of Justice as well as the Commission to get involved in questions relating to the civil order in Europe and not simply the market order.

By contrast the EMU provisions of the Maastricht Treaty refer in articles 3a and 102a to the Community conducting its economic policies in accordance, 'with the principle of an open market economy with free competition, favouring an efficient allocation of resources'. In addition declaration 18 of the Maastricht Treaty addresses the problem of the costs of legislation.

The European Council could build on both of these aspects of the Maastricht Treaty by setting out procedures for cost benefit analysis that the Commission should follow in presenting any proposals for Community legislation or regulation and by clarifying that any proposals to be considered by the Council of Ministers under the SEA and Treaty of Rome must first be justified by reference to Articles 3a and 102a of the Maastricht Treaty.

Finally, it has to be recognised in relation both to the Treaty of Rome and the SEA that an important reason for distrust that the Single Market will operate in accordance with the Maastricht principle of 'free and open markets' is that the Commission is not well suited to undertake quasi judicial functions of

economic regulation and competition policy. Its functions are too broad, its competencies conflicting, its procedures lack transparency and it is too political. The European Council should therefore initiate an expert exploration of whether autonomous agencies would be better able to carry out these quasi judicial functions in a manner consistent with free and open markets. This too is reflected in the draft protocol attached.

3. Union and Citizenship

The provisions in the Maastricht Treaty relating to 'Union' (in particular Articles A, B and F) as well as those relating to citizenship (Articles 8–8e) can be interpreted in a purely pragmatic way as conferring limited and broadly uncontroversial rights[1] for individuals and implying that 'Union' is no more nor less than what is described in the Treaty.

However, they can be interpreted in a doctrinal way. Under this kind of interpretation, 'Union' is seen to be being promoted by the Treaty as a superior political value in Europe without sufficient regard to other political values associated with a free society and whether or not the character of the 'Union' will be consistent with these other values. Similarly, the provisions on citizenship can be seen as trying to confer on the 'Union' the character of statehood, allowing the Community to intrude into civil order areas that are best left to Member States, and giving the Court of Justice further entry into civil order questions as well as interpretative latitude as to what are the latent attributes of citizenship.

The European Council could and should take action to allay these types of fears. One action would simply be to reaffirm through the issuance of the protocol on subsidiarity that decentralised arrangements in the Community are seen as the sine qua non for free societies to flourish in Europe. The other step would be to recognise the very difficult issues surrounding the reach of Community law and the role of the Court of Justice. In the final analysis the Court of Justice is not a neutral body and Community law is not a neutral instrument. The superiority of Community law is needed to enforce the rules of the market order in the Community and to keep Community bodies acting within their powers. However, it is not at all clear that the reach of the Court of Justice and hierarchical concepts of law should extend beyond this. The European Council therefore should set up an expert examination on the reach of the Court of Justice and Community law. Provision for this too is included in the draft protocol attached.

4. Enlargement

There is a danger that current disputes about the ERM and the Maastricht Treaty will both make membership in the Community appear much less attractive to public opinion in countries that are potential new members as well as delay consideration of their applications. This would be most unfortunate. Enlargement can help the Community regain its sense of forward momentum and it remains vital that Europe should not divide once more into differing economic and political blocs.

With regard to the current group of EFTA applicants, it is not foreseen that the negotiations on economic aspects of membership will raise difficulties. The exception is in relation to the CAP. It is not clear that adding the economic and social problems of Nordic and Alpine agriculture to the problems of the CAP is in anybody's interest. Special arrangements will be needed in this area.

The other difficult area is in relation to the Common Foreign and Security Policy title and in particular its reference to an eventual common defence policy. There is a segment of opinion in Europe which is in favour of such a development as a means to distance Europe from the USA. The reverse is needed. At this stage Europe needs to give incentives to the USA to remain in Europe and to take positive steps to act jointly with the USA in enforcing an international rule of law. It is not clear that EFTA entrants will be robust in their support of a continued close relationship with the USA and of NATO. This issue will come to a head over the question of their possible membership in WEU.

Broadly speaking, the new EFTA entrants are likely to welcome clarifications of Maastricht which emphasise decentralised procedures. There is one further unavoidable institutional aspect and that concerns voting arrangements in the expanded Community. The important consideration should be to avoid any exacerbation of small country\large country tensions which would arise if the number of Member States that could be over-ruled under majority voting procedures were to be increased. Therefore the same blocking minority as at present should be maintained.

Finally, it is important that Central Europe does not get lost in the shuffle of the many other issues in Europe including the transformation of the former Soviet Union. In central Europe there are signs of disenchantment with the post communist regimes and backsliding on both political freedoms and the commitment to the market economy. Britain can either press for accelerated membership for these entrants or at least ensure that relevant Community action is taken on a wider European basis. For example, the trade restrictions in the Europe Agreements could be eased, part of the Community budget could finance programmes in Central Europe and Community programmes in transportation and infrastructure could

[1] It should hower be noted that the citizenship provisions were a factor in the French referendum.

also be broadened to be operated on a pan European basis. Central European countries could be associated both with the CFSP and Home Affairs pillars of the Maastricht Treaty.

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*Explanatory note on the draft Protocol*

The Danish referendum and the reservations expressed elsewhere in the Community to the Maastricht agreement, including France, Germany and the UK itself, makes a response in the form of a Protocol essential. The response needs to focus on the following elements that support the principle of subsidiarity.

The Institutional Processes for Applying Subsidiarity: There is a need to give reassurance that the Maastricht principle of 'subsidiarity' will in practice (despite the vagaries of the language) be applied in ways that will guard against unnecessary intrusion and intervention from Brussels. The practical uncertainties centre on the future behaviour of the Commission and on the interpretations of the Court of Justice. In addition there is a need to strengthen the voice in Community procedures of those institutions that have an interest in seeing a decentralised Community—in particular the national parliaments and, in countries that have a strong regional articulation, the regions. The draft sets out the provisions of a declaration on subsidiarity that would give practical re-assurance that the Community will follow open and decentralised procedures.

Powers of the Commission: The reaction to Maastricht has illustrated once again the dangers to the Community of the conception of the Commission as an embryo-government of Europe pursuing its own agenda rather than acting in a civil service capacity preparing a professional review of options for Council consideration and focusing on administrative support for the Council and the Member States. The initiating powers of the Commission require review as well as how the Single Market framework is going best to be administered within the Community.

Efficiency of the Council: The Maastricht process also illustrated the dangers of poorly prepared Councils. There is a need to strengthen the capacity of the Councils to provide for Council led agendas and to review (as mentioned above) the full range of decision making procedures.

Abuse of the Single Market Framework: The SEA has worked effectively to break down market barriers between Member States. However, it has also been abused to extend into areas not necessary and indeed inimical to free and open economies and there is the risk that deregulation at the national level will be replaced by intrusive regulation at the Community level. It needs to be made clear that the overriding principle is that of Art3a of Maastricht in favour of free and open markets.

The Legal Framework: Underlying some of the misgivings about Maastricht is a concern about the tendency of the Court of Justice to extend the scope of community law and the perception that it favours Community jurisdiction and Community bodies in its rulings. An examination of the applicability of constraints on the Court of Justice and the reach of Community law would be timely.

Monetary Union: There remain reservations as to whether the model of the European Central Bank will prove viable in the Community context and whether the automaticity provisions of Maastricht are consistent with an evolutionary approach to a strong single currency area. There is nothing to be lost by a continued examination of ways to strengthen the credibility of the monetary constitution.

Future IGC: The next IGC needs to be much better prepared than Maastricht so that the full range of issues is examined and the options laid out. The potential new Member States both EFTA and Central European need to be associated with this work.

**The European Policy Forum hopes that this draft Protocol will constitute a useful contribution to debate on the next stage of Community development.**

## PROTOCOL

## ON THE APPLICATION OF SUBSIDIARITY IN THE EUROPEAN COMMUNITY

THE HIGH CONTRACTING PARTIES

**DESIRING** to lay down the details of procedures to implement subsidiarity referred to in Article 3b and to reaffirm the principle that the Community should not undertake responsibilities that Member States can exercise

**HAVE AGREED** upon the following provisions, which shall be annexed to the Treaty establishing the European Union:

(i) The Member States and the Commission shall prepare for the Council of Ministers by no later than March 1993 a listing of past Community legislation where responsibility can be passed back to the Member States, including action in respect of the CAP, health and safety and the Environment.

(ii) Any future proposals to the Council by the Commission which involves proposed action at the Community level shall be accompanied by a Commission opinion explaining why in the opinion of the Commission the same objective cannot be achieved by action by the Member States.

(iii) If such opinion is not accepted by Members accounting for 20 per cent of the votes on the Council, the Commission proposal is rejected.

(iv) Recalling Declaration 13 that 'The Conference considers it important to encourage greater involvement of national parliaments in the activities of the European Union' Parliaments of the Member States shall have the opportunity to express an opinion on decisions as to whether action is required at the Community level. In order to implement this agreement, Member States shall convene an expert group representing national parliaments to draw up appropriate procedures and to explore whether in due course a body of national parliamentarians should be involved in the implementation of Art. 3b.

(v) The Court of Justice shall give *avis prealable* to the Council confirming that the Court interprets article 3(b) of the Treaty as placing the onus of proof on the need to demonstrate that the proposed Community action cannot be carried out at the level of the Member States. Should the Court be of different opinion the Council of Ministers shall prepare new wording for Art. 3b to conform with the intent of this protocol.

(vi) The Council shall review the powers of the Commission in Article 155 of the Treaty with a view to clarifying that responsibility for the initiation of legislation is in the hands of the Council. As an interim measure the Commission is instructed to obtain a consensus at the Council of Ministers before presenting fresh initiatives under the Treaties of the Community.

(vii) The European Council reaffirms Articles 3a and 102a that the Community shall conduct its economic policies in accordance 'with the principle of an open market economy with free competition, favouring an efficient allocation of resources'. In order to ensure that the economic provisions of the Treaties of the Community are applied in a manner consistent with this principle, the European Council has decided on the following actions:

(a) it shall initiate an examination by experts of the institutional arrangements in respect of economic regulation and competition policy with a view to ensuring that open and judicially based procedures are followed. The expert group shall consider whether such processes are best secured at the Community level by autonomy for the relevant agencies.

(b) in relation to directives and regulations to be considered under the Single Market, actions taken by Community institutions (including the Commission) under Article 8a and 100a shall be based on the principle of 'mutual recognition' and shall not exceed those steps necessary to achieve the principle of Articles 3a and 102a.

(c) any directives or regulations proposed by the Commission under the Treaties of the Community shall conform to Declaration 18 of the Treaty on European Union and be accompanied by a cost benefit assessment in respect of any initiative with a cost threshold above 100m ECU. The cost benefit assessment shall inter alia quantify the costs to the private sector on an industry by industry basis as well as in respect of the costs for each Member State.

(viii) The Council of Ministers shall initiate a review of means of improving the efficiency of its procedures including the strengthening of its secretariat, strategic planning functions and support for the Presidency.

(ix) The Council shall initiate a review of future decision taking procedures (voting arrangements and similar decisions). As an interim step it agrees that voting arrangements in an enlarged Community should not lead to any increase in the number of Member States that can be over ruled in Community decision processes.

(x) The Council shall initiate a review of applicable jurisdictions and legal concepts in relation to the civil order in the Member States and the Community with a view to limiting the reach of Community law to that necessary for the attainment of the market order and that needed to prevent Community bodies exceeding their powers.

(xi) Reaffirming its commitment to EMU, the Council of Ministers shall lead a review of contractual models of political accountability for the ESCB.

(xii) Further, the European Council affirms, not withstanding protocol 10, that Protocol 11 of the Treaty recognizing the ability of the United Kingdom not to be obliged or committed to move to the third stage of Economic and Monetary Union without a separate decision to do so by its government and Parliament may be adopted by other Member States on notification to the Council of Ministers.

Finally, the High Contracting Parties undertake to review the workings of this Protocol and the findings of the expert groups established by it no later than mid 1994 so that it can be reflected in the next Inter Governmental Conference. New applicants for membership in the Community shall be associated with the expert groups and with the 1994 review.

## APPENDIX 2

### Memorandum submitted by Trevor C. Hartley Professor of Law, London School of Economics

SUBSIDIARITY AND THE MAASTRICHT AGREEMENT

In the Maastricht Agreement the concept of subsidiarity is enshrined in Community law for the first time. What does it mean and how effective will it be?

*Treaty Provisions*

Subsidiarity features in several parts of the Maastricht Agreement. In the Preamble to the Treaty on European Union ("TEU"), it is declared that, in the process of creating an ever closer union among the peoples of Europe, decisions will be taken "as closely as possible to the citizen in accordance with the principle of subsidiarity".[1] It is also stated, in the final paragraph of Article B TEU, that, in achieving the objectives of the Union, the principle of subsidiarity, as defined in Article 3b of the Treaty Establishing the European Community ("EC"), will be respected.

Article 3b EC contains three paragraphs. In the first, it is laid down that the Community "shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein." This appears to be an express formulation of the doctrine of *ultra vires*, but the effect of the phrase "and of the objectives assigned to it therein" is not entirely clear. It probably means that, even when acting within the powers conferred upon it, the Community may use those powers only in order to attain the objectives assigned to it. This is already the law under the doctrine of misuse of powers ("*detournement de pouvoir*") as laid down in Article 173 EEC, which remains as Article 173 EC.[2] Moreover, under Article 235 EEC, which continues as Article 235 EC, the Community can take the measures necessary to attain its objectives, even if there is no express power to do so.[3] Since this must itself be regarded as a power conferred by the Treaty on the Community in terms of the first paragraph of Article 3b, the restrictions laid down in that paragraph are of only limited effect.

It seems, therefore, that the first paragraph of Article 3b does not bring about any very significant change in the law, though it may be regarded as underlining the importance of the Community's keeping within its powers.

The principle of subsidiarity is defined and established by the second paragraph of Article 3b, where it is stated:

> 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 of the scale or effects of the proposed action, be better achieved by the Community.

This is as good a definition as one might ask for, but it should be noted that it applies only in areas which do not fall within the exclusive jurisdiction of the Community. It is not entirely certain which areas should be so regarded, but if one looks at the decisions of the European Court on the treaty-making powers of the Community, it seems that whenever the EEC Treaty gives the Community a power to take binding measures, and the Community uses that power to legislate or to enter into an international agreement in a given area, then that area is thenceforth regarded as falling within the exclusive jurisdiction of the Community.[4] In other words, once the Community has "occupied the field", the Member States are precluded from entering into international agreements in that field. If the European Court were to apply the same principle to Article 3b, any given area would be regarded as falling within the

[1] See also Art. A (second para.) TEU.
[2] Successful annulment actions on this ground are, however, rare: see T C Hartley, *The Foundations of European Community Law* (2nd ed., 1988) ("*Foundations*"), pp. 415–419.
[3] For a discussion of this provision, see *Foundations*, pp. 104–109.
[4] *Foundations*, pp. 156–165.

exclusive competence of the Community once the Community had occupied the field; consequently, subsidiarity would be applicable only when the Community legislated for the first time in a new field.

The third paragraph of Article 3b states: "Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty."

This covers more or less the same ground as the first paragraph.

*Effectiveness*

The effectiveness of these provisions may be looked at from both a political and a legal point of view. From the political point of view, the provisions may make the Commission more restrained in the measures it proposes and the Council may refuse to adopt measures that appear to infringe the principle of subsidiarity. From the legal point of view, the question to be considered is the extent to which the European Court would be prepared to declare measures invalid on the ground of subsidiarity. Clearly, the political effectiveness of subsidiarity depends to a considerable extent on its legal effectiveness: the Commission and the Council will not adopt a measure if it is likely that the Court will declare it invalid.

In order to challenge a Community measure on the basis of Article 3b, an applicant would have to establish the objectives of the measure and show that those objectives could be attained as well (if not better) through action by the Member States. Both of these requirements present difficulties. Most measures adopted by the Community have a number of objectives, some general and some specific. If any one of the objectives could be better attained by Community action, the European Court would probably regard that as sufficient to justify the measure (though it might be prepared to strike down clearly severable parts which did not fulfil the requirements of Article 3b).

