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# SWEDISH SNUS CONFRONTS BASIC EU PRINCIPLES

*Hans Henrik Lidgard\**

## 1. Federation or . . .

In his first book about the European Community – which became the standard in Swedish legal education on European law – “Celebrator” speculated whether the collaboration in Europe should be characterized as a “federation” or something else. I have always recalled that Lennart Pålsson preferred to use at most the words “a pre-federative organization”.<sup>1</sup>

In spite of all the learned opinions in the book, it is still these initial remarks that have followed me throughout the years. One must still ask: What is the proper characterization of the European collaboration, has it changed over time and where is it heading in the future.

As is well known, the member states have approached this discussion with the utmost concern to avoid using the “F-word” in official texts. Countries in favour of integration and a deepening of the collaboration would indeed not oppose it.

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\* The author presented his academic dissertation on “Sweden, EEC and Competition” in 1977 under the supervision of professor Lennart Pålsson. Special gratitude is conveyed to Kanslirådet Ninna Rösiö, another research fellow tutored by Lennart Pålsson, for support with material and advice to this paper. The paper was completed in July 1995.

<sup>1</sup> My memory has served me right. See L. Pålsson, *EEC-Rätt*, 1970, p. 22. “I de fall där de supranationella momenten är tillräckligt starkt utvecklade, talar man inte längre om en internationell organisation utan om en *federal statsbildning* (exempel Kanada, Schweiz, USA). Det finns de som velat karakterisera EEC som en sådan federation. Detta är dock åtminstone på nuvarande utvecklingsstadium en betydande överdrift. På sin höjd skulle man – beroende på den framtida utvecklingen – kunna tala om en ‘prefederal’ organisation.”

Others suggest, with a typical "de Gaulle ring" to it, that Community collaboration is a collaboration between free and independent states. They prefer to characterise the collaboration as an economic community or a union. The problem is that such notions do not give a definite and clear picture of the content of the collaboration or what can be expected in the future. Each interpreter adds his personal note to the definition and only the future will tell where it all ends.

The Treaty on European Union signed in Maastricht on February 7, 1992 ("TEU" or the "Maastricht Treaty")<sup>2</sup> did not eliminate the uncertainties, but rather added on new ones. "We have . . . a union without real unity, a building half-built with an institutional 'géométrie variable' and a 'rendez-vous' in 1996 to try to improve on what was achieved in Maastricht."<sup>3</sup>

The loopholes in the Maastricht Treaty necessitate further discussions, as predicted at the time of the signing of the Maastricht Treaty. A new conference was called for within five years to undertake the requisite supplementation to the legislation.<sup>4</sup> Today the member states are at a preparatory stage for this Intergovernmental Conference 1996 ("IGC 1996"), where the first task is to define which of the many open issues shall be the subject of priority. Many are called for, but only few can be chosen if the conference shall have any chance of success. The "F-question" will – perhaps without being discussed as such – underlie those issues which are to be debated.

It is not going to be easy to find detailed solutions to many open items without a basic agreement on the characterization of the European collaboration. One escape route that worked at Maastricht in 1992 and which many function again is the "subsidiarity principle".

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<sup>2</sup> The use of abbreviations is a constant problem. EEC, EC and now EU have been used at different times to describe the Community collaboration. This paper uses the notions and abbreviations established in 1993: European Union (EU), Treaty on European Union (TEU), Treaty establishing the European Community (ECT), European Council, Council (of the European Union), (European) Commission, European Parliament (EP), European Court of Justice (EJC) etc., unless the text would be misleading by such use.

<sup>3</sup> E.P. Wellenstein, "Unity, Community, Union – what's in a name?", Guest-editorial, *Common Market Law Review*, (1992), p. 209.

<sup>4</sup> Article N(2) TEU refers to those provisions of the Treaty for which revision is provided. Article 3b ECT on subsidiary is not included – which will not prevent that this provision will be part of the IGC 1996 discussion.

It becomes easier to transfer competence to the central level if the member states believe that it is not an exclusive, but rather a shared competence and that they retain ultimate control.<sup>5</sup>

Subsidiarity was one important issue in the snuff discussion within the Community during the first years of the 90s. The purpose was to allow Swedes to continue their age-old habit of putting moist tobacco under the upper lip.<sup>6</sup> The snuff debate touched upon Community concepts which will again be of relevance in the IGC 1996. The legality, subsidiarity and proportionality principles were all referred to. When the matter resurfaced during the accession negotiations, a compromise solution was found which led to a new form of restrictions on the free movement of goods. The snuff case was also of interest as an experience in approaching community authorities – a lobbying practice<sup>7</sup> that Swedes must be familiar with.

The purpose of this paper is to present the snuff discussion as it took place and especially as it relates to the subsidiarity concept and then to attempt conclusions relevant for IGC 1996.

## 2. Moist snuff

### 2.1 A barbarian Swedish habit

Swedes know "snus" as a "fine-cut", non-fermented tobacco with a 50 % water content. The product, whether in loose form or portion packed in small paper bags, is put under the upper lip – thereby

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<sup>5</sup> See for an overall Swedish analyses SOU 1994:12, "Suveränitet och demokrati", *Be-tänkande av EG-konsekvensutredningarna: Subsidiaritet* which is an official Swedish Royal Commission for investigating and reporting on how sovereignty and democracy in Sweden are affected by a membership in the European Union. Lennart Pålsson was one member of the Royal Commission. See also P. Cramér, "Noteringar rörande subsidiaritets-principens tillämpning i framtidens EG/EU", *Svensk Juristtidning* (1973) pp. 533–547.

<sup>6</sup> Responsible for the lobbying efforts were Stefan Gelkner, president of Gotia Tobacco and Roland Perlström, vice president Swedish Match.

<sup>7</sup> The word "lobbying/lobbyist" has been regarded as a new and unknown feature in Sweden – involving networking and greasing the palms of contacts. More correct is probably to define the lobbyist as a representative or an "ombudsman" as the word is commonly used in the Swedish language. His/her knowledge about Community procedures is vital; the net work is important but paramount is the interest he is representing and the strength of the opinion advocated. The authorities are presently preparing rules of conduct which shall govern the relationship between community officials and lobbyists.

allowing the active nicotine substance to penetrate the mucus membrane.