If uniformity of application is necessary to attain the objectives of the measure, then, almost by definition, Community action will be needed. There are many areas in which this is the case. Measures concerning the environment are an example. It is normally said that such measures must apply uniformly in all Member States; otherwise, States which applied a higher level of protection would be at a competitive disadvantage compared with those applying a lower level, since manufacturers in the latter would have lower costs. Similar arguments can be made regarding most measures in the social and labour fields.

In practice, it will almost always be possible to formulate the objectives of the measure in different ways. In defending the measure, the Commission and the Council will argue for a formulation which requires Community action. One can even expect that the preamble and wording of the measure will be drafted so as to facilitate this. In such a situation, everything will depend on the European Court. It will decide whether the measure falls within an area in which the Community has exclusive competence; it will formulate the objectives of the measure, and it will decide whether they can be better achieved by Community action. All these questions involve so many imponderables that it will almost always be possible for the Court, if it wishes, to find grounds for upholding the measure. As a result, the effectiveness of subsidiarity will depend, to a considerable extent, on the attitude and policy of the European Court.

Until now, the Court's policy has always been to expand Community power and to restrict that of the Member States. This policy may be illustrated with regard to many issues, not least that of the Court's own jurisdiction.[1] As far as the powers of the Commission and Council are concerned, it finds its most striking illustration in the development by the European Court of the doctrine of implied powers, which permits the Commission to legislate,[2] and the Community to sign treaties,[3] without any authorization in the EEC Treaty. If this policy continues, it is unlikely that any significant measures will be struck down by the Court on the basis of Article 3b.

It is interesting to note that the issues raised under the second paragraph of Article 3b are not greatly dissimilar from those which arise under Article 235 EEC, which empowers the Council to adopt measures if "action by the Community should prove necessary to attain...one of the objectives of the Community". Although measures passed under Article 235 have been successfully challenged on other grounds, no one appears ever to have considered it worth arguing that action by the Community (as distinct from that by the Member States) was not necessary to attain the objective in question.[4]

*Conclusions*

From a legal point of view, the effectiveness of the provisions concerning subsidiarity is likely to be limited unless the European Court changes its attitude. It may do this if the future political climate is such that it feels that the cause of European unity is best served by enforcing subsidiarity in a vigorous

[1] Two cases in which the Court went against the clear words of the EEC Treaty in order to expand its own jurisdiction are the *SPI* case, Cases 267–269/81, [1983] ECR 801 (*Foundations*, pp. 251–254) and *Parti écologiste "Les Verts"* v. *European Parliament*, Case 294/83, [1986] ECR 1339 (*Foundations*, pp. 77–78).
[2] *Germany* v. *Commission*, Cases 281, 283–5, 287/85, [1987] ECR 3203 (*Foundations*), pp. 103–104).
[3] The line of cases establishing this doctrine is discussed in *Foundations*, pp. 156–165.
[4] See *Foundations*, pp. 104–109.

manner. It is impossible to tell whether this will happen. The only sure way of making subsidiarity "bite" is to create a new organ with the power to strike down legislation that infringes it. Perhaps the French *Conseil constitutionnel* might to some extent provide a model. This body has the power to review Acts of the French Parliament (*lois*) before they finally become law in order to determine whether they are constitutional. In the Community, a "subsidiarity committee" could be given the task of deciding whether regulations, directives and decisions of the Council or Commission infringe the principle of subsidiarity. Only Member States would have the right to bring proceedings before it and, in order to prevent uncertainty, there would have to be a rule that proceedings must be brought within a very short time, say 21 days, after the measure is adopted. It might also be desirable to permit it to rule on draft measures before they are finally adopted.

How should the subsidiarity committee be composed? It could be made up of judicial or political figures from the Member States, but a more attractive idea might be for it to be composed of members of the national parliaments: they would be firm in ensuring that the Community did not trespass on the competence of the national legislatures.

It need hardly be said that any idea such as this would be vigorously opposed by the European Court, which may be expected to fight tooth and nail to maintain its judicial monopoly, and by organizations and individuals, including Community institutions, that wish to do no more than pay lip service to subsidiarity. The strength of their opposition may be regarded as a measure of the likely effectiveness of the idea.

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## APPENDIX 3

### Memorandum submitted by Philip Allott, Trinity College, Cambridge

BRITAIN AND THE EUROPEAN COMMUNITY

*An historic error and an historic challenge*

1. The reaction of British governments to the European Community has been the confused product of two basic instincts, both deeply rooted in our historical experience—the instinct of political freedom and the instinct of the balance of power.

2. British governments have been correct in recognising the EC as the latest episode in the unending process of European political organisation and reorganisation. The error they have made is in allowing the balance-of-power instinct to dominate their contribution to solving the problem of the long-term development of the EC. The challenge they now face is to bring to the solving of that problem their long-matured instinct for political freedom.

3. By a tragic failure of political imagination, Her Majesty's Government have identified the EC as simply posing one more challenge in the long story of our tangled relations with continental Europe, rather than as an opportunity for the United Kingdom to play a major part in creating a new constitutional order for Europe.

4. The instinct for political freedom has even been abused to bolster this 'foreign policy' view of the EC, by suggesting that the challenge of the EC to Britain is a collision between 'Brussels' (that is, foreign civil servants) and British 'sovereignty' (that is, British political freedom). This has led to the view that anything that can be done to limit the power of the EC institutions, other than the Council, is a victory gained for so-called British interests.

5. The same misjudgment leads to the view that the EC Council should be reconceived in such a way that it might become essentially intergovernmental in character, a natural successor to the forms of collective hegemony which Europe has known in previous centuries, especially the 19th century, and which, in the League of Nations and the United Nations, have been extended to cover the whole world in the 20th century. British governments have always treated such things with wary concern but, sometimes also, with great manipulative skill.

6. This instinctive 'Foreign Office' approach to the EC has had to meet and come to terms with an EC reality which cannot be forced into such narrow and old-fashioned categories. And it is this tension which led to the misbegetting of the Maastricht treaty. It is now threatening to generate one or more of three outcomes—the aborting of the EC as a lively and developing constitutional system, the formal establishment of a Franco-German hegemony in Europe, the formal marginalising of the UK as an EC member state.

7. Following another hallowed British tradition, the British government of the day would no doubt find some way of presenting any or all of these outcomes as triumphs of British diplomacy.

8. The EC reality which has derailed the instinct-led British governmental response is twofold—the ambitions of France and Germany, and the sheer magnitude and energy of the EC system, its political and economic and legal density.

9. The ambitions of the French and German governments pose a challenge to the United Kingdom which goes far beyond the power-play diplomatic challenges which we have learned to live with over long centuries. The EC is a revolutionary challenge, comparable to the challenge posed by the French Revolution. The British official response to the French Revolution was cynical incomprehension. But, at least, official Britain had the intelligence to see that things would never be the same again in Europe. In particular, it was obvious that the Revolution posed not only a foreign policy challenge, in terms of the so-called stability of Europe, but also a challenge to all social order everywhere. Like Reformation three centuries before, Revolution seemed likely to be socially contagious.

10. Edmund Burke, passionate advocate of evolutionary constitutionalism, diagnosed the weakness of the French Revolution as the product of the illegitimate intrusion of ideas into the otherwise instinctive business of political change. The British government's handling of the long term development of the EC shows the same rejection of the notion that ideas could or should be at the root of the re-ordering of Europe.

11. The French and the Germans, in particular, have other perspectives on European history and very different notions of the social role of ideas. For the British, instinct serves the function of ideas. Action, or inaction, speaks louder than words. For the French, ideas are the way of expressing political reality in order to control it. For the Germans, ideas are the way of imagining political reality, and thereby of identifying the possibilities of political action. For the French, ideas represent a possible rationality of society. For the Germans, ideas represent the possibility of power over society. For the British, ideas are merely behavioural facts, useful or dangerous depending on circumstances.

12. So, for the French and the Germans, the idea of European integration is itself a social force of a revolutionary character—the possibility, or the threat, not merely of a new political order but of a new moral order in Europe. They may disagree profoundly among themselves about the nature and purpose of that revolution, in particular as to the reconciling of national and regional identities with the new European order. But it is in the nature of social ideas that they generate opposing ideas. The French have always disagreed among themselves about their own revolution. (It has been said that French Politics since 1789 has been a permanent debate about the merits of the Revolution. The referendum of 20 September 1992 suggests that French politics will hereafter be a permanent debate about the nature and purpose of the EC.) But the British make a serious mistake when they imagine that continental factiousness about social ideas is the same phenomenon as British disdain for ideas.

13. The French and German governments must now be tempted to seek a new bilateral modus vivendi within an EC relaunched on the basis of the Maastricht treaty. If they were able to work from and beyond Maastricht in this way, and to share their further progress with a number of other continental countries, and if Germany is able, over the next ten years, to achieve in practice the vast potentiality of its economic power, then the prize would be very great—a dynamic and dominating world-power, surrounded by a penumbra of colonies and satellites, including the United Kingdom and various countries of eastern and southern Europe, with the European Central Bank in Frankfurt, the European Foreign Ministry in Paris, and the Supreme Headquarters of European Armed Forces in a specially created 'European territory' in Alsace-Lorraine.

14. In 1799 the British Prime Minister told First Consul Napoleon that the best thing for the peace of Europe 'would be the restoration of that line of princes, which for so many centuries maintained the French nation in prosperity at home and in consideration and respect abroad'. To that impudent advice Napoleon replied icily, in a note drafted by Talleyrand, that the British government was not in a strong position to give such advice, seeing that the British monarch was himself the beneficiary of power usurped through revolution.

15. As Her Majesty's Government seek to remove the revolutionary pith from the EC fruit and to restore something more reminiscent of the old European regime, the French and German governments must be inclined to say that neither British diplomacy nor British economic management in the 20th century justify any preaching from Britain about the proper organisation of Europe.

16. The British government's advice to France in 1799 seemed to be proved sound in the short term. The Bourbons were restored. In the long term it was completely wrong. The internal situation of one west European country after another, including Britain, was transformed, in the course of the 19th century, by means of a sort of permanent revolution. Every social system—political, economic, legal—was reconstructed.

17. In the idea of Maastricht II and in the accession of a motley collection of new EC member States in the future, the British government see the possibility of some sort of counter-revolution. But the

chances are that such a judgment, based on ancient instincts rather than new ideas, will be fundamentally wrong, once again. With whatever social and ideological pain and struggle, continental Europe has begun to create, and will now continue to create, a new constitutional and economic and moral order in Europe, with or without Britain.

18. One lesson of Maastricht is clear. The people of Europe do not accept the political legitimacy of the executive branches of government conspiring together in the meeting-rooms of the EC. National elections are not sufficient to authorise or validate such behaviour.

19. A new constitutional order for twelve nations cannot be cobbled together in secret by civil servants and diplomats, as if they were drafting an arms control treaty. There is no such thing as a 'British interest' for or against so-called federalism, for or against principles of so-called social policy, for or against fixed exchange rates, for or against subsidies for farmers, for or against so-called over-regulation by government.

20. Such things would be a matter of intense debate within the internal political system of each member state. The fact that they now have to be dealt with at the EC level does not mean that they have suddenly become technical matters, or matters to be resolved by diplomatic bargaining. No executive branch of government, least of all the British government, can claim that whatever view of such matters that it chooses in Cabinet to call a 'British interest' has been sufficiently authorised, or will be sufficiently validated, by general elections to the national parliament or by executive-orchestrated simple-majority votes in the national parliament.

21. Maastricht has brought the people of Europe to open rebellion against an EC system which they see as a New Leviathan. That fact gives to the United Kingdom the opportunity for a unique and decisive role in the future development of the EC system.

22. The people's rebellion has been brought to a head by three things.

23. (1) There is a crisis of confidence in the legitimating of government in the democracies of all the advanced industrialised countries. Election campaigns seem to the people to be more and more of a media-led charade. The problems and the issues facing governments have increased intensely in scale and complexity. But elections seem to the people to be less and less a debate about issues, and hence the verdict of the electorate seems less and less to be a significant judgment on past and future policies. As a consequence, some democracies have become de facto oligarchies, controlled by money and influence. Others have become de facto monarchies, run by permanent-official courtiers under the control of autocratic presidents.

24. The crisis of legitimation in the EC thus unfortunately coincides with a much wider crisis of democratic process in general.

25. (2) But the EC crisis of legitimation seems much more important because the more-or-less legitimate government of each member state is only one government among twelve. And the EC is obviously taking into its system all the more important aspects of government.

26. The phoney war against the EC Commission is a diversionary tactic of national executive branches. They should see the moloch in their own eye before they claim to see the leviathan in Brussels. Flattering as it must be to the self-esteem of the EC Commission to suggest otherwise, that body is in no position to realise any megalomaniac ambitions at all. Its independent powers of final decision are extremely limited. Even the nooks and crannies for which it is alleged to have a special fondness—the alcohol-content of lawnmowers and the noise-levels of beer-bottles—are places where it has been sent by the Community treaties or by the Council. The Commission deals with such matters because all modern governments deal with such matters, in thousands of acts of executive-branch legislation every year, and it is obviously sensible to have one set of a thousand such things, rather than 12,000 of them.

27. The central problem of the EC system is not the Commission but the Council. The Council has virtually no political legitimacy. It is accountable to no-one. Its relationship to the Commission is irretrievably obscure. It is more of a cabal than a cabinet, more of a permanent diplomatic conference than a senate. And yet it legislates profusely. It deliberates and decides in splendid isolation.

28. (3) Putting (1) and (2) together, there is formed an almost universal feeling in Europe that there is something fundamentally wrong with the EC constitutional system. Even those most closely involved in working the system seem, to their credit, to have a dull anguish about the impropriety of it all.

29. To suggest that such problems can be dealt with by a new principle of distribution of power between 'Brussels' and the national capitals (so-called 'subsidiarity') is a cruel deception of the people. Subsidiarity, if it means anything in the EC context, is an anti-competitive arrangement among executive branches (EC and national). By using the Maastricht treaty to include it as a legal text in the Community

treaties, they have, at least, removed the objection that the principle is a violation of the EC's own rules of competition (both Articles 85 and 86 EEC). And, a masterpiece of cynicism, that text would give to the European Court of Justice the task of deciding turf-disputes between the executive branches of the EC and the member-states, by interpretations of the word 'necessary'.

30. A true restructuring of the EC system will involve a fundamental redistribution of power at every level from the EC to the village, including the power not only of national central governments but also the growing power of sub-national governments.

31. Such is the special challenge for Britain. Our instinct for political freedom is the product of a national history which, in one respect, is unique in Europe. For 15 centuries, we have lived the problem of social organisation, developing, through much trial and much error, the social systems and social ideals which have spread through the nations of Europe and then to nations far beyond Europe.

32. The historic challenge of Europe for Britain is not a diplomatic challenge but a constitutional challenge. The problem of the long-term development of the EC should be taken out of the hands of Foreign Offices and, with great respect, of Foreign Affairs Committees. Their concern should be with the foreign policy of the EC.

33. The appropriate course of action for Britain would then be—(1) to press for the entry into force of the Maastricht treaty at the earliest possible time, subject to some sort of a declaration to say that organisational aspects of the Danish problem will be solved within 6 months of Maastricht's entry into force. The entry into force of the treaty will be merely a symbolic event. There will be much further political struggle before it enters into force as practical reality. The idea of Maastricht II is self-delusion. France and Germany could well take the opportunity to ensure that its main provisions would finally formalise Britain's permanent marginalisation in Europe;

(2) to press for the bringing forward of the 1996 Conference on EC Institutional Reform or, at least, to press for the most intensive and most extensive possible debate between now and 1996 about the nature and purpose and, hence, the restructuring of the EC. In the process, the British people might even stumble upon some way to reform our own second-rate and under-performing society.

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## APPENDIX 4

### Memorandum submitted by Martin Howe

### "SUBSIDIARITY": HOW TO MAKE IT WORK

#### 1.1 Introduction

The success or failure of any attempt to secure the effective implementation of the principle of subsidiarity in the workings of the European Communities will depend upon political, institutional and legal factors.