In Europe Swedes are almost unique in their snuffing habit. Our Nordic neighbours have adopted the custom to a limited extent and a minuscule amount of snuffers exist in Germany. The Germans rather use "Kau-Tabak" which has the curious instruction on the package: "Nicht zum kauen". Kau-Tabak is also granulated tobacco compressed into small pieces which when placed on the tongue release the nicotine buccally. In addition, North Africans living in France snuff – a habit that they have brought from their home region. Their product, which is produced in Belgium, differs from the Swedish. Otherwise Europeans more elegantly "sniff" a dry powder form of tobacco through the nose.

Snuffing also occurs outside Europe in certain disparate countries and it is interesting that no logic can easily explain how the habit has developed and spread. Some US states have adopted the snuff habit with products like Red Man, Skoal Bandits and Copenhagen (as if this most Swedish habit emanated in Denmark). The products are all similar to Swedish "snus", but differ in that the tobacco has been fermented. To underscore the difference, the snuffing American will put his snuff under the lower lip. A special form of snuffing – "snuff-dipping" – has spread among women in the Southern states. A moistened stick is dipped in the snuff and thereafter massaged between the teeth and the gum and the nicotine is thereby introduced into the bloodstream.

Oral snuffing is also widespread in countries like India, Pakistan and in certain African countries. Oddly, Sudan has a per capita snuff consumption that is as high as Sweden's.

The snuffing habit is approximately 150 years old in Sweden. Initially it started among the working population – fishermen and foresters – but gradually it has spread to society at large. One reason is that snuffing has been regarded as a less harmful alternative to smoking. Almost 20 % of the grown male population in Sweden occasionally snuff. Surprisingly 2 % of the female population also more or less regularly use portion packed snuff.

It has been discussed whether snuffing is an introduction to the habit of smoking for young people. If the answer is "yes", statistics

show that Swedish youth smoke proportionally less than youth in other countries. The assumption is therefore that if the young Swedes had not started snuffing they would have smoked instead.

## **2.2 Snuff becomes a European matter**

Europeans consume approximately 6,000 tons of snuff each year. The small eight million Swedish population uses 5,300 of the 6,000 tons and 370 million other Europeans the remaining 10%. The figures verify that the consumption of oral moist snuff is primarily a Swedish habit.

As stated, snuffing is also widespread in certain US states and the total American consumption is larger than the European. One leading US producer decided in the mid 80s to increase its efforts to export American fermented snuff to the unexploited European continent. The company obtained permission and UK government support to establish a snuff factory in Scotland. In parallel it initiated marketing of its products in a number of European countries with efficient American marketing concepts primarily directed towards young people. It intended to build a long-term market by creating a habit among the young.

United Kingdom, Ireland and Belgium responded to the American marketing methods by prohibiting the product in their respective markets. The legal enactments were all appealed by the producing industry. An Irish court upheld the prohibition arguing that the prohibited product had side effects detrimental to health.<sup>8</sup> The UK court – based on equitable grounds – set the administrative decision aside. The product was considered harmful, but authorities could not allow the establishment of a production unit while prohibiting the

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<sup>8</sup> The Irish legislation banning oral smokeless tobacco products was contained in the Tobacco (Health Promotion and Protection) Act 1988 S.I. No. 39 of 1990. Section 6 stipulates that: "(1) Any person who imports, manufactures, sells or otherwise disposes of, or offers for sale or other disposal, or advertises, an oral smokeless tobacco product shall be guilty of an offence . . ." The High Court in case 1990 No. 871p between United States Tobacco (Ireland) Limited and United States Tobacco International Inc (plaintiffs) and Ireland, Minister for Health and Attorney General (defendants) upheld the legislation. Judgment of Mr. Justice Blaney delivered the 19th day of February 1991.

sale of the resulting product.<sup>9</sup> In Belgium the matter was appealed through the ordinary system, but due to a dragged-out procedure no judgment was issued before the matter was raised on the European level and therefore withdrawn by the applicant.<sup>10</sup>

### 3. The initial European process

#### 3.1 The Commission initiates activities

In 1989, during the national appeal procedures, the European Commission initiated a separate investigation. Intervention became necessary because the same product was now allowed in certain member states and prohibited in others. The overriding principle of free movement of goods in Europe required a consistent treatment of the product throughout the Community.

Within the Commission, the task force "Europe against Cancer" was appointed to handle the snuff issue. In combating cancer, the task force had made the struggle against tobacco one of its main priorities. Having assigned the task force the matter meant that health issues were an important factor in the future discussion, whether this was a Community competence or not. Concern for free trade became a secondary issue.<sup>11</sup>

During an initial 10 month period the Commission invited interested parties to submit their observations, among them representatives from the Swedish tobacco industry. Unfortunately, the Swedes were not fully aware of how important their first contact with the Commission was. They made their observation and left Brussels

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<sup>9</sup> The English legislation is contained in Oral Snuff (Safety) Regulations 1989 (SI 1989 No. 2347). The legislation was set aside by Decision of 21.12.1990: Secretary of State for Health – ex parte United States Tobacco International Inc. – Lord Justice Taylor – Queens Bench division [1991] 3 WLR 529.

<sup>10</sup> The appealed Belgian legislation – l'Arrêté Royal du 13/8/90 – stipulated in Article 2, § 2b): "Il est interdit de mettre dans le commerce le tabac à sucer en sachets destiné à être mis dans la bouche tel quels." The matter was referred to the Conseil d'Etat, matter G/A 43927/III/12037, but withdrawn in view of the up-coming European process which would impact on the Belgian legislation as well.

<sup>11</sup> The secondary interest for the rules on free movement is demonstrated by the ultimate solution, described in Section 5.2 below. Therefore, the European oral tobacco market is today as fragmented as before the Commission initiated its initiative – if not more.



with the impression that their arguments had some impact. In retrospect the Swedish case would have been better served if complete scientific argumentation had been presented at this stage. Once the institutional bodies have made their assessment it becomes difficult – on the verge of impossible – to introduce additional evidence which could tip the balance in favour of a different decision.

In November 1990 the Commission had completed its investigations and prepared a draft Directive prohibiting the release on the market of oral moist snuff tobaccos.<sup>12</sup> The Directive was based on Article 100a ECT and not Article 235 ECT. A reason was that the Commission expected opposition from at least one member state to its different tobacco initiatives.<sup>13</sup> The use of Article 100a ECT was questioned by EP Legal Committee as not satisfying the legality principle but never really challenged. Following Community procedures, the draft was next submitted to the Council.

The definition of the prohibited product under this first proposal was crucial.<sup>14</sup> It covered the marketing and sale of tobacco in powder

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<sup>12</sup> Proposal for a Council Directive amending directive 89/622 on the approximation on the laws, regulations and administrative provisions of the Member States concerning the labelling of tobacco products. COM (90), Brussels, 12 November 1990.