In a political climate where there is universal acceptance—on the part of all Member States and amongst the Community institutions—of the principle of subsidiarity, and agreement on its meaning, it might matter less whether or not the principle had the backing of legal norms or institutional mechanisms.

It must be doubted how firmly rooted is the apparent enthusiasm for "subsidiarity" which has recently become widespread within the Community and its institutions. How much of this apparent enthusiasm is lip service provoked by the ratification difficulties faced by the Maastricht Treaty, which will dissipate once the ratification hurdle is surmounted? Still less is there any general acceptance at the political level of what the principle actually means when translated into practice in specific areas of policy.

All this means that a firm legal underpinning of the principle is essential if "subsidiarity" is not to disappoint the hopes which are now being placed upon it. Furthermore, the prerequisites for making the principle legally effective—agreement on a definition of subsidiarity which is capable of being effectively interpreted—are essential for its effectiveness in the political sphere as well. A well constructed legal underpinning should both give protection in its own right against unwelcome Community intrusions into the life of Member States, and also foster the political climate in which such intrusions are increasingly seen as unacceptable.

The legal effectiveness of any attempt to secure the observance by the Community of the principle of subsidiarity will depend upon three factors:

(1) *Definition:* Whether the principle is defined in a way which is (a) satisfactory in concept and (b) of sufficient clarity to permit of predictable interpretation and application.

(2) The strength of the *juridical basis* and the width of the *field of application* of any provisions governing subsidiarity.

(3) Whether institutional mechanisms exist which will secure the effective observance and enforcement of the principle of subsidiarity; or whether, on the contrary, institutional pressures will lead to it being largely sidelined in practice.

1.2 DEFINING THE PRINCIPLE OF SUBSIDIARITY

As soon as one starts to look closely at possible definitions of the principle of "subsidiarity", it becomes clear that the word is used by different people to describe a range of widely different concepts. In its papal historical origins[1], the word conveys that a central authority should perform only those tasks which cannot be performed effectively at a more immediate or local level. Its meaning according to its historical origins is perhaps less important than present day political expectations of what "subsidiarity" is intended to achieve.

Mr Douglas Hurd has described it as the principle of "minimum interference" by the Community institutions in the affairs of member states. It is probably this sense which most closely reflects political expectations in the United Kingdom of what the principle is seeking to achieve.

However, the definition most established in Community legislation is what I shall refer to as the "better attained" test. This asks whether Community-defined objectives are better attained by action at Community or national level. This test is already present in the Rome Treaty in Article 130r(4)[2], which reads:

> "The Community shall take action relating to the environment to the extent to which the objectives referred to in paragraph 1 can be attained better at Community level than at the level of the individual Member States."

New Article 3b of the Rome Treaty, which will be inserted by the Treaty of Maastricht, is very similar to Article 130r(4)—I discuss the wording of Article 3b below in more detail.

The problem with the "better attained" test is that it merely asks whether it is the Community or Member States who will be better at attaining objectives laid down by the Community. In no way does it question the justifiability of the objectives themselves. It risks reserving to Member States merely the role of implementors of policies laid down by the Community.

The "better attained" test does not seek to require that attainment or non-attainment of the objectives within one Member State should in any way affect the interests of other Member States. It does not ask whether the objectives concerned are worth pursuing at all having regard to the interference which they may cause in the internal affairs of Member States; and the test does not ask whether or not the subject matter is such that it might be legitimate for Member States to set objectives which might differ from those of the Community.

An example will illustrate this point. One objective of the Rome Treaty (as amended by Maastricht) is to secure "a high level of social protection[3]". A measure which, in aid of this objective, required Member States to provide certain specified social benefits to their citizens would not be challengeable under the "better attained" test. A Member State which disagreed with the necessity of this level of social protection would, by definition, be frustrating the "better attainment" of the objective. Accordingly, to achieve the objective, a recalcitrant Member State must be compelled by action at Community level.

The fundamental problem with the "better attained" test arises where the Treaty objective or the objective of the proposed measure is itself internal to the Member States. A test which merely questions what is the right mode of achieving the Community-defined objective, without testing the objective itself in some way, wholly fails to confront this problem.

The basis for a more satisfactory definition of subsidiarity can be found in a publication of the Commission itself[4]:

> "The autonomy of decision making at whatever level of personal and collective life should be limited only to the extent dictated by the common interest. This principle has a long tradition in the Community: it is called subsidiarity."

[1] The papal encyclical *Quadragesimo Anno* of 1931.
[2] Added to the Treaty of Rome by the Single European Act.
[3] Article 2 of the Rome Treaty, as amended by Maastricht
[4] ECE Commission's Programme for 1989.

The introduction of the notion of common interest opens up a way of questioning not merely the mode of attainment of objectives, but the objectives themselves. It is important that common interest is interpreted not merely to mean Treaty objectives, but real interests of other member states which would be harmed if the action is not taken.

I would advance a tentative general definition of subsidiarity as follows:

> "The Community shall respect the principle that there should be minimum interference with the autonomy of each Member State and of its citizens. Limitation of or interference with such autonomy is only justified if and to the extent that it is clearly necessary to protect a substantial Community interest, in that there would otherwise be an adverse effect upon the material interests of other Member States."

This definition embodies both the concept of "minimum interference" and also the need to justify any Community measure by reference to impact on other Member States. It is far closer to the "everyday" understanding of the meaning of "subsidiarity" than the "better attained" test.

Some might think that the above discussion of the definition of subsidiarity is merely lawyers' logic chopping and over-concern with fine print. Nothing could be further from the case. The "better attained" test, and the definition which I propose above, embody materially different concepts. If adopted as a basis for the implementation of subsidiarity in the European Communities, they will give rise to markedly different practical results.

The "better attained" test is in fact a very limited definition of subsidiarity which falls a long way short of what subsidiarity is understood to mean in current political expectations. Its adoption as the basis for implementation of "subsidiarity" in the Community will seriously disappoint those expectations. The "better attained" definition contains a very restricted form of subsidiarity: subsidiarity only in the mode of achievement of a programme of objectives laid down by the Community. As such, it reserves for Member States the role of agents for the implementation of Community policies.

### 1.3 Workability in interpreting the definition

I have explained why I consider the "better attained" test to be conceptually unsound, in that it is very limited and does not reflect the "popular" meaning of the word "subsidiarity". I have proposed what I believe to be a better definition (which I have no doubt is capable of improvement).

A further consideration is the extent to which a definition lends itself to legal interpretation: whether by a Court or by other institutions.

In order to decide whether or not a measure contravenes a "better attained" test such as that in Article 3b, one is required to ask whether or not the measure's objectives can be sufficiently attained by member states or better attained by the Community. This is essentially a practical and political judgement as to the relative effectiveness in particular circumstances of two alternative political means of securing an objective. It is not a legal question at all readily capable of determination by a court. It is the type of question which courts will shy away from answering directly, since judges in general do not feel that they are properly equipped to substitute their own opinion on a question of political fact assessment and value judgement in place of that of a political body such as the Commission or the Council of Ministers[1].

Were an item of Community legislation to be challenged before the ECJ on the grounds of alleged non-compliance with a "better attained" test such as that in Article 3b, the Court would almost certainly confine itself merely to asking whether or not the legislating bodies had addressed the question of whether action at Community level would be more effective, rather than concerning itself with the merits of the answer to that question[2]. It would of course become routine to insert recitals into every regulation and directive stating that "Whereas the objectives of this measure cannot be sufficiently achieved by the Member States and can be better achieved by the Community..."

It would be extremely difficult to mount a successful challenge to a Community measure for contravention of a "better attained" subsidiarity test. There would, I consider, be more prospect of mounting such a challenge under a "common interest" definition of the principle, since the presence or absence of an identifiable element of harm to other Member States would at least be a more concrete question for a Court to focus on than trying to compare the relative effectiveness of two courses of action.

[1] Lord Mackenzie-Stuart, former President of the European Court of Justice, forcefully expressed this view in his letter to The Times of 15 June 1992: "the interpretation of subsidiarity is a political issue and not one for the Court of Justice...Should Maastricht go ahead, the Court's task is an unenviable one.

[2] This indeed would be the approach of an English court when faced with similar problems when they arise under English administrative law.

Even so, a general test, no matter how carefully thought out and conceptually sound, will not necessarily be predictable in its application to specific policy fields.

This means that it might be possible to achieve agreement in the Community to a general definition of the principle of subsidiarity, but such agreement could mask fundamental disagreements about the way in which the principle ought to be interpreted in its application to different specific areas of policy.

1.4 SUBSIDIARITY IN SPECIFIC AREAS OF POLICY

Agreement on guidelines for the application of the principle to specific areas of policy would therefore be the most vital element in securing the effective implementation of the principle in the Community. Without such agreement, the implementation of the principle could well prove disappointing both at the legal and at the political level.

*Competition law and State aids*: This field is of particular interest because of an analysis of the potential application of subsidiarity to this field by the Commissioner responsible, Sir Leon Brittan[1]. As an example of the principle of subsidiarity in operation, Sir Leon points to the division, based principally on turnover limits, between Community and national control of mergers. Mergers which have significant effects at Community level should be analysed and regulated at that level; mergers which only have effects at national level should be left to be regulated at that level.

Sir Leon proposes extending this principle to the control of potentially anti-competitive agreements and cartels by, in effect, delegating responsibility for the enforcement of Community competition law to national authorities and courts in cases where multi-country or Community wide investigations and actions are not necessary. Sir Leon also refers to his proposal to exempt state aids amounting to less than 50,000 ECU over a 3 year period from Commission scrutiny, as an example of subsidiarity in action.

One can have certain reservations about aspects of Sir Leon's case. The fact that the Commission is actively pressing for a radical reduction of the merger turnover threshold, so bringing many more mergers within its own control, suggests that the Commission sees the need for its own intervention with different eyes from more detached observers. The State aids threshold is miniscule and would have to be substantially raised to be taken seriously as an implementation of the principle of subsidiarity. The return of competition law to national authorities is proposed to be delegation merely of the enforcement of Community law and policy, rather than the restoration to Member states of fuller freedom of action in substantive competition law and policy.

These reservations point to the necessity of the Commission not being judge in its own cause when it comes to questions of subsidiarity. But despite these reservations, Sir Leon has identified a principle according to which a dividing line can be worked out between Community and national spheres of action in the competition field.

*Social policy*: This is probably the most difficult area to achieve agreement within the Community on how subsidiarity should be applied; or at least to achieve an agreement which reflects Britain's views and interests.

The problem is that, at least on one view, the Treaty objectives in the social policy field themselves offend against the principle of subsidiarity. Article 119 of the Rome Treaty provides for equal pay between the sexes, and has been held to be directly applicable[2]. Article 118a provides for the adoption of measures (by qualified majority voting) in aid of the health and safety of workers. Art 118a is the Treaty provision which is being used to press the United Kingdom to adopt the 48-hour working week.

Health and safety standards, or equal pay at work, within one Member State do not directly affect other Member States. At first sight one would therefore think that measures in the social field would be prime candidates for falling foul of the application of the principle of subsidiarity. This reckons without the view which found expression in the judgment of the European Court in the Defrenne case on equal pay[3]:

> "The aim of Article 119 is to avoid a situation in which undertakings established in States which have actually implemented the principle of equal pay suffer a competitive disadvantage in intra-Community competition as compared with undertakings established in States which have not yet eliminated discrimination against women workers as regards pay."

The same line of reasoning could, of course, be used to justify all forms of Community social policy which impose costs on businesses. The problem is that once this argument is accepted, it is very difficult to see any dividing line by which the principle of subsidiarity can be applied in the social sphere.

[1] Lecture to the London Common Law and Commercial Bar Association, "Subsidiarity in Competition Law", 2 July 1992.
[2] Defrenne v. *SABENA* [1976] ECR 455.
[3] [1976] ECR 455 at 471, para 9.

It is very important that the United Kingdom wins agreement that this argument—the "uniform handicap" argument—is not of itself a sufficient justification under the principle of subsidiarity for the imposition of internal measures within member states. If such agreement is not won, it is very likely that the principle of subsidiarity will in practice prove of little use as a means of checking intrusive social policy measures.

*Environment*: In this field, a form of the subsidiarity principle is already present in the Treaty, in Article 130r(4) quoted above. This is a "better attained" test, upon whose limitations I have already commented above. Those shortcomings are graphically illustrated by the Community's failure in the environmental field to keep out of environmental matters which are purely internal to Member States.

In the field of the environment it is possible in principle to construct a dividing line between matters which are internal to Member States, and those matters which may impinge upon other Member States. Atmospheric and sea pollution for example are matters which may impinge on other Member States, and therefore for which there is a case for regulation at Community level. On the other hand, the line of motorways is an internal matter which should not be the concern of the Community.

It is ironic that drinking water standards, which have recently caused so much trouble to the United Kingdom, appear to be essentially an internal matter. This is a matter which is ripe for return to national standards of regulation if the principle of subsidiarity is genuinely applied. Drinking water is not (except in bottled form to which different standards apply) generally traded across national frontiers in the Community.

*Single Market*: It may be thought at first that there is little scope for the application of the principle of subsidiarity in the field of "single market" measures, since the essence of such measures is to create a uniform set of rules for goods and services which circulate within the single market. Furthermore, there is reluctance from the United Kingdom's point of view to weaken single market measures, since the single market is viewed as one of the most important benefits of membership of the Community.

Nonetheless, there are aspects of single market measures which could benefit from the application of the principle of subsidiarity.

An absolutist approach to single market measures requires that in order to achieve a uniform market across the Community, all goods (or services) which satisfy a set of standards laid down by the Community should be allowed to circulate freely in all Member states; and all goods (or services) which do not satisfy the Community standards must be banned in all Member States. This leads to the extremely difficult task of devising a uniform set of standards, and has a tendency to lead to the most restrictive forms of national standards being adopted as the Community standards.

This leads, for example to attempts to ban certain French cheeses from sale in France because their methods of production do not conform to hygiene standards expected in Germany and elsewhere.

A subsidiarist approach to single market measures would lead to far more emphasis being placed on the function of Community wide standards as acting as a passport to free circulation, rather than those standards being used restrictively in all cases to ban local production and sale of all goods which fail to reach those standards. A purist would argue against this approach by saying that local production and sale of lower standard goods might compete unfairly with higher standard goods from elsewhere in the Community.

It is questionable how real is this argument. Such "uniform handicap" arguments, if accepted, can be used to justify the imposition of all sorts of costs and restrictions—including employee social benefits and Social Charter measures—upon the grounds that if businesses in some Member States carry a cost, then all must be forced to do so.

More emphasis on liberalising measures in the single market area—making achievement of a set of Community standards a passport to free circulation—rather than on restrictive measures, would be consistent with the United Kingdom's general arguments against the imposition of "social" measures on grounds of alleged distortion of competition. Furthermore, it would reduce the real resentment generated by European Community measures when, for example, well loved national foodstuffs or other goods are suppressed for failure to meet a set of uniform Euro-standards.

### 1.5 Juridical basis and width of application of subsidiarity provisions

The "juridical basis" is the legal strength or force of a measure; at one end of the scale a measure can be embodied at Treaty level, so governing the legal validity of subordinate Community measures such as regulations and directives. At the opposite end of the scale of legal strength, a provision could be embodied in a "gentlemen's agreement" between governments with no legal force in Community law or international law.

There are the following choices for the juridical basis of a provision implementing the principle of subsidiarity:

*Treaty text*: It is most satisfactory from a legal point of view to embed the principle in the Treaty text. Such a principle in the Treaty text should not only regulate certain subordinate measures taken under the Treaty, but should also explictly apply as a guide to the interpretation of the Treaty itself and so qualify or limit Treaty objectives which might otherwise be inconsistent with the principle.

*Protocol*: Legally a protocol is as much part of a Treaty as the text itself. It is attached to the Treaty at signature and has to go through the same ratification procedure. Attaching a protocol to the Treaty of Maastricht would be only cosmetically different from amending the text: the political attractions of employing a protocol are in the appearance it gives of not "renegotiating" the text. However, it is inherently unsatisfactory trying to improve a deficient provision in the text by leaving the deficient provision unamended and seeking to rectify it in a protocol. Given the fundamentally flawed nature of the "better attained" definition of subsidiarity in existing clause 3b, it would be very difficult to achieve satisfactory improvement with a protocol, especially if the protocol sought to be merely "explanatory".