<sup>13</sup> See H. Rasmussen, *EU-ret og EU-institutioner i kontekst*, 1994 pp. 48. Rasmussen suggests that the Commission is deliberately manipulating the legal basis in order to achieve political results (p. 50). EJC has always supported the Commission if there has been a reference to a legal objective even if the true underlying reason came outside the competence of the Community. Note, however, case C 155/91, *E.C. Commission v. E.C. Council*, [1993] 1 ECR, 939 at para. 10 and 14–15 where the Court held that an environment measure fell under the specific environmental rules and did not come under the rules of free movement of goods. This judgment was followed in case C 187/93, *European Parliament v. E.U. Council*, [1995] CMLR volume 73(7) p. 309 where ECJ held at para. 25 that “the mere fact that the establishment or functioning of the internal market is involved is not enough to render Article 100A of the Treaty applicable and recourse to that article is not justified where the act to be adopted has only the ancillary effect of harmonising market conditions within the Community.”

<sup>14</sup> The original Council Directive 89/622/EEC, OJ No. L 359, 8.12.1989 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the labelling of tobacco products – defines “tobacco products” as “products for the purpose of smoking, sniffing, sucking or chewing in as much as they are, even partly, made of tobacco.”

The Commission Proposal *op.cit.* (note 11) added the following definition: “(4) “oral moist snuff tobaccos” means all products made wholly or partly of moistened tobaccos in fine cut, ground or particular form or in any combination of these two forms which are for oral use other than smoking.

or particular form for oral consumption to which water had been added and it had been carefully designed not to affect any form of non-smoking tobacco already existing in the Community. Dry snuff for nasal consumption as well as German "Kau-Tabak" and chewing tobacco escaped the prohibition. The difference was not the tobacco form, but rather its water content – even if water as such has never been alleged to have a detrimental effect on human health!

The proposal was one of the few instances where a prohibition has not covered the harmful substance, but one special form of it – the moist powder form. Throughout the process it has therefore been argued that the Commission's approach was an unlawful discrimination between one product and another essentially similar one in breach of the principle of non-discrimination. Such discrimination could only be accepted if the authorities had proven that the prohibited form was more harmful.<sup>15</sup>

As a factual basis for its proposal, the Commission relied on certain scientific studies made in USA and India which suggested that oral, moist snuff indeed caused mouth cancer. The preamble of Directive 92/41 states "... in accordance with the conclusions of the studies conducted by the International Agency for Research on Cancer, tobacco for oral use contains particularly large quantities of carcinogenic substances; whereas these new products cause cancer of the mouth in particular."

The Swedish snuff industry argued that these studies were of limited relevance as they related to different products having different mode of actions. No conclusive long term study had been made on Swedish products. On the contrary, scientific work performed in Sweden rather suggested that the eventual harm caused by Swedish "snus" could be reversed once the habit was abandoned. A persuasive argument by the industry was that, considering the large proportion of Swedish snuffers, it could be expected that Sweden would have a far higher incidence of oral cancer than any other country. In

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<sup>15</sup> The principle of equality or non-discrimination requires that similar situations should not be treated differently unless the differentiation is objectively justified. In case 13/63, *Italy v. Commission*, (1963) ECR 177 ECJ observed in para. 4 that "Material discrimination would consist in treating either similar situations differently or different situations identically."

reality, however, Sweden has the lowest rate of oral cancer per capita in Europe. 150 years of widespread consumption had not had any impact on the health of the Swedish population. Not only had the Commission not carried its burden of proof, evidence even lay against the Commission.

### **3.2 Lobbying the European Parliament**

During an almost two-year period the snuff matter went back and forth between the institutions in the Community according to the then existing decision-making process. Although oral snuff had no great significance in the Community, the debate was considerable.

In the European Parliament ("EP"), The Environmental Committee under its rapporteur Vernier and the Legal Committee advised by its rapporteur Lord Inglewood produced two different opinions. The Environmental Committee agreed without reservations with the Commission and argued in favour of a prohibition. The Legal Committee was not convinced that the Community had the legal competence (see below) to deal with snuff matters and stalled its decision.

During the parliamentary process lobbyists approached parliamentarians and, though the Swedish representatives came from a non-member country and advocated in favour of a tobacco product, they were well received. Evidence and arguments were presented in "big brown envelopes" as the Swedes were out solidly to prove their case. The question is, however, whether this massive scientific information was not counterproductive. Members of the European Parliament (MEPs) have a hectic agenda and are unlikely to study large dossiers regarding such a remote issue as oral snuff.

The personal and oral approach also applied was far more successful. It is the experience of most lobbyists that MEPs are quite receptive to short, condensed oral presentations of facts and arguments that show other aspects than those in favour of a proposal. Lacking this additional view, the MEPs would have to rely on information produced by the Commission, which is perhaps not always complete and free from bias.

### 3.3 The legal arguments

As indicated, the snuff lobbyists argued that the Directive was a discrimination against snuff over other tobacco products and also advocated against the Commission's evaluation of the impact on health. No suggestion was made that the Swedish product was healthy, but rather that the Commission had failed to prove that snuff was harmful and especially more harmful than any other tobacco product. The more forceful arguments pleaded were that several fundamental Community concepts were infringed by the proposed Directive:

1. The "Legality Principle"<sup>16</sup> was – as indicted by the hesitation of the EP Legal Committee – not satisfied. The snuff prohibition was in reality based on health concerns that were then not a part of its competence.<sup>17</sup>
2. The "Subsidiarity Principle"<sup>18</sup> was also infringed as the matter was not an exclusive EC competence and it was not established

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<sup>16</sup> The legality principle has been recognized as a fundamental principle of Community law and Article 3b ECT now confirms this principle by providing 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."

<sup>17</sup> Article 129 ECT as amended by the Maastricht Treaty now stipulates that "The Community shall contribute towards ensuring a high level of human health protection by encouraging cooperation between the Member States and, if necessary, lending support to their action. . . . Health protection requirements shall form a constituent part of the Community's other policies." It is questionable if even this stipulation could give EU competence to enact a snuff prohibition. In fact, Article 129 ECT is a good expression of the subsidiary principle in the sense that legislation shall primarily be undertaken at state level and the Community shall support such actions.

<sup>18</sup> The subsidiarity principle can be referred back to Thomas Aquinas. It has especially been adopted and discussed by the Catholic church. See L.F. Eklund, "Subsidiaritetens principen dess bakgrund och innebörd", *Expertrapport till SOU 1954:12, Suveränitet och demokrati*. It has its equivalence in different federal constitutions. In the Constitution of the United States of America, Amendment X it is stipulated that: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively; or to the people." This is a stipulation seldom referred to in court proceedings. Of greater interest is the definition of congressional powers in Article I, Section 8, which when read together with Section 10 actually contains a division of powers between federal and state level in the form of detailed listing. A detailed listings has been inserted in the German constitution. See below (note 56). In spite of all the years of federal experience the underlying idea of a balance of power between central and local authority remains un-precise.

that it could not be handled on a national level just as efficiently as on the Community level (see below).<sup>19</sup>

3. Finally, the "Proportionality Principle"<sup>20</sup> was disregarded. It would have been more adequate and less burdensome for the interested parties if snuff was allowed but made subject to the relevant restrictions on marketing and sale used for general tobacco products: i.e. restrictions on sale to younger persons, on advertising and perhaps coupled with gradual reduction of alleged harmful substances like nitrosamines.

The remarks made were indeed timely as they just preceded the Maastricht treaty. In fact, Article 3b ECT now contains direct references to the three principles referred to.

The legality and proportionality principles are well known in Community law whereas the reference to the subsidiarity principle was a more novel approach.

The underlying idea was simple: The habit of snuffing is primarily practised in Sweden. Therefore, let the Swedes handle the matter as Swedish authorities are fully competent to take the required precautions and so is any other member country affected by the habit. Nothing would prevent these countries from taking adequate measures required to protect the health and well-being of their citi-

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<sup>19</sup> Compare Rasmussen, *op. cit.* (note 12) P. 48, who argues that the proposed parallel prohibition on Tobacco Advertising – proposed directive (Com (92) 196 Final). Brussels 30/4 1992 – infringed the subsidiarity principle – especially in view of the prohibition on harmonization in Article 129:4.

<sup>20</sup> Case C-331/88 *The Queens v. Minister of Agriculture, Fisheries and Food and the Secretary of State for Health, ex parte FEDESA and others* ("Hormones") CMLR 1991 p. 407 at para. 13: "The Court has consistently held that the principle of proportionality is one of the general principles of Community law. By virtue of that principle, the lawfulness of the prohibition of an economic activity is subject to the condition that the prohibitory measures are appropriate and necessary in order to achieve the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued." The proportionality principle is now recognized by Article 3b: "Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty."

zens.<sup>21</sup> There was no need for an intervention by the Community which should rather confine itself to supporting the member states in their efforts.

The arguments were made in spite of the fact that Sweden was still not a member of the Union, but relying on the 1972 Free Trade Agreement between Sweden and the EEC and subsequently the European Economic Area agreement (EEA). This latter agreement should have the same legal consequences as Community law. A prohibition of the product in the Union would promptly have to be extended to the EEA in the form of an EEA directive and subsequent national implementation. Therefore the same principles should apply in the interpretation of the EEA agreement as would apply in Community law.

The subsidiarity argument was not evident and several commentators deny that such a concept existed at so early a stage in the Community development.<sup>22</sup> Arguments in favour of a prior existence underline that the preamble of the treaty of Rome refers to an ever closer union. Through Article 235 ECT the possibility of adding new areas of competence is included in order to achieve objectives foreseen by the Treaty. Likewise, the use of directives foreseen in Article 189 ECT could also be seen as an expression of the subsidiarity idea.

On each point it could, however, be argued that they rather speak in the opposite direction and that the basic concept of the ECT is that of transfer of defined areas of competence from the member states to the Community institutions. In recent times it has been necessary to adopt a more flexible approach in order to achieve political consensus on adding new competencies to the Community. With the Single European Act ("SEA") in 1987 the subsidiarity concept was intro-

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<sup>21</sup> Case 120/78 *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)* CMLR 1979 p. 494. See the recently published dissertation by C.M. Quitzow, *Fria varurörelser i den Europeiska gemenskapen. En studie av gränsdragningen mellan gemenskapsanläggigheter och nationella angelägenheter*, 1995, pp. 295–330.

<sup>22</sup> D.Z. Cass, "The word that saves Maastricht? The principle of subsidiarity and the division of powers within the European Community", *Common Market Law Review* 29 (1992), pp. 1107–1136 explains the gradual development of the subsidiarity concept in Community law. A.G. Toth, "The Principle of Subsidiarity in the Maastricht Treaty", *Common Market Law Review* 29 (1992), pp. 1079–1105, especially at p. 1081 opposes the prior existence.

duced in relation to the environment with an express reference. Such a clause would not have been necessary if subsidiarity already was a fundamental principle in Community law.<sup>23</sup>

## 4. The decision making process

### 4.1 Parliament votes in the first reading

Lobbyists referring to both health arguments and underlying Community concepts and the Legal Committee hesitation had some impact on the decision-making in Parliament, but it was not enough. In the end the proposed directive carried in July 1991 with a small 19 vote majority in the first reading.<sup>24</sup>

In parallel the Economic and Social Committee ("ECOSOC") dealt with the Commission proposal. As the opinion of this institution carries less weight in the community decision making process, the Swedes did not actively lobby it. At about the same time as the decision in Parliament the committee eventually arrived at a recommendation following the proposal of the Commission. ECOSOC added that portion packed snuff especially should be prohibited.<sup>25</sup>

### 4.2 Council adopts a Common Position

As the next step in the Community decision making process the Council, based on the advice from Parliament and ECOSOC had to adopt its "common position" – which should be subject of a second reading in the Parliament before finally adopted by the Council. Lobbying activities towards the Council and the member states were, of course, crucial.

At this time the Swedish Parliament had instructed its government

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<sup>23</sup> Article 130r(4) ECT provided that: "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."

<sup>24</sup> The Parliament gave its opinion on 8 July 1991, OJ No C 240, 16.9.1991 p. 24.

<sup>25</sup> The Economic and Social Committee gave its opinion on 29 May 1991, OJ No C 191, 22.7.1991 p. 37. The proposed prohibition of portion-packed snuff has been inserted in directive 92/41/EEC in spite of the fact that it is not clear why a product which is already prohibited by the directive shall be "especially prohibited".

to support any snuff-defending activities.<sup>26</sup> Snuff thereby became a national Swedish concern and the lobbyists received official Swedish support in accessing important decision-makers. Even if it is not easy for diplomats to argue in favour of a tobacco product, the minister responsible for European matters – Mr. Dinkelspiel – and the diplomatic corps did so in line with their instructions.