*Declaration*: A declaration is a statement made by Member States about a Treaty. It expresses their view as to how it should be interpreted or applied. The political attraction of using a declaration is that it need not go through the ratification procedures in the same way as the Treaty itself or a protocol. However, in that very fact lies its legal weakness. A declaration does not have the legal force of a Treaty provision and so would only be of persuasive force when the Treaty came to be interpreted by the ECJ. A declaration would be an even less satisfactory method of seeking to strengthen a flawed text than a protocol.

*Subordinate measure*: An attempt could be made to embody the principle of subsidiarity in a subordinate measure under the Treaties such as a Regulation of the Council of Ministers. However, the Council could not by such a measure impose a binding fetter on its exercise of the powers conferred on it by the Treaty, so such a measure could be overridden if felt politically convenient at the time. It would however be possible to create a Treaty provision which empowers the Council or another body to create detailed guidelines on the application of the principle of subsidiarity and gives force to those guidelines.

*Inter-governmental agreement*: This would essentially be little different in its legal effects from a Declaration, unless given force in Community law as an addition to or amendment of the Community Treaties.

### 1.6 Institutional mechanisms

In a previous publication[1] I have set out my reasons for believing that both the Commission and the European Court have exhibited inbuilt tendencies towards over-centralisation. It must be questioned whether the principle of subsidiarity, if left to be applied and interpreted by these bodies, will in fact be accorded as great a respect as is hoped for it.

The Council of Ministers cannot itself act as a satisfactory brake on measures which offend against subsidiarity. By definition, the measures which are in question will not be voted through the Council unless all or a qualified majority of Member States are in favour of them. The majority who are politically in favour of the measures are unlikely to agree that they offend against the principle of subsidiarity.

For the same reason, a committee of representatives of Member governments would be unlikely to be an effective check against measures which contravene the principle of subsidiarity, since their votes would merely reflect those of their governments on the Council.

This leads to the requirement for a body of persons independent of the Commission, the Council or Member governments, specifically charged with the task of reviewing proposed Community legislation in order to safeguard the national autonomy of Member States. One possibility would be a panel of persons nominated by the national legislatures of Member States. This body should have a prescribed part in the Community legislative process and at very least powers to force delay and reconsideration of measures, and preferably more substantial blocking powers. It could either review all legislation automatically, or intervene on the complaint or instigation of a Member State or other interested parties.

### 1.7 How effective is "subsidiarity" under the Maastricht Treaty?

Although the text of the Maastricht Treaty refers to the principle of subsidiarity in a number of places, those lead back to "subsidiarity" as defined in new proposed Article 3b of the Rome Treaty:

> "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 pro-

[1] "Europe and the Constitution after Maastricht", published by the Society of Conservative Lawyers, June 1992.

posed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.

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

This new Article embodies the "better attained" test of subsidiarity, and so suffers from the serious defects of concept and of enforceability of that form of test which I have outlined above.

It is worth looking in turn at how far it fulfills the other requirements for legal effectiveness which I have postulated in Section 1.1 above.

*Field of application*: The Article on the face of it does not apply to areas of policy which are within "the exclusive competence of the Community". The precise width of this exclusion is not clear, and will not be easy to interpret. The existence of this exclusion means that the Community will be entitled to take action in circumstances where national action would be entirely satisfactory, if the area of policy concerned is one of "exclusive competence".

The other (less obvious but very significant) gap in the field of application of this Article is that it only applies to subordinate legislation and actions (regulations, directives and decisions) and does not regulate the interpretation and application of the provisions of the Treaty themselves. Thus, Treaty provisions which are held by the European Court of Justice to be "directly applicable" as part of the laws of Member States are not subject to this Article[1]. It would also appear that the large body of existing legislation (regulations, directives) already passed under the Rome Treaty before the commencement date of the Maastricht Treaty will not be subject to Article 3b either: it will only apply to new "actions" taken by the Community after Maastricht comes into force.

*Institutional mechanisms*: The Maastricht Treaty lacks institutional mechanisms by which the principle of subsidiarity can be given effect. Legal challenge before the ECJ is likely to be a virtually ineffective mechanism for the reasons given above. There is no institutional counterweight to limit the natural centralising tendencies of the Commission, or which would bring an independent view to bear upon which of the Commission's activities are superfluous in the light of subsidiarity.

*Conclusion*: The proposed Article 3b is subject to important limitations in its field of application, is unsatisfactory in its definition of the concept of subsidiarity, is incapable of being predictably interpreted, and lacks an institutional mechanism to secure its effective observance. These problems render it, considered as a legal mechanism, virtually ineffective as a limitation on future overcentralising measures of the Community institutions.

Considered at the political level, the defects in the definition of subsidiarity in Article 3b seriously detract from its usefulness even as the basis of political arguments against unwelcome measures.

1.8 SUMMARY OF CONCLUSIONS:

1. The principle of subsidiarity can be made to work in the European Communities. The ingredients needed to make it work are:

(1) A sound definition of the basic principle of subsidiarity.

(2) Guidelines which lay down the basic approach to applying the principle of subsidiarity in different specific policy areas.

(3) A firm juridical basis for the principle at Treaty level.

(4) Institutional mechanisms designed to secure the effective observance of the principle.

2. Proposed Article 3b of the Treaty of Rome, to be inserted by the Treaty of Maastricht, is to be welcomed in so far as it represents a formal acknowledgement that the principle of subsidiarity (in some form) should play its part in the workings of the European Community.

3. However, proposed Article 3b is subject to important limitations in its field of application, is unsatisfactory in its definition of the concept of subsidiarity, is incapable of being predictably interpreted, and lacks an institutional mechanism to secure its effective observance. Unless it is improved, these problems will render it, considered as a legal mechanism, virtually ineffective as a limitation on future over-centralising measures of the Community institutions.

4. Proposed Article 3b contains a "better attained" definition of subsidiarity, which asks whether Community or national action will be better at attaining Community-defined objectives. This is in fact a

[1] Important examples of "directly applicable" Treaty provisions are Articles 30 to 36 (free movement of goods), Article 119 (equal pay for men and women), and Article 8a (the single market to comprise "an area without internal frontiers").

very limited definition of subsidiarity which falls a long way short of what subsidiarity is understood to mean according to current political expectations. The adoption of the "better attained" definition as the basis for the implementation of "subsidiarity" in the Community is likely to disappoint those expectations.

5. A sound definition of the principle of subsidiarity would require that Community measures be justified by the need to protect an identifiable common interest, meaning a material effect on the interests of other Member States.

6. Agreement needs to be reached on at least the basic approach of how to apply the principle of subsidiarity in different policy fields. There are fundamental questions of approach to be resolved, particularly in the field of social policy, which are unlikely to be answered by a general definition.

7. Effective implementation of the principle of subsidiarity requires revision of the basic definition in Article 3b, otherwise any structure of protocols or declarations designed to implement it will rest on unsound foundations.

8. The principle of subsidiarity should be embodied at Treaty level, and should govern the interpretation and application of the Community Treaties themselves, not merely subordinate instruments such as Regulations and Directives.

9. The principle of subsidiarity requires institutional support if it is to be made effective. The Commission in particular cannot be left to be judge in its own cause of which of its activities and powers should be restricted or ended because they conflict with the principle.

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## ANNEX

### SUGGESTED REVISED ARTICLE 3b

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

2. The Community shall respect the principle that there should be minimum interference with the autonomy of each Member State and of its citizens. Limitation of or interference with such autonomy is only justified if and to the extent that it is clearly necessary in order to protect a substantial Community interest, in that there would otherwise be an adverse effect upon the material interests of other Member States.

3. The provisions of this Treaty, including provisions which may be directly applicable, shall be construed and have effect subject to this principle. Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty, and those objectives shall be pursued only to the extent that such pursuit is compatible with the principle in paragraph 2 of this Article.

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## APPENDIX 5

**Memorandum submitted by John Usher**
**Professor of European Law, University of Exeter**

i) INTRODUCTION

The purpose of the present paper is to consider the legal situation with regard to the provisions of the Maastricht Treaty following the referenda in Denmark and France. Despite the political upheavals however, it should be said at the outset that questions such as the transfer of powers (or sovereignty) to the Community, the direct application and direct effect of Community law, and the correlative theory of the primacy of such provisions of Community law when they conflict with provisions of national law, were all established aspects of Community law when we joined in 1973, and are not new problems relating to Maastricht. Indeed, certain aspects of the Maastricht Treaty represent an attempt to progress by intergovernmental co-operation away from the compulsory jurisdiction of the European Court.

Turning to the consequences of what has happened so far, the basics may be simply described:

(a) The existing Community Treaties may not be amended unless all existing Member States agree to and ratify such amendments.

(b) There is nothing to prevent eleven (or fewer) Member States entering into a Treaty between themselves on matters outside or additional to the existing Treaties—indeed the Maastricht

Treaty itself as is well known, envisages less than twelve Member States acting together in the "new" areas of Monetary Union and Social Policy. In the former case, the situation arises not just from the special treatment accorded to the UK and Denmark, but also from the fact that it was appreciated that not all Member States would meet the rather strict criteria for economic convergence laid down as the precondition for participation in the monetary union. The example could also be taken, however, of the Schengen Agreement on the elimination of border controls, to which the United Kingdom is not a party.

This agreement was negotiated in June 1985 (that is before the adoption of the Single European Act) between Germany, France, and the Benelux countries, and has been acceded to by Italy (1990), and Spain and Portugal (1991). Without entering into the substantive details of the agreement or of the 1990 convention for its application, it may be noted that it sets out rules for crossing the signatory States' frontiers not just for their own citizens but also for citizens of all EC Member States, that it indicates matters on which the signatory States are to take common initiatives at the Community level, and that it requires the development of common policies by its participants in areas such as visas for citizens of non-Member States of the EC—a matter which would be brought expressly into Community competence by the Maastricht Treaty.

It may be wondered how far this is an indicator of things to come, though for the Maastricht Treaty itself to operate in this way would require redrafting (particularly of the institutional provisions) and hence possible renegotiation of the compromises so painfully reached in December.

(c) it may be submitted that much of what is in the Maastricht Treaty may lawfully be achieved without amending the existing Treaties, and the rest of this paper will be devoted to a consideration of this possibility in the context of certain major aspects of the Maastricht Treaty.

ii) European Union

The Maastricht Treaty makes a clear distinction between the European Union, where its provisions, on matters such as Foreign and Security Policy and on Justice and Home Affairs, are essentially non-justiciable, and the European Community subject to the compulsory jurisdiction of the European Court of Justice—although it must be said that this concept is somewhat blurred in the context of citizenship of the Union, which is inserted into the Community Treaty, and to that extent must be intended to give rise to legally enforceable rights. To the extent that the Union provisions are non-justiciable, the lawyer might well wonder what useful purpose was served by inserting them into a Treaty. Indeed, the political cooperation provisions in the Single European Act, which are similarly non-justiciable, appear to a large extent to have been a consolidation of what had already been achieved by political agreement. It may be suggested that developments in this area may continue to be made by political agreement.

Perhaps more contentiously, it may be submitted that, since the European Court held in its December 1991 Opinion 1/91 on the European Economic Area Agreement that the Community already had the objective of achieving European Union, it might even be legitimate to legislate in this area using the general power of art .235 of the EEC Treaty, which allows the Council, in the absence of more specific powers, to enact legislation which is necessary to achieve the objectives of the Community. In other words, a consequence of failure to ratify Maastricht might be that areas which under that Treaty were intended to be a matter of intergovernmental co-operation might become subject, over the years, to binding Community rules.

iii) Economic and Monetary Union

It is sometimes forgotten that the EEC Treaty has from the outset required, under arts.103 and 105, coordination of economic policy and exchange rate policy, and in its December 1991 Opinion 1/91 the European Court also suggested that the attainment of Economic and Monetary Union was already a Community objective; it should therefore hardly be a surprise that the ECU has been defined in a series of Regulations enacted under art. 235. Furthermore, legislation expressly intended to give effect to the first stage of Economic and Monetary Union has already been enacted.

However, the European Monetary System itself shows what can (and cannot) be achieved in the grey area between political agreement and "soft" law: its ground rules adopted in December 1978 are contained in a "Resolution" (an act nowhere defined in the Treaties) of the "European Council" (a body whose existence was first legally recognised in the Single European Act and which is treated in the Maastricht Treaty as an organ of the Union rather than of the Community). Whatever its legal status, considerable amounts of money have recently been spent endeavouring to maintain it. Recent events also however show that the extent to which Member States feel obliged to support each others currencies may be a matter of political and economic judgment, in the absence of binding legal rules.

Formal secondary legislation has been used to create a Monetary Committee, a Committee of Governors of Central Banks, and the European Monetary Co-operation Fund. It may be doubted as a matter of law (as opposed to politics) whether it is impossible to create a European Central Bank (or sys-

tem of central banks) by the same method, although the existing case-law on delegation of powers suggests that it would not be possible to grant such a body power to issue binding Community legislation of the types defined in the Treaty. Similarly, if secondary legislation has already created the ECU, can it not further define its role as a currency? Such legal theorising should however be tempered by the need for economic convergence, as was realised by those who drafted the Maastricht Treaty.

iv) Social Policy

The Maastricht Protocol on Social Policy does, of course, purport to allow eleven Member States to act together through the Community institutions. However, the present author is one of those who has doubts as to how far it would be used. It refers to continuing "along the path laid down in the 1989 Social Charter" (also signed by eleven Member States). That Charter declared expressly that its implementation "must not entail an extension of the Community's powers as defined by the Treaties", and listed in detail the existing provisions which could be used. Legislation has in fact been issued under general Treaty powers which expressly states that it is intended to implement the Social Charter, such as Directive 91/533 on contracts of employment, which, since it was made under art.100 which requires unanimity in the Council, must at the least not have been opposed by the United Kingdom minister. This pattern has been repeated in Council Directive 92/56 on collective redundancies. The present author remains of the opinion that most of the Social Policy Protocol may be achieved under existing Treaty provisions.

v) Other Powers

The present writer has gone on record elsewhere with the view that most of the "new" powers in the Single European Act represented Treaty recognition of developments which had already taken place under general Treaty powers, in particular arts.100 and 235, in areas such as environmental law. The same approach could be taken with regard to the Maastricht Treaty: when it was signed there was already Community legislation on, for example, consumer protection, tourism, energy policy, European networks, health protection and (to a limited extent) education.

Whilst many current EEC provisions may only be used to the extent "necessary" for the achievement of the Community's objectives, failure to ratify the Maastricht Treaty will mean that there will be no express reference to subsidiarity. To some extent the political objective of requiring the Community legislative institutions to bear that consideration in mind would appear already to be being observed; for example, Council Decision 92/421 on tourism policy expressly refers in its recitals to the "need to comply with the subsidiarity principle".

On the other hand its legal effects may be doubted. In this context it is worth recalling the long-established case law on the the judicial review of a Community institution's discretion. Where "the evaluation of a complex economic situation" is involved, the Court must confine itself to examining whether the exercise of the discretion contains a manifest error, or constitutes a misuse of power, or whether the institution did not "clearly" exceed the bounds of its discretion[1]. Since this case-law was developed in the context of the exercise of delegated powers by the Commission, it would seem highly unlikely that the Court would wish to exercise a greater degree of control over the exercise of original legislative power by the Council of Ministers.

vi) Institutional Reforms

What cannot be done without a treaty amendment, however, is to change the legislative procedure under which Community measures are adopted. Nevertheless, while it is in the institutional and procedural area that the failure to ratify Maastricht would be most noticeable, certain provisions do no more than to consolidate the case-law of the European Court, notably the revised art. 173 of the EEC Treaty with regard to the status of the European Parliament as applicant and defendant in actions for annulment, and the reference to respect for fundamental rights "as general principles of Community law" in art.F(2) of the "Common Provisions". On the other hand, it is difficult to see how reforms of legislative procedure, in particular the co-decision mechanism between the Parliament and the Council, can be introduced into existing areas of Community competence without a Treaty amendment agreed by all the Member States; indeed, while it may be possible for eleven Member states to operate new procedures agreed by them in new areas of competence which apply only to them, it may be submitted that a serious problem even with the Maastricht Protocol on Social Policy (if it comes into force) is the overlap of certain of its substantive provisions with unrepealed provisions of the present version of the EEC Treaty.