COREPER was approached, but also member states siding against the proposal. For reasons of constitutionality Germany opposed the snuff-prohibition. Similarly Italy would vote against a prohibition – but for different and perhaps not so obvious reasons. All that was required was a no-vote from one additional country – large or small – to create a blocking minority and thereby prevent the Council from adopting its common position.

United Kingdom, which under ordinary circumstances would be a safe opponent to Community tobacco legislation and a supporter of subsidiarity, had an active anti-snuff position. It was therefore not prepared to vote against the Directive. Denmark – where moist snuff is both produced and used – also seemed a likely no-voter. Denmark was, however, defending its cigarette producing industry and not prepared to dilute its efforts in favour of snuff. Holland, finally, had been ambivalent towards a prohibition, but now held the presidency of the Council which led it to a more Community-oriented approach.

The “common position”<sup>27</sup> – which was adopted in November 1991 – contained several amendments: The original definition had been altered, but still achieved the same purpose as in the initial Commission proposal. The particular prohibition for portion packed snuff suggested by the Economic and Social Committee was included in the definition in spite of its lack of logic and in the preamble of the Directive it was now clarified that “traditional products” were ex-

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<sup>26</sup> Parliamentary Standing Committee on Industry and Commerce 1990/91: NU 47 suggested that the EU proposal amounted to a restriction of trade. In addition a prohibition would infringe the liberty of the tenth of the Swedish population which comprises the country's snuff consumers. See Svenska Dagbladet 10/4 1994 “Näringsutskottet vill rädda snuset”.

<sup>27</sup> Position Commune arrêtée par le Conseil le 11.11.1991 en vue de l'adoption de la directive modifiant la directive 89/622/CEE. Doc 8657/91.



empted.<sup>28</sup> For a brief period this latter passage was interpreted to mean that also Swedish snuff would come under the exemption. Commission officials clarified – in keeping with accepted Community law principles<sup>29</sup> – that this exemption would only apply to traditional EU products. Such products would have come outside the operative definition of the Directive anyway as it had been carefully designed not to cover any product within the Community.

### 4.3 The second reading in Parliament

With the new procedural rules under the Maastricht agreement, Parliament could either oppose the common position or amend it by a qualified majority of all MEPs. It was regarded as highly unlikely that 260 members would come out against proposed legislation taking a negative approach to a tobacco product which was neither produced nor consumed in the Union. This certainly “was not a hill to die for”.

Undiscouraged by the impossible mission and more experienced this time, the Swedish lobbyists changed their tactics compared to the first reading. No “thick brown envelopes” or complicated arguments regarding discrimination, health and Community concepts. Lobbying activities were concentrated on group leaders and key parliamentarians. Support from political forces in Sweden was also strong. The distributed information was clear and above all simple – contained in

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<sup>28</sup> The preamble of the Commission amended proposal, COM (91) final – SYN 314, Brussels, 188 September 1991 stipulates for the first time in the end: “Whereas, the sales bans on such tobacco already adopted by three Member States have a direct impact on the establishment and operation of the internal market; whereas it is therefore necessary to approximate Member States’ laws in this area taking as a base a high level of health protection; whereas the only appropriate measure is a total ban; whereas however, *such a ban should not affect traditional tobacco products for oral use* (emphasis added) which will remain subject to the provisions of Directive 89/622/EEC as amended by this directive applicable to smokeless tobacco products;” This statement in the preamble was adopted by the Council common position (see below).

<sup>29</sup> The fact that the exemption for traditional products appears only in the preamble is significant. The ECJ made clear in case 215/88 *Casa Fleischhandel v. BALM*, (1989) ECR 2808 at para. 31 that: “whilst a recital in the preamble to a regulation may cast light on the interpretation to be given to a legal rule, it cannot in itself constitute such a rule.” Accordingly the reference to traditional products is only valid as to those products which do not come under the operative provisions of the directive. It is no more than an explanation. It cannot be used to create derogations from what is otherwise prohibited.

1-page "flyers". Personal contacts with as many MEPs as possible were added on top of the strategic contacts.

At this stage of the debate it had become obvious that Swedish public opinion was much affected by the EU approach to a product which quickly became identified with the Swedish national character. Was the prohibition of that products what the Union was all about?

It would be difficult to secure a Swedish "yes" to EU membership if no sensible solution to the snuff issue was found. For those MEPs who favoured an enlargement of the Union this was indeed an important argument. In addition several parliamentarians now saw the snuff-legislation as a good example of when the new subsidiarity principle should be applied.

Based on the discussion, the Swedish industry representatives drafted an amendment to the proposed Directive which would exempt traditional "European" (in a wider sense) products from the prohibition.<sup>30</sup> In the end only products produced in other parts of the world would come under the prohibition – which was not a concern of the Swedish producers. The draft amendment was endorsed and signed by more than 60 MEPs.

In the parliamentary debate which followed, Mr. Tom Spencer, leading British conservative and a strong advocate of Swedish membership in the Union, urged the Commission to accept the amendment.<sup>31</sup> Commissioner Ripa Di Meana riposted that it would not be necessary as Swedish "snus" came under the exception for tradition-

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<sup>30</sup> The proposed amendment contained the following text: "Tobacco for oral use, for the purpose of Article 8a, means all products for oral use *which are not of a traditional European type*, made wholly or partly of tobacco, in powder or particulate form or in a form resembling a *confectionary* products."

<sup>31</sup> See European Parliament minutes from debate 10.3.92 p. 71. Mr. Spencer said that "At the moment there is a reference in the revised Common Position [to traditional products] which might make things easier. But at the moment it is only in the recitals. It is not in the operational parts of the Directive. It is my concern and that of many friends in Sweden that this matter should be made absolutely clear. . . . The Swedes have the lowest rate of oral cancer in Europe. In fact the highest rates of oral cancer, as far as we can tell, appear to be connected with Calvados drinking. That is a figure given us by the Belgian cancer authorities."

al products.<sup>32</sup> Mr. Spencer then suggested that the reference to traditional products should be included in the operative text of the directive which the Commissioner did not think necessary as the explicit recital should be sufficient to achieve an exception for Swedish "snus".

Again, lobbying seemed to work – but by a small margin the final vote in March 1992 turned out against the proposed amendment. Out of the required 260 votes, 240 voted in favour of the amendment, 46 voted no and yet another 8 abstained.<sup>33</sup> However, considering the views expressed by the Commissioner it appeared as if Swedish "snus" would according to the view of the Commission come under the exception for traditional products.