Finally, it may be observed that Protocols on such matters as the Irish constitution and the interpretation of the European Court's judgment in the Barber case will disappear if the Maastricht text does not enter into force. With regard to the latter Protocol, it may be wondered what effect it will have even if the Maastricht text does eventually enter into force if the European Court delivers another judgment taking the matter further in the intervening period.

[1] Case 55/75 Balkan v. HZA *Berlin-Packhof* [1976] ECR 19 at p. 30.

vii) Conclusions

The aim of this paper has been to discuss what is legally possible rather than what may be politically realistic, but its main theme is to suggest that the Community has been and is likely to remain a dynamic body which could continue down many of the paths indicated at Maastricht even without the benefit of a new Treaty, provided there is a common will so to do.

In this context it is perhaps worth remembering that the concept of an Economic Community arose from the ashes of the failure to ratify a Defence Community Treaty, that the French "empty chair" policy in 1965–6 led to the introduction of the Common Customs Tariff eighteen months early in July 1968, and that, for example, the Community's move into environmental law and consumer protection under general Treaty powers occurred in the 1970's when its legislative mechanisms are commonly supposed to have stultified. On the other hand what clearly cannot be done without a Treaty is to try to reduce the democratic deficit by increasing the role of the European Parliament. The present writer's personal wish remains, however, that the Maastricht Treaty will eventually enter into force.

## APPENDIX 6

### Memorandum submitted by Jeremy Lever Q.C.

1. In this Memorandum I set out my view, as a lawyer, on the principle of subsidiarity, as contained in Article 3b of the Treaty establishing the European Economic Community as amended at Maastricht. I also deal with the application of the principle of subsidiarity in the field of competition law, an area of law with which I am familiar as a practitioner. Lastly I draw attention to the potential significance of the establishment of the office of a Community Ombudsman.

The Text of Article 3b

2. Article 3b of the Treaty, as amended, provides that:

> 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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> 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 efforts of the proposed action, be better achieved by the Community.
>
> Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.

The Objectives and Activities of the Community

3. In order to ascertain the meaning and scope of Article 3b of the amended Treaty, it is first necessary to examine generally the scope of the amended Treaty and the objectives set out in it.

4. The amended Treaty will be called the Treaty establishing the European Community. It is of more than semantic significance that the amended Treaty omits the word "Economic" from the title of what is now the European Economic Community (which, together with the European Coal and Steel Community and the European Atomic Energy Community, comprise the "European Communities"): the objectives of the Community will extend well outside the economic sphere. Thus Article 2 of the amended Treaty provides (emphasis added) that:

> The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing the common policies or activities referred to in Articles 3 and 3a, to promote throughout the Community a harmonious and balanced development of economic activities, sustainable and non-inflationary growth *respecting the environment*, a high degree of convergence of economic performance, a high level of employment and of *social protection*, the raising of the standard of living and *quality of life*, and economic and *social cohesion and solidarity* among Member-States.

5. Article 3 of the amended Treaty includes the following new activities of the European Community:

— measures concerning the entry into, and movement of persons in, the internal market (Article 3(d));

— the strengthening of the competitiveness of Community industry (Article 3(1));

— encouragement of the establishment and development of trans-European networks (Article 3(n));

— a contribution to the attainment of a high level of health protection (Article 3(o));

— a contribution to education and training of quality and to the flowering of the cultures of the Member States (Article 3(p));

— a contribution to the strengthening of consumer protection (Article 3(s)—although the Community has been pursuing policies in the field of consumer protection already—and

— measures in the sphere of energy, civil protection and tourism (Article 3(t)).

6. Article 3(h) includes a provision that is already elsewhere in the Treaty, which provides for the approximation of the laws of Member States to the extent required for the proper functioning of the common market. The ambit of this provision will become much wider when the Community's objectives are widened as provided for by Article 2 of the amended Treaty and the activities of the Community are increased as provided for by in Article 3.

7. Finally, in the context of the Community's powers, one should not overlook Article 235 of the Treaty which, both in its pre-existing form and as amended, provides that:

> If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures.

8. Important Community Directives have been adopted on the basis of Article 235, notably in the field of the environment. Examples include Council Directive 76/160 concerning the quality of bathing water (OJ 1976 L31/1) and Council Directive 80/778 relating to the quality of water intended for human consumption (OJ 1980 L299/11). Article 235 has also been used as the basis for the merger control regulation, Council Regulation 4064/89 on the control of concentration between undertakings (OJ 1990 L257/14), and in the social field as the basis for Council Directive 79/7 on the progressive implementation of the principle of equal treatment for men and women in matters of social security (1979 OJ L3/24).

9. Measures taken under Article 235 require unanimity. So do Council measures to harmonise laws of the Member States—being laws that directly affect the establishment or functioning of the common market (see Article 100). However, Article 100a, which was introduced into the existing Treaty by the Single European Act, provides for an exception to Article 100. Article 100a enables the Council to take harmonising measures that have as their object the establishment and functioning of the internal market by qualified majority voting rather than by unanimity. The internal market is defined in Article 7a of the amended Treaty as "an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty". However fiscal provisions, provisions relating to the free movement of persons and those relating to the rights and interests of employed persons that have as their object the establishment and functioning of the internal market still require unanimity. And where a measure is adopted under Article 100a by qualified majority, Member States retain a qualified right to apply national provisions in so far as such provisions are justified on certain specified "non-economic" grounds (public morality, public policy, public security; the protection of health and life of humans, animals and plants; the protection of national treasures; the protection of industrial and commercial property; the protection of the environment; and the protection of the working environment) and the Commission verifies that the national provisions are not a means of arbitrary discrimination or a disguised restriction on trade between Member States and accordingly confirms them.

10. In all the new areas where competence has been given to the Community by virtue of Article 3 of the Treaty, other than in the field of industrial policy (see Article 130(3), the voting in the Council is by qualified majority, save where the Council wishes to overturn the European Parliament's rejection of the Council's common position or to amend the European Parliament's amendments to the Council's common position, being amendments that have been endorsed by the Commission, (see Article 189c of the amended Treaty).

THE SCOPE OF ARTICLE 3B

11. The first sentence of Article 3b merely confirms the fact that the Community has no sovereign powers of its own but relies on powers having been assigned to it, pursuant to the Treaty, by the Member States.

12. The second sentence of Article 3b contains the heart of the subsidiarity principle. The first point to note is that it applies only to areas outside the exclusive competence of the Community. For example, the Community has exclusive competence in the field of external trade (Article 113). In other areas of Community activity the Community is deemed to have exclusive competence when it adopts rules for a particular sector in the sense that Member States are thereafter under an obligation to refrain from taking any measures which might undermine or create exceptions to the common rules laid down by the Community. This principle is well established in the case law of the Court of Justice see, for example, Case 177/78 Pigs and Bacon Commission v. McCarren [1979] ECR 2161. The areas where the Community has exclusive competence are therefore quite extensive.

13. In the environmental area, there has been an interesting progression. The EEC Treaty in its original form did not contain the necessary powers to take such measures which could therefore be taken only if action by the Community proved necessary to attain, in the course of the operation of the common market, one of the objectives of the Treaty; unanimity in the Council was then required (Article 235). The Single European Act specifically created a power for the Community to take action in the environmental area though it still required unanimity in the Council for the taking of such measures. The Treaty, as now to be amended, carries the process a stage further forward by enabling the Council, by unanimous decision, to define those environmental matters on which thereafter decisions are to be taken by a qualified majority. However, in most of the new areas brought by Maastricht within the purview of the European Community, the Council will be able from the outset to act by qualified majority.

14. Generally speaking, for one reason or another, the exercise by the Community of its exclusive competence does not require a unanimous vote in the Council. Therefore, the absence of any requirement to apply the principle of subsidiarity in the area of the Community's exclusive competence is not counterbalanced by a legal requirement that every Member State should concur in the exercise of the competence.

15. Even in areas where competence is shared between the Community and Member States, will the principle of subsidiarity provide a significant legal constraint on the ability of the majority to take action? Recent and proposed Directives in the field of the environment and employment indicate the kind of basis on which the need for action at the Community level can, and probably will, be claimed in the new areas of activity by the Community.

16. Thus, in Council Directive 80/778 on drinking water the relevant paragraphs of the preamble state:

> Whereas a disparity between provisions already applicable or in the process of being drawn up in the various Member States relating to the quality of water for human consumption may create differences in the conditions of competition and, as a result, directly affect the operation of the common market; whereas laws in this sphere should therefore be approximated as are provided for in Article 100 of the Treaty;
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> Whereas this approximation of law should be accompanied by Community action designed to achieve, by more extensive rules concerning water for consumption, one of the aims of the Community with regard to the improvement of living conditions, the harmonious development of economic activities throughout the Community as a continuous and balanced expansion; whereas certain specific provisions to this effect should therefore be laid down; whereas Article 235 of the Treaty should be invoked as the necessary powers have not been provided for by the Treaty.

17. Similar reasoning was used in Council Directive 76/160 on bathing water:

> Whereas surveillance of bathing water is necessary in order to attain, within the framework of the operation of the common market, the Community's objectives as regards the improvement of living conditions, the harmonious development of economic activities throughout the Community and continuous and balanced expansion; whereas there exist in this area certain laws, regulations or administrative provisions in Member States which directly affect the functioning of the common market; whereas however not all the powers needed to act in this way have been provided for in the Treaty.

18. In so far as Council Directives 80/778 and 76/160 were required to be taken in part under Article 235, they required unanimity in the Council but in the present context that only goes to show that all the Member States accepted the rationale for action at the Community level. The justification advanced for taking measures at the Community level is also apparent in the recent legislation and proposed legislation in the employment field under Article 118a of the Treaty, introduced by the Single European Act, which allows qualified majority voting in the Council (for this purpose it is unnecessary to go into the controversial question of whether measures that have been, or are to be, purportedly taken in the employment field are really social measures anyway). Thus, on the 25 June 1991 the Council adopted a Directive supplementing earlier measures to encourage improvements in workers' safety and health at work: see OJ 1991 L206/19. The relevant paragraphs of the preamble state:

> Whereas Article 118a of the Treaty provides that the Council shall adopt, by means of directives, minimum requirements for encouraging improvements, especially in the working environment, to guarantee a better level of protection of the safety and health of workers;
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> ...
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> Whereas this directive constitutes a practical step within the framework of the attainment of the social dimension of the internal market".

19. Similar reasoning appears in the proposed Council Directive concerning the protection at work of pregnant women or women who have recently given birth. The relevant paragraphs of the preamble state:

> Whereas Article 118a of the Treaty provides that the Council shall adopt by means of directives, minimum requirements for encouraging improvements, especially in the working environment, to ensure a better level of protection of the safety and health of workers;
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> ...
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> Whereas 11 Heads of State or Government of the Member States of the European Community, meeting in Strasbourg on 9 December 1989, adopted the Community Charter of basic social rights for workers;
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> Whereas paragraph 19 of this Charter lays down that "Every worker must enjoy satisfactory health and safety conditions in his or her working environment", and that "appropriate measures must be taken with a view to achieving further harmonisation of conditions in this area while maintaining the improvements made";
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> Whereas the Commission, in its action programme for the implementation of the Community Charter of basic social rights for workers, has included amongst its aims the adoption by the Council of a directive on the protection of pregnant women at work.

20. The proposed Council Directive concerning certain aspects on the organisation of working time provides in its preamble as follows:

> Whereas Article 118a of the EEC Treaty provides that the Council shall adopt, by means of directives, minimum requirements for encouraging improvements, especially in the working environment, to guarantee a better level of protection of the safety and health of workers;
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> ...
>
> Whereas laying down minimum requirements with regard to individual periods of rest and of work improves the working conditions referred to in Article 118a;
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> Whereas the Community Charter of the Fundamental Social Rights of Workers states at Title 1, point 7 that the completion of the internal market must lead to an improvement in the living and working conditions of workers, a process which must result from an approximation of these conditions, while maintaining the improvement, as regards in particular the duration and organisation of working time; whereas point 8 states that every worker of the European Community shall have a right to a weekly rest period and to annual paid leave, the duration of which must be progressively harmonised in accordance with national practices; whereas point 19 of the said Charter affirms that every worker must enjoy satisfactory health and safety conditions in his working environment and that appropriate measures must be taken in order to achieve further harmonisation of conditions in this area while maintaining the improvements made;
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> Whereas the European Parliament considers it indispensable in its Resolution of 15 March 1989 on the social dimension of the internal market that minimum rules should be adopted which establish a ceiling for daily and weekly working times;
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> Whereas in order to achieve improvement in the health and safety of workers certain minimum daily and weekly rest periods should be complied with for all workers in the Community.

21. If such reasoning is adopted in the future, the principle of subsidiarity in Article 3b of the amended Treaty would appear to be inapplicable in a situation where the Community has decided that it is necessary to harmonise national laws for the purpose of achieving one of the objectives of the common market, whether it be the raising of the standard of living and quality of life or achieving a high level of social protection. As a matter of logic it is difficult to see how such objectives can be achieved otherwise than at a Community level. It is true that the recent Directives in the employment field are generally without prejudice to national rules which go beyond what is laid down at the Community level. However, since the purpose of most Community measures, particularly in the field of employment and environment, is a raising of general standards throughout the Community, it is difficult to see how one will be able to argue that such an objective can be sufficiently achieved at the national level and difficult to see how one will be able to refute the contention that the proposed action is better achieved by the Community.

22. In the absence of political agreement at the Community level, whether within the Council or the Commission, that a proposed measure should not go forward by reason of Article 3b of the Treaty, the Court of Justice would, in my judgment, be unlikely to strike down a Directive which sought to achieve one of the objectives of the Community and fell within the scope of the Community's activities on the basis that it was incompatible with the principle of subsidiarity laid down in Article 3b of the amended Treaty.

23. This is not to say that the enunciation of the principle of subsidiarity in Article 3b of the amended Treaty is a sham or even that it will necessarily be ineffective. It may be highly effective as a "constitutional convention" if it is loyally supported by the Council and by the Commission whenever unanimity in the Council is not required. However, if it is not so supported at the political level, the law is unlikely in practice to be of much use in realizing the principle. Moreover, if I were to be proved wrong about this and the law turned out to be effective in "securing subsidiarity", it would probably be because the Court of Justice itself became very obviously "politicized"—making the appointment of the judges of that Court "by common accord of the Governments of the Member States" (Article 167) a very significant political act.

24. One solution that might have been, but was not, adopted at Maastricht would have been to require unanimity within the Council for all measures in all of the new areas of competence for the Community, unless and until the Council unanimously resolved that in respect of specified matters in those areas a qualified majority should suffice (that is the solution adopted in the environmental area, to which I have referred above). Any Member State could then have ensured respect for the principle of subsidiarity by withholding approval for any measure in any of the new areas, though of course such a solution would also have enabled any Member State to block such measures for other reasons unconnected with subsidiarity and that was presumably thought to be too high a price to pay.