#### 4.4 The Directive enacted

The voting result in the Parliament indicated that the MEPs were strongly in favour of exempting Swedish snuff, but an overwhelming majority of those voting was not enough at this stage of the Community decision making process. The qualified majority rule required 260 if favour – no less. Shortly after the vote in Parliament, the Council therefore enacted the final directive.<sup>34</sup>

Directive 92/41 defines in Article 1:2 the prohibited tobacco for oral use as:

"... all products for oral use, except those intended to be smoked or chewed, made wholly or partly of tobacco, in powder or particulate form or in any combination of these forms – particularly those presented in sachet portions or porous sachets – or in a form resembling a food product."

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<sup>32</sup> See above (note 31). The Commissioner said: "Taking the Swedish case as an example, I would like to say that the Directive will be applied as regards *ex novo* presentation of such products but that it will not apply to consumption of traditional products. In the opinion of the Commission, this point is already sufficiently clear in Clause 17 of the text of the proposed Directive."

<sup>33</sup> Parliament debate see OJ No. C 94, 13.4.1992.

<sup>34</sup> Council Directive 92/41/EEC OJ L 158/30 11.6.92, amending Directive 89/622/EEC on the approximation of the laws, regulations and administrative provisions of the Member States concerning the labelling of tobacco products, adopted by the Health Minister Council on May 15, 1992.

In spite of all the years of discussion and all the ink spilled on carving out a precise definition, the final wording leaves room for substantial discussion. Should the sentence be read as a prohibition on all products for oral use except the excluded ones that follow? That is clearly not the intention – but is it not what the definition actually says? Furthermore, snuff is neither in “powder or particulate form” but “fine-cut”. This word was contained in the original Commission proposal, but eventually deleted. Will this fact make the fine-cut Swedish “snus” escape the prohibition? The prohibition itself is related to the placing on the market of oral tobacco products as defined. What happens to the producer who markets the same product for “nasal consumption”, but the consumer is using it orally? What is the real meaning of the exception for traditional products? How many years of how wide-spread use does it take for a product to be traditional?

This unclear provision should have been implemented in the different member states before 1 July 1992 – i.e. one and a half months after the decision was finally made by the Council and some two weeks after it was published in Official Journal. This, of course, did not happen. Step by step the individual countries have introduced legislation at their convenience and often with their own little twist to make up for the deficiencies in the Directive. The implementation phase is still in 1995 not completed to the entire satisfaction of the Commission.<sup>35</sup>

## 5. Subsidiarity and compromises – a part of a new EU flexibility

### 5.1 The Subsidiarity Concept develops

References to the subsidiarity principle during the second reading in Parliament were still somewhat hesitant due partly to the emphasis

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<sup>35</sup> Denmark has made clear that it regards loose snuff as a traditional product which does accordingly not come under the ban. Germany has still not finalized its implementing legislation. Finland has prohibited snuff in accordance with the directive, but interestingly Åland is making use of its autonomous position and does not intend to prohibit snuff in any form.

put on Swedish membership in the Union, but also to the preliminary stage of the development of the principle – even if it had now been reduced to writing in the Maastricht Treaty. A clear interpretation could only be given by the ECJ and the Swedish tobacco industry prepared for legal proceedings promptly after the debate in Parliament had ended.

The first problem was to find a legal basis for bringing the matter to the Court, as member states were not likely to challenge the Directive. Any legal action would have to await not only the final adaptation of the Directive but also national implementation. Referral to the ECJ had to be arranged under an article 177–184 procedure.<sup>36</sup>

The Maastricht treaty which had been signed in February 1992 affected several of the areas which had been subject of the snuff debate. For one thing the Union had obtained a limited competence in health matters through the inclusion of Article 129 ECT. Furthermore, the discussion regarding the widening of Community competencies was balanced by a stipulation in Article 3b ECT dealing with subsidiarity:<sup>37</sup>

“In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.”

It has been argued that subsidiarity in Community law is a poor concept. It hampers integration rather than promoting it.<sup>38</sup> No doubt, the rule adds to the confusion by being imprecise in referring to notions such as “sufficiently achieved”, “reasons of scale and effect”

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<sup>36</sup> The possibility of injunctive remedies in Great Britain to prevent a Council decision or UK implementation of the Directive post adoption was considered, but abandoned.

<sup>37</sup> There are at least three references to the subsidiarity principle in TEU: The preamble states that the Member States are resolved “to continue the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen in accordance with the principle of subsidiarity.” Likewise Article A, second paragraph in Title I provides that decisions should be taken “as closely as possible to the citizen” and Article B, last paragraph in Title I requires that the conditions and the timetable shall be adhered to “while respecting the principle of subsidiarity as defined in Article 3b . . .”

<sup>38</sup> See Toth, *op. cit.* (note 22) at p. 1103.

and "better achieved". All leave room for differing interpretations. On the other hand it was the solution without which it is unlikely that the member states would have proceeded with other parts of the Maastricht Treaty.<sup>39</sup>

The Commission now underlines that subsidiarity allows both centralization and decentralization in the decision-making process.<sup>40</sup> Clearly, exclusive Community competencies fall outside the principle.<sup>41</sup> Likewise, in areas where the Community has no competence, the subsidiarity principle is of no relevance.<sup>42</sup> It is only applicable in areas of shared competence where a division of power becomes necessary. Initially there were few areas of shared competence in the Treaty of Rome. Over time this situation has changed and today shared competencies exist in areas like energy, environment, social, consumer and regional policies. These areas are generally speaking extended new competencies and the use of the subsidiarity principle has been a condition for the extensions.

It is difficult to understand the provision as anything but a presumption that legislation shall be enacted at national level. It is only where the member states cannot in a sufficient way achieve the objectives, but the Community can, that legislation shall be performed at Community level.

The EU authorities must from now on in accordance with Article 190 ECT consider subsidiarity aspects in their new legislative enactments with an indication in the preamble of new proposals why Community legislation is required.

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<sup>39</sup> See SOU 1994:12, op. cit. (note 5), at p. 124.

<sup>40</sup> Rapport sur le fonctionnement du Traité de l'Union Européenne. Préparer l'Europe du XXIème Siècle. Bruxelles 10/5 1995.

<sup>41</sup> Included in the exclusive competence are e.g. foreign trade policy, agriculture and fishery, transport and antitrust – at least to the extent the latter affects trade between member states. See Cramér, op. cit. (note 5) p. 539–540. Competition law is a good example for collaboration between EU and national authorities and application of subsidiarity in the best sense. Editorial Comment, "Subsidiarity in EC competition law enforcement", *Common Market Law Review*, (1995). The Commission has also suggested that the four freedoms are covered by the exclusivity. According to EF-Karnov 1993, p. 41, this would be to go too far. The principle should apply to any area where the member states may effectively legislate until Community law has been enacted.