### Subsidiarity in the Field of Competition Law

25. In the discussion about subsidiarity some thought should, in my view, be given to the application of the principle of subsidiarity in the field of competition law. Article 85(1) prohibits agreements or concerted practices between undertakings which restrict competition within the common market and may affect trade between Member States. Any such agreement is automatically void under Article 85(2) unless it is exempted under Article 85(3). Article 86 prohibits any abuse of a dominant position by one or more undertakings which may affect trade between Member States. At the moment the Commission has the power to apply Article 85(1) and Article 86 of the EEC Treaty as a matter of public law, and the Courts of the Member States have the power to apply those Articles as a matter of private law. In theory, national competition authorities also have jurisdiction to apply Article 85(1) and Article 86 as a matter of public law so long as the Commission has not initiated any procedure: see Article 9(3) of Council Regulation 17 of 1962; but, because the Commission can at any moment intervene and thereby remove the jurisdiction of a national authority that has sought to exercise that jurisdiction, Article 9(3) of Council Regulation 17 has been and is a dead letter. In any event, the Commission has exclusive jurisdiction to grant both individual and block exemptions of beneficial agreements under Article 85(3) of the EEC Treaty. National courts of course recognize the legal effects of such exemptions when the validity of an agreement is called in question under Community law in a national court. The application of competition law is therefore an area where there is a degree of shared competence between the Member States and the Community, although the Commission has exclusive competence to grant exemptions under Article 85(3) and effectively exclusive competence in the area of public law, in each case subject to judicial review by the Court of First Instance.

26. The Commission has proved a popular forum with British undertakings that wish to lodge complaints about restrictions of competition or abuses of dominant position. It is often not difficult to show a sufficient actual or potential effect on trade between Member States even where the parties are both British undertakings. Particular advantages for a British undertaking of going to the Commission are that:

(i) the Commission has power to take immediate action (by way of "interim measures") in really urgent cases whereas, save in rare cases covered by the Restrictive Trade Practices Act 1976, the Office of Fair Trading has no corresponding power under UK national law; and

(ii) successful action by the Commission against a wrongdoer under Community law paves the way for recovery by an injured party of damages whereas there is no right to compensation for loss suffered by reason of anti-competitive conduct that is condemned under UK national law (save, again, in relatively rare cases covered by the Restrictive Trade Practices Act 1976).

27. The popularity of the Commission as a forum for resolving competition disputes is, however, being undermined by its inability to deal with the growing case load. In a recent case (Case T–24/90 Automec v. Commission (No. 2), judgment of 18 September 1992) the Court of First Instance upheld the Commission's rejection of a complaint made by one Italian undertaking against another Italian undertaking (albeit a subsidiary of a German company) on the ground that there was no Community interest in pursuing the complaint and that the complainant should proceed in his national court. In that case the Commission submitted that it no longer had the resources in Directorate-General IV to follow up every competition complaint. The Commission informed the Court that DG IV now has 28 A-grade posts in Directorate A dealing with general questions; 90 posts (of which 4 per cent–5 per cent are vacant) in the sectorial Directorates B, C and D; 44 in Directorate E dealing with State Aids, and 28 in the merger task force. Directorate-General IV, with its responsibilities for Community-wide enforcement of Community law in the field of competition and State aids therefore has a substantially smaller staff than the UK

Office of Fair Trading even leaving aside the UK Monopolies and Mergers Commission and the UK Restrictive Practices Court. A shortage of resources in DG IV are nothing new (see, for example, the Report of the House of Lords Select Committee on the European Communities, European Union, 14th Report of Session 1984/85, paragraph 51 at page xxi, and the evidence of Dr. Ehlermann and Dr. Glaesner at page 106, QQ. 165–6). Nevertheless, until very recently, the Commission was still issuing a booklet for the information of businessmen which stated:

> "When a complaint is submitted by a party having a legitimate interest in the matter, the Commission will examine whether a violation of the competition rules is in fact taking place. If the complaint turns out to be well-founded, the Commission can then take the necessary measures to put an end to the infringement": EEC Competition Rules—Guide for Small and Medium Sized Enterprises, November 1983, page 46, re-published as "EEC Competition Policy in the Single Market", March 1989, page 48.

28. The Commission is, however, now keen to see many Community competition cases dealt with at the national level. It has recently issued draft Antitrust Enforcement (National Courts) Guidelines which are designed to encourage potential complainants to go to National Courts. A copy of the Guidelines, as published in the CMLR Antitrust Reports (1992), is annexed to this Memorandum with the permission of the publishers, Sweet & Maxwell Limited. The draft Guidelines state:-

> "10. The Commission believes that greater involvement of national courts will help to ensure more balanced application of Community competition rules throughout the Community. It is a crucial step towards a practical division of labour between the Commission and national courts, in line with their respective functions. The Commission's primary duty, as a political institution, is to safeguard the general interest of the Community. It must therefore, through the rational and rigorous use of its limited administrative resources, concentrate on cases which need to be dealt with as a matter of priority in the light of Treaty objectives or other important Community interests. The national courts, by contrast are called upon primarily to protect the legitimate private interests of all those who are seeking redress.
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> 11. Accordingly, the Commission intends, in implementing its decision-making powers, to concentrate on notification, complaints and own-initiative proceedings have particular political, economic or legal significance for the Community.
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> By contrast, cases not involving specific features that are of general significance should, it believes, be dealt with differently: while notifications are normally dealt with by means of comfort letters, complaints should be handled by the national courts or authorities.
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> 12. However, in determining its priorities, the Commission also intends to examine whether individuals and companies have effective scope for enforcing their rights in proceedings before national courts and to take appropriate account of difficulties or obstacles which national courts may encounter where the need arises for extensive, cross-frontier investigations or for sectoral or overall economic assessments."

At paragraph 25 of the draft Guidelines the Commission refers to its wish to decentralise the application of the competition rules as far as possible, applying the principle of subsidiarity.

29. Unfortunately, however, the Courts, at least in this country, provide an unsatisfactory forum for the implementation of competition law: lawyers in eighteenth century costume operating in nineteenth century court rooms do not mix well with late twentieth century economic issues. In particular, when any economic issue that involves more than straightforward questions of fact come before the general courts in this country, they and the parties are faced with the problem that statistical and economic material that would be used unquestioningly by government departments, regulatory agencies, market research organizations and professional economists is liable to be inadmissible as evidence otherwise than by agreements between the parties. Even relevant specific findings of fact contained in Reports of the Monopolies and Mergers Commission are inadmissible as evidence of those facts. Additionally the parties to private adversary litigation are often extremely ill-placed to gather or put before the judge an adequately supported and reasoned economic analysis and the judge may not have even a passing acquaintance with economic theory or terminology and has no power to engage in independent economic research. The idea that the UK Courts will provide an adequate substitute for the enforcement of the Rules of Competition of the Treaty as rules of public law is therefore unrealistic.

30. There are, then, a number of ways in which the principle of subsidiarity could be applied to the benefit of those who wish to pursue their Community law rights in the United Kingdom. First, the United Kingdom competition authorities, that is primarily the Office of Fair Trading, should be willing to examine Community competition complaints. Although it has the power to do that at the moment as long as the Commission has not itself initiated any procedure (see Article 9(3) of Regulation 17), in practice, as I have already said, this is a dead letter: Community competition complaints are invariably dealt with by the Commission in Brussels and not the OFT. It is desirable that the Draft Antitrust Guidelines should be amended so as to deal expressly with the position of national competition authorities, rather

than, as at present, being confined to national courts. The Guidelines should set out the type of cases in which there would be a presumption that the matter could be dealt with by national competition authorities. Examples would include disputes between undertakings in the same Member State that did not involve export or import bans (there is an analogy in Article 4(2)(l) of Regulation 17 which provides that agreements the only parties to which are undertakings from one Member State and that do not relate either to imports or exports between Member States do not have to be notified as a precondition for an individual exemption under Article 85(3)). This would breathe some life into Article 9(3) of Regulation 17.

31. There are many disputes, which fall within the scope of Community competition law, that involve only British companies. Such disputes could often be more cheaply and quickly resolved by the Office of Fair Trading in London than by the European Communities Commission in Brussels, whose procedure is, moreover, slowed down by the need to operate in more than one language.

32. A further, or alternative, suggestion would be to amend United Kingdom competition law so that it was identical to Articles 85 and 86, subject to there being no need to prove an effect on trade between Member States. A number of Member States, such as Ireland, Italy and Spain have recently done this. A reform along this line would plug the gaps that exist at present in UK competition law. A similar reform was suggested by the Department of Trade and Industry in Opening Markets: New Policy on Restrictive Trade Practices, July 1989 (Cm 727) but nothing has been done to introduce new legislation (which is now urgently needed in any event). In the absence of such new legislation United Kingdom companies are encouraged to invoke Community competition law even though the dispute is essentially one of a domestic nature but where, in order to show that the conduct falls within the scope of Community competition law, it can be argued that the conduct in question "may affect trade between Member States". If United Kingdom competition law mirrored Community competition law (without the need to prove an effect on trade between Member States) there would be much less incentive for parties to essentially British disputes to invoke Community law at all.

33. Finally, another, although perhaps more controversial way forward, would be to seek an amendment to Council Regulation 17 which grants the Commission the exclusive right to give exemptions under Article 85(3) of the Treaty. Exclusive jurisdiction was given to the Commission by a Council Regulation, not the Treaty. Such exclusive jurisdiction was understandable in 1962 when there existed no corpus of Community competition law and the Community consisted only of 6 Member States and had only 4 official languages. The position has changed today. There is a substantial body of case law and practice on the applicability of Article 85(3), the Community now consists of 12 Member States and has 9 official languages. The Commission complains about its workload. The Commission should therefore welcome the opportunity of off-loading some of its cases onto national authorities, even where those cases may involve the grant of an individual exemption.

34. Clearly it would be necessary to ensure that such a procedure did not lead to different criteria being applied in different parts of the Community and the creation of general legal uncertainty. This could, however, be avoided by introducing a procedure whereby a national competition authority that was proposing to grant an exemption under Article 85(3) of the Treaty would have formally to notify its intention to the Commission. The matter could then be discussed, as it is now, before the Advisory Committee of representatives of the Member States. The Commission could be given a right of veto of a proposed exemption. Such a veto would itself be subject to judicial review pursuant to Article 173 of the Treaty.

35. I believe that such proposals would streamline the conduct of competition law and should be welcomed alike by consumers, businesses and bodies that administer competition law.

### The Establishment of an Ombudsman

36. Lastly, it should not be overlooked that the amended Treaty will create the post of Ombudsman who will be empowered to receive complaints from any citizen of the European Union, or any national or legal person residing or having its registered office in a Member State, concerning instances of maladministration of the activities of the Community institutions or bodies (other than the Court of Justice and the Court of First Instance): see Article 138e of the amended Treaty. The creation of an Ombudsman should be equally welcome to those who favour further development of the Community and those who desire to see more control over the activities of the Community Institutions in the exercise of their functions. The office of Ombudsman is capable of making a significant contribution to controlling the activities of the Community Institutions which have received considerable criticism, some of which at least has been fully justified.

# DRAFT ANTITRUST ENFORCEMENT (NATIONAL COURTS) GUIDELINES

## Draft notice on the application of Articles 85 and 86 of the EEC Treaty by national courts

### I. Introduction

1. The primary responsibility for applying to firms Community competition law as laid down in **Articles 85** and **86** of the EEC Treaty has been given to the Commission of the European Communities.

However, this jurisdiction is not exclusive, and the courts of the member-states may themselves apply the competition rules. The Commission considers that it is in the interests of an active and effective competition policy and of all the economic operators concerned to expand and facilitate, as fast as possible, reliance on the decentralised decision-making machinery. The national courts have their own responsibility and a key role to play in this respect.

2. The power of the national courts to apply Community competition rules arises from the principle of the direct effect of the relevant provisions and exists alongside the corresponding powers of the Commission and the national competition authorities. It has been expressly recognised by the Court of Justice of the European Communities.

3. In BRT v. SABAM,[1] the Court of Justice stated:

> As the prohibitions of **Articles 85(1)** and **86** tend by their very nature to produce direct effects in relations between individuals, these Articles create direct results in respect of the individuals concerned which the national courts must safeguard.

The task of the national courts is thus not merely to decide on the applicability of the above-mentioned Treaty provisions to the cases brought before them. They must also determine the effects in private law of prohibitions contained in the Treaty and award the parties those rights which the relevant applicable national law allows where **Article 85(1)** or **Article 86** is infringed.

4. However, the Commission has sole power to exempt agreements, decisions and concerted practices pursuant to **Article 85(3)** from the prohibition laid down in **Article 85(1)**.[2] Consequently, agreements, decisions and concerted practices of the type referred to in **Article 85(1)** must normally be deemed to be prohibited until such time as the Commission decides to exempt them. Any difficulties that might arise from this legal situation must be overcome through co-operation between the national courts and the Commission (see points 25 *et seq.* below). By contrast, Council or Commission regulations granting block exemption under **Article 85(3)** from the ban laid down in **Article 85(1)** to certain categories of agreements, decisions or concerted practices have direct legal effects. As the Court of Justice has consistently held,[3] the application of such block exemption regulations falls within the jurisdiction of the national courts.

5. The Court of Justice has also laid down principles governing procedures and remedies for breach of directly applicable Community law. In REWE v. HAUPZOLLAMT KEIL,[4] the Court held that:

> Although the Treaty has made it possible in a number of instances for private persons to bring a direct action, where appropriate, before the Court of Justice, it was not intended to create new remedies in the national courts to ensure the observance of Community law other than those already laid down by national law. On the other hand... it must be possible for every type of action provided for by national law to be available for the purpose of ensuring observance of Community provisions having direct effect, on the same conditions concerning the admissibility and procedure as would apply where it is a question of ensuring observance of national law.

The national courts must thus make available to individuals and companies in the event of breach of the Community competition rules all remedies provided for by national law on the same conditions as would apply if a breach of national law were involved.

6. National remedies must guarantee full and effective legal protection. For this purpose the national courts, applying **Article 85(2)**, must declare null and void agreements, decisions or practices prohibited

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[1] Case 127/73: [1974] ECR 51, [1974] 2 CMLR 238 at para. [16]; see also Case 37/79, MARTY *v.* ESTEE LAUDER;.[1980] ECR 2481 at 2500, [1981] 2 CMLR 143 at 157; Case 66/86, ZENTRALE SUR BEKAMPFUNG UNLAUTEREN WETTBEWERBS *v.* AHMED SAEED FLUGREISEN; [1989] ECR 803 at 845 *et seq.*, [1990] 4 CMLR 102 at 131 *et seq.*

[2] See Article 9(1) of Council Regulation 17; [1959–62] O J Spec. Ed. 87.

[3] Case 63/75, FONDERIES ROUBAIX *v.* FONDERIES ROUX; [1976] ECR 111 at 118, [1976] 1 CMLR 538; Case C–234/89, DELIMITIS v. HENNINGER BRAU; not yet reported, paras. [45] *et seq.*

[4] Case 158/80; [1981] ECR 1805 at 1838, [1982] 1 CMLR 449 at 483; see also Case 33/76, REWE v. LANDWIRTSCHAFTSKAMMER SAARLAND: [1976] ECR 1989, [1977] 1 CMLR 533; Case 79/83, HARZ *v.* DEUTSCHE TRADAX; [1984] ECR 1921, [1986] 2 CMLR 430; Case 198/82, AMMINISTRAZIONE DELLE FINANZE DELLO STATO v. SAN GIORGIO [1983] ECR 3595, [1985] 2 CMLR 658.

under **Article 85(1)**. In the case of abuses of a dominant position covered by **Article 86**, the national courts must apply the rules laid down under national law for infringements of a statutory prohibition. Full and effective legal protection also means that national courts must if necessary, issue interim injunctions and, where appropriate, award damages for economic loss suferred as a result of infringements of the Community competition rules in all cases where such remedies are available in similar proceedings under national law.

7. The simultaneous application of national substantive law is in principle compatible with the existence of Community law as a separate legal system. However, the application of national provisions must be without prejudice to the unrestricted and uniform application of **Articles 85** and **86** and the effectiveness of the measures taken to enforce them. Conflicts between Community and national competition law must therefore be resolved in accordance with the principle of the precedence of Community law.[1]

8. It follows from this principle that national courts may not apply national provisions and recognise as valid legal acts, agreements and decisions which are prohibited under **Article 85(1)** and are thus automatically void under **Article 85(2)**. The same applies to legal acts which are defined as abuses in **Article 86** and are therefore prohibited. Conversely, cartels which have, pursuant to **Article 85(3)**, been exempted from the ban laid down in **Article 85(1)** may not normally be declared to be prohibited or null and void on the basis of national law, given the principle of the precedence of Community law, the aim of which is to ensure that national measures do not undermine the full effectiveness of the Treaty. This would happen where such a prohibition under national law would have the effect of prejudicing the essential basis of the exemption granted.