<sup>42</sup> Examples of areas not covered by Community law are family law, criminal law, general torts and damages. See L. Pålsson, *EG-Rätt*, (1978), p. 75.

In spite of the restriction referring to the *acquis communautaire* in Article C TEU,<sup>43</sup> the European Council in Lisbon of June 1992 instructed the Commission to make a report on subsidiarity. Herein the Commission identified legislation or proposed legislation which should be withdrawn because it came under the principle.<sup>44</sup> This affected the proposed Directive on Tobacco advertising<sup>45</sup> – but not the Snuff directive, which remains valid.

## 5.2 The Swedish exception

The result of the EU procedure intended to introduce a prohibition of the marketing of oral tobacco products was the banning of an ill defined product for questionable reasons – with a wide general exception providing that the ban “should not affect traditional tobacco products for oral use”.

Swedish “snus” in loose form undoubtedly satisfies any possible definition of a traditional product as the product has been widely used in Sweden for more than 150 years. Even the portion packed product – which is loose snuff surrounded by a bag made of approved paper – satisfies normal traditional requirements having been marketed in Sweden for some 20 years. The portion packed product has throughout its years of existence gained market share because it has been regarded as a more hygienic and milder product.

If Swedish “snus” were regarded as a traditional product in the Community it would escape the prohibition of the Directive and could be sold both in Sweden and other parts of the Community without any restrictions. This was probably the legal position after the enactment of Directive 92/41. Commissioner Ripa Di Meana already during the parliamentary debate indicated that this would be the case.

Unfortunately for the Swedish tobacco industry, the relative un-

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<sup>43</sup> Article C TEU stipulates: “The Union shall be served by a single institutional framework which shall ensure the consistency and the continuity of the activities carried out in order to attain its objectives while respecting and building upon the *acquis communautaire*.”

<sup>44</sup> “Commission Report to the European Council on the adaptation of Community legislation to the subsidiarity principle.” Brussels 24/11 1993.

<sup>45</sup> Proposed Directive, Com (92) Final, Brussels 30/4 1992.

certainly surrounding the fate of the Swedish "snus" led the Swedish authorities to bring the matter up for clarification both in the Swedish negotiations for accession to the European Union and in the context of the EEA-agreement. In the membership negotiations Sweden requested that the Directive should not be applicable to "snus" in Sweden. The EU side granted a derogation for "snus" both in loose and portion packed form – but not for "snus in forms resembling food products" – on condition that Sweden would introduce an export ban in respect of all member states except Norway.<sup>46</sup>

In March 1994 the matter was the subject of a decision in the EEA Joint Committee as Directive 92/41 was part of the "pipeline acquis communautaire" which had been adopted in the EU after 31 July 1991 (which was the stop date for EU legislation included in the EEA agreement). In this decision<sup>47</sup> the Joint Committee amended Protocol 47 and certain annexes to the EEA agreement. Chapter XXV dealt with tobacco and stipulated that the Community prohibition on oral tobacco should not apply to marketing in Iceland, Norway and Sweden. Again the exception did not apply to "snus" in forms resembling food products. Furthermore it required the three countries to ban export of the products to all other contracting parties.

Sweden complied in a timely manner with its obligation under both the Accession Agreement and the EEA agreement through a

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<sup>46</sup> The concession is contained in a one page document titled Sweden-Norway, Conference on accession to the European Union, Brussels, 21 December 1993, CONF 8/93 (General). Subject: Chapter 29: Other – Union common position on Swedish and Norwegian requests concerning "snus". It is a Community declaration rather than an agreement, but the document is exhibited to the Accession Agreement.

<sup>47</sup> Decision of the EEA Joint Committee No. 7/94 of 21 March 1994 amending protocol 47 and certain Annexes to the EEA Agreement. "1. The following shall be added in point 1 (Council Directive 89/622/EEC): "as amended by: – 392 L 0041: Council Directive 92/41/EEC of May 15 1992 (OJ No. L 158, 11.6.1992, p. 30), The provisions of the Directive shall, for the purposes of the present Agreement, be read with the following adaptations: a) The prohibition in Article 8 . . . shall not apply to the placing on the market in Iceland, Norway and Sweden of the products defined in Article 2.4 . . . However, this derogation shall not apply to the prohibition of sales of "snus" in forms resembling food products. Furthermore, Iceland, Norway and Sweden shall apply an export ban on the product defined in Article 2.4 . . . to all other Contracting Parties to the present Agreement."



governmental regulation<sup>48</sup> which prohibits export of defined oral tobaccos to Finland, Austria and the member states of the Union. The Swedish law does, however, make an exception for export for personal use, which is important for all Swedes sojourning in the Community.

The above process satisfies several overriding political concerns both in Sweden and the Community. Swedish snuffers would no longer oppose Swedish membership in the Union as they could continue their age-long and peculiar habit. The Commission had found a solution which allowed it to successfully close the dossier without interfering with the Swedish tradition and yet securing that the product would not be traded in the Community at large. At one stage it was suggested that the Commission would on application from the member states approve and list the "traditional products" in Europe. This was no longer necessary and no precise list has been made. With the Swedish snus issue cleared away, remaining oral tobacco products – if any – coming under the prohibition probably did not matter as national peculiarities are hard to export anyway. On an overall political note it could be said that a flexible solution in line with the requirements of the subsidiarity principle had been found.

From a legal perspective, however, the procedure leaves room for considerable doubts. Already during the Community internal process it had been questioned whether fundamental Community concepts like the legality-, equity-, subsidiarity- and proportionality principles had been adhered to in a correct way. The exemption for "traditional products" introduced during the final stage of the decision making had removed these concerns as the reach of the prohibition would in any event be limited.

With the measures adopted during the accession negotiations and

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<sup>48</sup> Förordning om förbud mot export av snus; utfärdad den 16 juni 1994. "1 § Varor som anges i bilaga får inte exporteras till Finland, Österrike eller medlemsstat i Europeiska unionen. Förbudet i första stycket gäller inte varor som medförs av en resande och som är avsedd för dennes eller dennes familjs personliga bruk eller som gåva till närstående för personligt bruk." The exhibit identifies the product using the customs classification system and defining it in the same terms as the Directive: "Tobak för användning i munnen utom sådana produkter som är avsedda att rökas eller tuggas, och som helt eller delvis är framställda av tobak i pulver- eller partikelform eller i någon kombination av dessa former – i portionspåsar eller porösa påsar – eller i en form som påminner om ett livsmedel."

in the context of the EEA agreement the matter again became important for Swedish tobacco industry. The end result was that the Union in an unprecedented way had barred access for Swedish traditional products to the Community in conflict with the prohibitions contained in ECT Articles 30 and 34 and EEA Article 12 on quantitative restrictions.