II. Advantages of proceedings in national courts

9. The application of Community competition law by the national courts has considerable advantages for individuals and companies:

- the Commission cannot award compensation for loss suffered as a result of an infringement of **Article 85** or **Article 86**. Such claims may be brought only before the national courts. Companies are more likely to avoid infringements of the Community competition rules if they risk having to pay damages in such an event;
- national courts can usually adopt interim measures and order the ending of infringements more quickly than the Commission is able to do;
- in a national court, it is possible to combine a claim under Community law with a claim under national law. This is not possible in a procedure before the Commission;
- in some member-States, the courts have the power to award legal costs to the successful applicant. This is never possible in the administrative procedure before the Commission;
- the national courts are designed, and also in a very much better position than the Commission, to decide on private cases brought on the basis of **Articles 85** and **86**.

10. The Commission believes that greater involvement of national courts will help to ensure more balanced application of Community competition rules throughout the Community. It is a crucial step towards a practical division of labour between the Commission and the national courts, in line with their respective functions. The Commission's primary duty, as a political institution, is to safeguard the general interest of the Community. It must therefore, through the rational and rigorous use of its limited administrative resources, concentrate on cases which need to be dealt with as a matter of priority in the light of the Treaty objectives or other important Community interests. The national courts, by contrast, are called upon primarily to protect the legitimate private interests of all those seeking redress.

11. Accordingly, the Commission intends, in implementing its decision-making powers, to concentrate on notifications, complaints and own-initiative proceedings which have particular political, economic or legal significance for the Community.

By contrast, cases not involving specific features that are of general significance should, it believes, be dealt with differently: while notifications are normally dealt with by means of comfort letters, complaints should be handled by the national courts or authorities.

12. However, in determining its priorities, the Commission also intends to examine whether individuals and companies have effective scope for enforcing their rights in proceedings before national courts and to take appropriate account of difficulties or obstacles which national courts may encounter where the need arises for extensive, cross-frontier investigations or for sectoral or overall economic assessments.

[1] Case 14/68, WALTWILHELM AND OTHERS v. BUNDESKARTELLAMT; [1969] ECR 1 at 13 [1969] CMLR 100 at 118; Joined Cases 253/78 & 1–3/79, PROCUREUR DE LA REPUBLIQUE v. GIRY AND GUERLAIN; [1980] ECR 2327 at 2375, [1981] 2 CMLR 99 at 136.

III. Possible situations arising in proceedings before a national court

1. *Application of Article 85(1) and (2) and Article 86*

13. The national courts must, within the framework of their jurisdiction, first decide whether the agreement, decision or concerted practice at issue infringes the prohibitions laid down in **Article 85(1)** or **Article 86**. In examining the facts of a case in the light of the terms of those provisions, the national courts are not formally bound by the views of the administrative authorities that share competence for competition matters. However, they should take any decisions, opinions or other official statements of the Commission in the same case into account as a significant factor in the conclusions to be reached. The national courts should be guided in interpreting the rules laying down the prohibitions by the existing decisions and case law of the Commission and the Court of Justice. The Commission has accordingly, in a number of general notices,[1] specified categories of agreements that are not caught by the ban laid down in **Article 85(1)**.

There will not normally be any need for the national court to stay proceedings unless there are persistent doubt as to the compatibility of the conduct at issue with **Article 85(1)** or **Article 86** or unless the Commission has already initiated proceedings in the same case.[2]

14. Where the assessment of the facts shows that the conduct of one or more undertakings infringes **Article 85** or **Article 86** the national court must rule that Community law has been infringed and take the appropriate measures. This includes the imposition of civil-law sanctions for infringement of a statutory prohibition.

15. Where the national court finds that the conditions for applying **Article 85(1)** or **Article 86** are not met it should pursue its proceedings on the basis of this finding, even where the agreement, decision or concerted practice at issue has been notified to the Commission and the Commission has not yet decided on its position.

2. *Application of Article 85(3)*

16. If the national court concludes that an agreement fulfils the prohibition criteria laid down in **Article 85(1)**, it must check whether the conditions for exemption by the Commission under **Article 85(3)** are fulfilled. A distinction should be made here between several types of situation.

17(a) If the Commission has already granted exemption from the prohibition laid down in **Article 85(1)**, the national court is bound by such a decision. It must then treat the agreement, decision or concerted practice at issue as permitted and fully recognise its effects under civil law.

By analogy, the national court will take into consideration comfort letters in which the Commission has already stated that the agreement, decision or concerted practice is compatible with **Article 85(3)**.

18(b) Agreements, decisions and concerted practices which fall within the scope of application of a block exemption regulation[3] are automatically exempted from the prohibition laid down in **Article 85(1)** without the need for a Commission decision or comfort letter. The national courts may apply and interpret such block exemption regulations in the same manner as outlined in point 13 above.

19(c) Agreements, decisions and concerted practices which are not covered by a block exemption regulation and which have not been the subject of an individual exemption decision or a comfort letter sent by the Commission must be examined in the following manner:

20. The national court must first examine whether the procedural conditions for exemption are fulfilled, notably whether the agreement, decision or concerted practice has been notified in accordance with Article 4(1) of Regulation 17. Where no such notification has been made, and subject to the provisions of Article 4(2) of Regulation 17, exemption under **Article 85(3)** is ruled out, and the national court can apply the ban laid down in **Article 85(1)** and the nullity rule laid down in **Article 85(2)**.

21. Where the agreement, decision or concerted practice has been notified to the Commission, the court will assess the likelihood of an exemption being granted in the light of the substantive criteria laid down in **Article 85(3)**, the case law of the Court of Justice and the previous decisions taken by the Commission.

[1] See the notices on exclusive dealing contracts with commercial agents: JO 2921/62; agreements, decisions and concerted practices in the field of co-operation between enterprises; [1968] JO C75/3, [1986] CMLR D5 as corrected in [1968] JO C84/14; assessment of certain subcontracting agreements; [1979] OJ C1/2, [1979] 1 CMLR 264; agreements of minor importance; [1986] OJ C231/2.

[2] See Case 127/73, BRT *v.* SABAM; [1974] ECR 51 at 63, [1974] 2 CMLR 238 at 271.

[3] A list of the relevant regulations and of the official explanatory comments relating to them is given in the Annex to this Notice.

22. If the national court concludes that an individual exemption is unlikely, it can apply the ban and the nullity rule laid down in **Article 85(1)** and **(2)**, deduce the relevant consequences from this in private law and adopt the measures required.

23. If the national court takes the view that individual exemption is possible, it should suspend the proceedings and inform the Commission accordingly. If in doubt as to the possibility of such exemption, the court may ask the Commission to give it a provisional opinion. If the Commission's opinion is that exemption is unlikely, the court can reverse the suspension, resume the proceedings and prohibit the agreement. If the national court does suspend the proceedings, it remains free to adopt any interim measures it deems necessary pending the Commission's decision. The Commission will endeavour to give priority to proceedings suspended in this way, particularly if the outcome of civil litigation depends on it.

24. If litigation before a national court involves an agreement which existed before Regulation 17 entered into force in 1962 (or before the relevant Regulation became applicable as a result of the accession of a new member-State) and which was notified to the Commission within the time-limit set in that Regulation (or was exempted from notification under Article 4(2) of Regulation 17), the national court must treat such an agreement as valid as long as the Commissioner or the authorities of the member-States have not taken a prohibition decision (see BRASSERIE DE HAECHT)[1] or informed the parties that the file has been closed (see LANCOME V. ETOS)[2].

## IV. Co-operation between the Commission and the national courts

25. The Commission has neither the physical nor the human resources to intervene in all cases where an infringement may have been committed.

Indeed, it does not seek to do so. This is why it has, on numerous occasions, expressed its desire to increase and broaden the decentralised application of the competition rules as far as possible, applying the principle of subsidiarity. **Article 5** of the EEC Treaty lays down the principles of constant and loyal co-operation between the Community and the member-States[3]. Such co-operation is all the more necessary in the decentralised implementation of competition law as it is a prerequisite for the strict, effective and consistent application of Community law by the competent national courts and by the Commission in compliance with their specific procedures and with the general interest in having a uniform competition policy.

26. The case law of the Court of Justice, the decisions taken by the Commission, the implementing and block exemption regulations, the notices and the annual reports on competition policy are all elements of secondary legislation or guidelines which may assist the national courts in examining individual cases. However, the national courts can also consult the Commission whenever they feel it necessary in order to obtain information on the stage of procedure reached in cases pending before it. They may also, if necessary, ask the Commission to give an opinion on how much time is likely to be required for granting or refusing individual exemption for notified agreements or practices, so as to be able to determine the conditions for any decision to suspend proceedings or whether interim measures need to be adopted (see point 23 above).

27. Before imposing the **Article 85(1)** prohibition on an unnotified agreement or prohibiting an abuse of a dominant position pursuant to **Article 86** (see points 14 and 20 above), the national court can ask the Commission for its opinion on the appropriate interpretation of Community law and in particular the conditions for applying **Articles 85(1)** and **86** as regards the effect on trade between member-States and as regards the extent to which the restriction of competition resulting from the practices specified in those two **Articles** is appreciable.

The national court, while not being bound by such interpretative opinions, will thus, in implementing such co-operation, obtain useful guidance for reaching its decisions.

28. Over and above the exchanges of information required in specific cases, the Commission is anxious to develop as far as possible a more general policy of training and awareness that would enable judges and lawyers to improve and increase their knowledge of Community law and procedures. For this purpose, the Commission intends to implement a systematic programme of symposia, lectures, courses and training seminars in each of the member-States.

29. The Commission also intends to publish an explanatory booklet that could provide practical guidance for national courts, lawyers and firms regarding the application of the Community competition rules at national level.

[1] Case 48/72; [1973] ECR 77 at 87, [1973] CMLR 287 at 302; see also Joined Cases 209–213/84, MINISTERE PUBLIC V. ASJES [1986] ECR 1425 [1986] 3 CMLR 173.
[2] Case 99/79; [1980] ECR 2511, [1981] 2 CMLR 164.
[3] See order of the Court of Justice in Case C–2/88, ZWARTVELD: not yet reported; DELIMITIS referred to above, paras. [53] *et seq.*

The purpose of the booklet will be to supply more detail on points that cannot be dealt with in this Notice, including:

(i) *source material*: sources that may be taken in to account by national courts in the field of Community competition law;

(ii) *principles of interpretation of Community law*: differences between concepts used in Community law and national law;

(iii) *authority of Commission decisions*: relationship between Commission decisions and national court decisions; effect of res judicata of national court decisions;

(iv) *powers of national courts*: powers of investigation interogatories, compellability of witnesses, investigations in other member-States, difficulty of applying remedies and sanctions in other member-States;

(v) *disclosure of documents to national courts by the Commission*: relationship between national procedures and Commission procedures: application of Article 20 of Regulation 17 (professional secrecy);

(vi) *remedies*: different types of remedies available on a country-by-country basis: nullity, temporary injunctions, damages, specific performance, etc.; guarantee of minimum protection for an effective application of the Community competition rules;

(vii) *damages*: general issues involved; relationship between damages and injunctions; relationship between Community fines and damages under national law; recovery of damages in other member-States;

(viii) *interim measures*: differences between interim measures granted by the Commission and temporary injunctions at national level.

30. This Notice does not relate to the competition rules governing the transport sector[1]. Nor does it relate to the competition rules laid down by the Treaty establishing the European Coal and Steel Community.

31. This Notice is issued as a guideline and does not in any way restrict the rights conferred on individuals or companies under Community law.

32. This Notice is without prejudice to any interpretation of the Community competition rules which may be given by the Court of Justice of the European Communities.

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## APPENDIX 7

### Memorandum submitted by Professor Helen Wallace, Sussex European Institute

1. The debate over the Treaty of Maastricht and its ratification has conflated two quite different sets of issues: first, arguments over the substantive policy commitments that the Treaty envisages; and, second, views about the way that the European Community(EC) or European Union should be run. But the debate has also brought to the surface a more long-running set of underlying problems about the nature of the commitments that different member states are willing to make to the EC and its development.

2. In the UK all of these elements have run together to produce a febrile atmosphere, greatly complicated by quite different issues about government policy and its credibility. Elsewhere in the EC the ricochets of controversy within the UK are producing a severe erosion of British credibility with our Community partners, as a commitment from British ministers to the Treaty of Maastricht, negotiated with great difficulty during 1991, is thrown into question. The unfortunate coincidence in timing with the British Presidency of the Council has made the situation particularly sensitive. That movement in the Community debate should be so dependent on the outcome of deep controversy within the country of the Presidency does little to vindicate the case for greater reliance on intergovernmental methods for managing the Community. That the country which had already proved so obdurate in the IGC negotiations and been so much responsible for many of the textual contortions should still jib at the consequences tests to the limits the forbearance of other member states.

[1] Council Regulation 141/62 exempting transport from the application of Council Regulation 17: [1959–62] OJ Spec. Ed. 291, as amended by Regulation 165/65: JO 314/65 and Regulation 1002/67; [1967] JO 306/1; Council Regulation 1017/68 applying rules of competition to transport by rail, road and inland waterway; [1968] OJ Spec. Ed. 302; Council of Regulation 4056/86 laying down detailed rules for the application of Articles 85 and 86 EEC to maritime transport; [1986] OJ L378/4, [1989] 4 CMLR 461; Council Regulation 3975/87 laying down the procedure for the application of the rules on competition to undertakings in the air transport sector: [1987] OJ L374/1, [1988] 4 CMLR 222.

3. This memorandum addresses some of the issues about how the EC is run and how these might be tackled. It does not address the substantive policy issues or the polemicism of the domestic debate in the UK. However, it is important to keep in mind that it is no more sensible to rewrite the Community rules, which apply to twelve member states, to serve the interests of a single member state than it would be for the other eleven members to disregard serious problems within that member state. Nor can the Maastricht Treaty be altered in its substance, except by the agreement of all member states. The issues that have caused such deep concern in both Denmark and the UK clearly need to be addressed, but the stability and the viability of the Community as whole also matter. They matter rather more than usual in the current juncture when a dramatic combination of economic and political challenges faces Europe, both Community Europe and the wider continent. Parochialism and narrow-minded compromises will not serve the Community well or promote the interests of its individual members.

*Long-term issues*

4. The Maastricht debate has thrown into relief several long-run issues about the way that the EC is run. These can be summarised as follows:

i. where to strike the balance between the collective responsibilities and policy powers of the EC *vis-a-vis* those of the member states;

ii. choices between 'integration' (within the Community framework) and 'co-operation' (within a looser intergovernmental framework);

iii. the secretiveness and lack of transparency of EC decision-making and law-making;

iv. concerns about the legitimacy, accessibility and accountability of the process;

v. a debate about what makes for effectiveness in the pursuit of agreed Community rules and policies; and

vi. the longer term ambitions of the Community or Union.

5. All of these questions need to be seen in a wider context in which:

i. the EC is likely to be gradually enlarged over the next decade, provoking further institutional adaptation;

ii. the global system will need new structures and forms of 'management';

iii. competition with the US and Japan (and other economic centres) will increase, not abate;

iv. yet traditional forms of governance within states are also being questioned; and

v. within Western Europe (and, albeit for different reasons, in Eastern Europe) the dividing line between public and private spheres appears to be shifting or at least is being debated.

6. These two long lists of serious questions suggest that there is no 'quick-fix' solution to rejig the EC model and resolve them all in one fell swoop. Short-term palliatives may be found, perhaps even at the Edinburgh session of the European Council, but the underlying issues will take more time, more reflection and considered debate. Greater regard for the principle of subsidiarity is welcome and indeed long overdue, but it deserves more than instant judgments and in any case is no panacea. Note should be taken of the fact that the already protracted negotiations that led to the Treaty of Maastricht did less than justice to some of the issues outlined above and also of the clear political costs of having negotiated that Treaty so much behind closed doors that it has been hard to retain public trust for the process. Part of the answer to the conundrum lies in preparing the next Intergovernmental Conference, already envisaged for 1996, in a different and much more open way. In any case political realism suggests that there would be deep resistance from some member states to the immediate adoption of devices that sought fundamental revisions to the Community method or to the current balance between the institutions, as distinct from palliatives and pointers as to possible future courses of action.

7. The issue of where to strike the balance in the attribution of powers between the EC and its member states defies categorical and once-and-for-all answers. Views vary over time, as between subjects and among countries. The environmental arena provides apt illustration. Environmental issues were not mentioned at the time that the Treaty of Rome was drafted, because they lacked salience and profile for the drafters of the 1950s. Even now there is a wide spectrum of views among member states, from the intense concern for active public policy on the part of the Danes to the more cautious attitudes of the Greeks. Treaty-makers and legislators have to strike different balances at different periods on this and many other policy issues. What is important is that the broad operating rules of the EC should provide for the use of reasoned criteria in determining the relative scope of Community action and for modes of action that carry consent and provide for effective interventions. By definition, therefore, this requires some flexibility and adaptability of approach, but set in a context of political trust.

8. Subsidiarity cannot therefore be defined as a strict division of powers, but only in relative terms, with the aid of other operating principles. The arenas for collective rules and policies would logically include interests that are shared across the EC, a European public interest, or issues that clearly go beyond the capacity of an individual country, a necessity for joint action, or areas in which the joint, that is Community, level provides the possibility of more effective action together than separately. Two important qualifications must then be attached: first, that the default position should be that powers are exercised at the lowest feasible level of governance (local, regional as well as member state); and that powers may be handed back down to more local levels (that is if the Community-level justification ceases to be convincing), as well as powers shifted upwards to the Community (or indeed other international) level.

9. In any event the execution or implementation of EC policies may be set at a more local and more accessible level than that at which the common rules are framed. It is common in a democratic and pluralist system for this to be so, for services to be delivered locally or rules enforced locally, subject to overall surveillance to see fair play, to ensure equivalence of treatment and to provide recourse to 'referees' who are not partisan or vulnerable to parochial or insidious special pleading. It is equally normal for rules to be differentially applied to fit local circumstances in which there is some *objectively* justifiable case for deviation from a general rule. What is much harder to tolerate is divergent local practice on the basis of a subjective difference of preference,

10. The Community already has some features that lean in this direction, helped by the more explicit reference to subsidiarity in the Treaty of Maastricht. These features could be used more extensively and developed further; they include:

i. greater readiness in regulations to acknowledge objective differences of circumstance (for example like the sheepmeat regime);

ii. greater use of directives as framework laws, rather than as pseudo-regulations, leaving real latitude to member states as to the 'form and method' (subject to agreed means of enforcement and refereeing);

iii. more active involvement of agencies from the member states in policy and rule implementation;

iv. the submission of both proposed new EC legislation and, periodically, old legislation to a subsidiarity—'is this really necessary or appropriate?—test; and

v. wider consultation at any point that the policy boundary between EC and member states might be contested or liable to change.

11. For such measures to make an impact requires an active engagement by all EC institutions and relevant organs within the member states. The Commission is not the the legislature of the EC, whatever its role in putting drafts on the table. Much of the 'interference' from Brussels that has been so widely criticised stems from *either* the Council *or*, less often, the European Parliament *or*, quite often, pressures from a particular lobby for a particular piece of legislation. Yet more of the 'interference' derives from the fact that at the implementation stage Brussels is often blamed by local implementers for a change of national practice, even though it may have been warmly endorsed by the relevant member state (this emerged very clearly in the French referendum campaign).

12. But it must be borne in mind that subsidiarity is a two-way street: more latitude for the UK or for Denmark has to be matched by more latitude for other member states. A more permissive approach to EC legislation means a less than level playing field and more uneven application of the rules. Though the British by and large advocate tough EC rules to implement the single market, it is precisely some of those tough rules that cause indigestion in those other member states that might welcome a laxer interpretation of market rules and continued opportunities to interpose barriers against troublesome liberalisation. It is hard to reduce the EC to a well-policed single market, when corollaries in other areas are seen elsewhere as necessary adjuncts, for example, cohesion or the social dimension for most other member states. To reduce the EC to a free trade area would be to go backwards from the single market and in any case would simply not be a runner for most EC members.

13. We have been faced with contending claims on the issue of whether the Maastricht text is more oriented to intergovernmental co-operation or towards tighter integration. Some member states had clearly wanted a more integrationist approach, of the kind advocated in the (heavily rejected) Dutch negotiating text of summer 1991. Others notably the UK, at the time with less vocal support from Denmark, had wanted to rely more on intergovernmental co-operation, especially for what became the new 'pillars' of the adopted Maastricht text. There is here, and always has been in the EC, a legitimate area of debate between contending viewpoints. This debate was not closed by Maastricht, though it has been halted for a period. However, these contending positions are already reflected in the balance between collectivism, as expressed in the role of the Commission, and intergovernmentalism, as displayed in the still strong role of the Council of Ministers. While there is no clear majority for extending the pow-

ers of the Commission, which after all the Maastricht text did little to alter, there is a clear majority against weakening the Commission.

14. The debate cannot be closed *sine die* for the reasons set out above on the environmental policy arena—new policy areas may at some stage command such wide assent and so clearly require tough common rules that they are accepted within the tighter framework. After all this is what the Single European Act did in adopting a tight set of rules for dealing with non-tariff barrier protectionism. So here, as in the associated questions of subsidiarity, the debate will properly have to be revisited from time to time.

15. Though federalism is much reviled in the UK, it happens to provide useful benchmarks for such a debate, since the concept is precisely related to systems of governance in which powers are shared between different levels. In all working federations the boundaries shift from time to time—interestingly the US, Canada and Germany have all recently seen a strengthening of the state or provincial levels against the 'centre'. Thus 'centralisation' is also a misnomer as a label for the case for collectively exercised powers, the ambition of the EC integrationists. It is in any event clear in Western Europe that there is not widespread support from either the political class or public opinion for big and overbearing government from Brussels.

16. Nor is 'intergovernmental co-operation' necessarily so attractive an alternative in those areas of public policy where openness, accountability and judicial control matter. British parliamentarians (like their counterparts in several other EC countries) have protested with obvious justification that, for example, a Convention on the External Frontier, which directly touches the rights of individuals, was negotiated in secret by governments without the text being available for public scrutiny or having a judicial process attached to it.

17. The *secrecy* and *lack of transparency* of the EC have also been much criticised. There is a paradox here in that for those in the know the EC process is remarkably open and more so than that in several member states, not least the UK. Working documents on legislative proposals can generally be seen at an early stage and views on their merits can be fed back in to the deliberative process, notably via the Commission and the European Parliament. However, the deliberations at the law-making phases in the Council of Ministers are held in secret, with documents and positions held close to the chest by negotiators from the member states.

18. It is therefore at this phase that action would have to be taken to produce a dramatic improvement. This is why some have called for open sessions of the Council acting in legislative mode. The difficulty with this is the reluctance of ministers to negotiate in public. One simple but controversial device would be to make Council texts public at the stage at which they move from the Committee of Permanent Representatives to ministers, when national and European Parliaments would have the opportunity to see what was being cooked up, as would other interested parties and the press. In addition measures to make the earlier versions of proposals more widely available, as 'green papers', would be welcome, not least to spread the information available beyond the lobbying groups and special interests which at present have disproportionate access to information. At this stage a wider range of organisations, including, for example, national parliaments, could be invited to submit comments.

19. Transparency, however, also depends on the clarity of language used by the EC. Too often the drafters of proposals produce texts that are not informed by a sense of their political acceptability, though this failing is not confined to the EC level of decision-making. Too often the negotiators are so preoccupied with marginal qualifications of language *vis-a-vis* each other's positions and with the varied interpretations which lawyers might construct that they neglect the impact on the citizens and the objects of the legislation. Not surprisingly a whole new industry has grown up to provide glossaries and explanatory documents, mostly designed for commercial and specialist markets. To subject documents to a 'plain language' test, as well as to the jurists-linguists, would help, as would the parellel publication *and wide circulation* of simple explanatory notes setting out the key points of legislation proposed and agreed.

20. The Maastricht debate has in effect challenged whether EC decision-making carries *legitimacy*, provides for *accountability* or suffers from *remoteness*. These issues arise from concerns about both the preparation of legislation and its adoption, or for that matter about the ways in which the EC impinges on the citizen, sector, region or company. The preparatory phase of work by the Commission routinely involves the governments of the member states, interested parties (predominantly private sector and public industry) and the European Parliament, along with very specialist groups of other experts. The range of opinions taken into account is often quite wide, but is drawn from a rather technocratic and corporate milieu. This may be fine as far as detailed content is concerned, but is vulnerable to criticism that this process leads to an under-representation of wider public interests or, say, consumer as distinct from producer interests. This contributes to the sense that the process is closed or that some have more privileged access than others, thus undermining the basis of legitimacy. This, combined with the weak development of accountability procedures, has led to a democratic deficit, not just in terms of the formal parliamentary processes, but in terms of the overall tangibility and accessibility of the EC.

21. The extent of this real problem cannot be underestimated. Its treatment in the Maastricht Treaty negotiations was somewhat superficial and rested mostly on a rather stylised debate about the powers of the European Parliament, with some rather underdeveloped ideas about the Council of Regions and the need for links with national parliaments. The truth of the matter is that much more thinking needs to be addressed to the legitimacy issue. Simply to add layers of consultation or multiple levels of consent required for action would not necessarily help, though this is precisely the way in which the Swiss Confederation works. Whatever the way forward it needs to be along two parallel tracks: the institutional rules need to be adapted to produce a more open and accountable process, to apply to treaty amendment as well as day-to-day law- and policy-making; *and* behaviour needs to alter so that both the proposers of ideas in the Commission and the legislators of the Council acknowledge the need for more active testing of opinion and garnering of consent. This would need to be evident in behaviour in member states as well as in 'Brussels', to the extent that the direct 'relays' for the community are actually the authorities and politicians of the member states.

22. All of these concerns with process, procedures and the drawing of boundaries between the EC and the member states could very easily distract from attention to the *effectiveness* of the EC in terms of the policy results to be achieved. The quality of policy output matters too, as does the need for an investment in the delivery of policy. Both are relevant to the extent of political respect for the EC and its activities. This was another area neglected in the Maastricht negotiations. There is evidence of overload in the Commission, understaffed services in important policy areas and work still to be done on managing the new regulatory framework of the single market. It is unreal to think that either these problems can be addressed or the additional activities implied in the quest for a more open and accessible process, unless an effort is made to tackle the effectiveness issue. Some of this has to do with the workings of the Commission services, in part it could be addressed by the development of 'executive agencies' and a more rounded pattern of partnership with agencies in the member states.

23. As long as these various issues cause frictions and distrust it will be hard to hold a sensible debate on the longer term goals of the Community or the Union. However, unless these issues are addressed with cool heads and open minds, there will be continuing confusion. This would not serve the interests of any of the member states, nor would it provide a robust framework from which to tackle the substantive policy agenda of the Community.

24. What then could be reasonably expected from the *Edinburgh European Council*? The meeting can reach only an interim solution to the 'Danish problem' for two reasons: first, it is hard in advance to tell what would reverse the results of a second Danish referendum (the Danish White Paper in effect recognises this in its listing of options); second, a 'renegotiation' of the Maastricht text as such is improbable. Therefore an indicative declaration to clarify the Maastricht text and to lay down markers for the next IGC is the obvious target and could be a useful achievement. It would not, however, address some of the substantive concerns evident in the Danish debate, nor does it necessarily follow that those of the Danes coincide with those of the British.

25. However, such a discussion is also contingent upon what happens to the 'British problem'. In the absence of movement to ratify Maastricht in the UK an 'Edinburgh declaration' will be harder to negotiate, since other member states might be wary of weaving further British hesitations into the fabric of the Community. If the British have made some progress towards ratification there will be a chance of finding a remedy for the Danes and of reassuring the British. If ratification were to be blocked in the UK, then the Edinburgh meeting could well be stalled, not only on the Maastricht issues, but also on the rest of the EC agenda.

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## APPENDIX 8

**Supplementary memorandum submitted by Martin Howe**

### SUBSIDIARITY AND THE BIRMINGHAM DECLARATION

#### 1. Introduction

This Memorandum is intended to bring up to date my earlier Memorandum on subsidiarity of 5 October 1992, by commenting on the Birmingham Declaration issued by the European Council at its meeting on 16 October 1992.

#### 2. Legal impact of the Birmingham Declaration

In my previous Memorandum, I set out a number of factors which in my view are necessary in order for the principle of subsidiarity to be rendered effective in practice. I will consider the extent to which the Birmingham Declaration does or does not represent progress as regards those factors.

*Basic definition*: It is hard to see that the Birmingham Declaration has any effect on the basic definition of subsidiarity contained in Article 3b. Paragraph 5 refers to "excessive centralisation", and states that action at Community level should only happen "when proper and necessary". If the objectives of a proposed action cannot, in the words of Article 3b, "be sufficiently achieved by the Member States", it would follow that action at Community level would be "proper and necessary". The Declaration does not impose any hurdle on Community action additional to the (inadequate) hurdle already present in Article 3b.

In my previous Memorandum, I criticised the "better attained" definition of subsidiarity in Article 3b as being subsidiarity only in the mode of achievement of a programme of objectives laid down by the Community; and so essentially reserving to Member States the role of mere agents for the implementation of Community policies. It is noteworthy that the only specific "guideline" mentioned in the Declaration, in paragraph 5, 2nd indent, seeks "the lightest possible form of legislation, with maximum freedom for Member States on *how best to achieve the objective in question*." (my emphasis). This reinforces my concern that the Birmingham Declaration reflects the development of an artificially narrow form of "subsidiarity" in which the Community defined objectives themselves are not open to any question even if they lead to undue interference.

*Guidelines in specific policy areas*: Agreement on such guidelines is the single most essential element in making subsidiarity work. Without such guidelines, agreement on a general definition of the principle will mask real differences of approach which will emerge in disputes at a later stage. Difficulty in reaching agreement on such guidelines is an ominous portent. The Declaration foreshadows the production of guidelines before the Edinburgh summit, and final judgement must be withheld until the content of such guidelines can be seen. The guidelines will not be effective if they turn out to be vague general rules similar to the suggestion of using the "lightest possible form of legislation" mentioned in paragraph 5, 2nd indent.

*Juridical basis and field of application*: The Birmingham Declaration, because of its status, is not a binding instrument in Community law. Its effect on the Court and on other Community institutions would be persuasive only; although it is in such general terms and adds so little to the Treaty text that it would make little difference even if it were a binding instrument. Of more concern is the proposed status of the guidelines: if these have real content, it would be unsatisfactory if they were merely embodied in a further declaration, since they might then be disregarded by the Court or other Community institutions.

*Institutional mechanisms*: Changes to the procedures and practices of the Council of Ministers are foreshadowed, and reference is made to changes in the Commission's internal procedures. These however are purely internal changes, and paragraph 6 of the Declaration specifically rules out affecting the balance between the Community institutions. It cannot be expected that Community institutions will effectively police themselves when it comes to imposing limitations on their own powers; it is likely that "subsidiarity" will be brushed aside when measures are thought to be politically desirable.

*Conclusion*: The Birmingham Declaration does not of itself contribute anything of substance to making the principle of subsidiarity more effective at the legal level. It foreshadows the creation of "guidelines" which might or might not, depending on their nature and content, be of some value.

### 3. Subsidiarity at the political level after Birmingham

I acknowledged in my previous Memorandum that effectiveness at the legal level is not the only consideration. Subsidiarity could be made effective at the political level even if the legal basis for it were not as strong as might be desired. However, in order for this to be so, it would be necessary for there to be a general political consensus in favour of respecting subsidiarity, and a general measure of agreement about what the principle means in practice.

The problems experienced in reaching agreement on any more emphatic statement of the principle than that embodied in the Birmingham Declaration, or in reaching agreement on the guidelines, suggest that neither of these preconditions for the effectiveness of the principle of subsidiarity at the political level is present.

This apparent lack of political underpinning for the principle renders the manifest deficiencies in the legal underpinning of the principle even more alarming.

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