The notion of "traditional product" is not available for Swedish oral tobacco on similar terms as for traditional products from other member states. The use of the word "snus" in the Community declaration of December 1993 appears to clarify that the Swedish oral tobacco is subject to a special treatment for which there is no explanation and no reason given. The consequence is that "snus" produced in Denmark – which in fact exists – is a traditional product which can be sold freely in the Community – even to Sweden, but when the same product is produced in Sweden it cannot be sold back. In fact, the Commission could argue that even the imported Danish product cannot be reexported to the country it came from.

Considering general Community concepts the result of the legislation is absurd and recourse to legal remedies may be a solution. The Swedish "snus" producers could initiate export of their products to a well situated continental member state – like e.g. Denmark och Germany. This export will contravene the Swedish export ban and may also be regarded as prohibited in the country of importation. The Swedish legislation should then be challenged as infringing fundamental Community concepts whereas the importing country should be requested to respect a traditional product from another member state. Both steps may very well require the intervention of the EJC.<sup>49</sup>

After several years of political wrestling it appears as if time has come for a judicial determination of whether the authorities in their

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<sup>49</sup> The main problems today appears to be that the Community position on Swedish "snus" has been exhibited to the Accession Agreement in the form of a document under the heading MISCELLANEOUS (AA-AFNS page 608). In the case C 191/90 *Geneviza UK Ltd and Another v. Smith Kline and French Laboratories Ltd*, [1993] I C.M.L.R. 89 at paras 32 and 41, the ECJ established that Articles 47 and 209 of the Spanish and Portuguese Accession Agreement contained valid derogations from the free movement of goods within the Community. The question therefore is if the document annexed to the Swedish Accession Agreement has the same legal status as the very precise and clear exception established in the Spanish and Portuguese agreements.

lawmaking have adhered to fundamental Community concepts – among them the non-discrimination and the subsidiarity principles – when constructing the complicated legal web now discriminating against Swedish “snus”.

### 5.3 The 1996 Intergovernmental Conference

The application of the subsidiarity principle remains in a state of flux and must be subject to development in the future. Such precision will affect relations between the Community and the member states – but it also has a bearing on private interests as is demonstrated by the snuff case.

At the moment of writing, Europe is preparing the agenda for the forthcoming IGC 1996. The Community institutions have submitted their reports on the functioning of the Union and the member states are gradually presenting their views in preliminary position papers.

Is there going to be a “widening” or a “depending” of the Community in 1996? The answer is that it must be both. Several Eastern European states are far advanced in the European integration process and politically there is hardly a way back. Enlargement can not, however, happen without substantial reforms covering such fields as institutions, decision making, and agriculture to name a few.<sup>50</sup>

A study of the national and institutional comments submitted so far indicates the risk of an overwhelming agenda. The problems of Maastricht may rapidly become a reality also in 1996. There could even be a possibility that those forces in the Community which remain reluctant to further enlargement of the Union could jeopardize IGC 1996 by taking an overambitious approach. Preparation, a carefully selected agenda and skilful compromising may lead to results.

The fundamental question is still what characterization of the European collaboration can unite the diverse opinions. One option is to build on the free market concept and to combine general in-

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<sup>50</sup> A. Olander, “1996 års regeringskonferens – avstamp för ett annorlunda EU?” *Briefing från UD* 3/95 pp. 3–8.

tergovernmental collaboration with national autonomy. The alternative is support for a strengthened central authority. In order to be successful the member states may have to confine themselves to what is absolutely necessary to allow for the planned enlargement towards the east rather than to solve all outstanding issues.

It appears that subsidiarity will be a high priority for IGC 1996. The concept has been dealt with in almost all the preliminary position papers submitted before the summer vacation 1995:

The European Commission<sup>51</sup> underlines in its report to the Council that several major problems in Europe today have a Community dimension and must be handled accordingly. The conclusion is not that everything must be done centrally. In accordance with the subsidiarity principle the right solution shall be found in the individual case. The Commission points out that the principle is too often invoked to weaken the Union. This is wrong, subsidiarity also has a positive dimension in explaining that certain matters are better handled at the EU level.

The European Parliament also comments upon subsidiarity in its Resolution to the Council.<sup>52</sup> Under the heading "Clarifying competencies" Parliament suggests that the present Article 3b TEU should be maintained. There is no need to establish a fixed list identifying competencies as it would be too rigid and too hard to achieve.

The ECJ<sup>53</sup> only briefly refers to the subsidiarity concept by noting that several cases relating to the interpretation of Article 3b have now been referred to the Court.

The member states have dealt with subsidiarity in their different position papers and other statements. The dividing line appears to follow their general attitude to Community collaboration. UK, France, Germany and the Nordic countries favour collaboration be-

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<sup>51</sup> Commission report op. cit. (note 40).

<sup>52</sup> Resolution on the functioning of the Treaty on the European Union with a view to the 1996 Intergovernmental Conference – Implementation and development of the Union, 17/5 1995 PE 190.441.

<sup>53</sup> Report of the Court of Justice on certain aspects of the application of the Treaty on European Union. Luxembourg May 1995. The Court refers to the following pending cases relating to subsidiarity: Case C-84/94 *United Kingdom v. Council* and Case C-233/94 *Germany v. Parliament and Council*.

tween independent countries while Spain, Italy and the Benelux have developed a more integrationistic approach.<sup>54</sup>

The Federal German Government wants to extend the scrutiny of documents tested for compatibility under Article 3b. The subsidiarity principle needs to be strengthened through precise definitions of the respective areas of competence. Furthermore, the second element in Article 3b: "and can therefore, by reasons of scale or effects of the proposed action, be better achieved by the Community" should be deleted. The German Länder are going further by requesting a clear separation of powers through a precise list per subject area.

Due to the Presidential election France did not take any position during spring of 1995. During his electoral campaign Mr. Chirac made clear references to the subsidiarity principle as a way to shift powers back to the member states.

The UK – which already during the Maastricht discussion favoured a subsidiarity clause – had not developed its ideas in this context during spring 1995. Spain, which took the opposite view to the UK in Maastricht, has again come out aggressively against the subsidiarity concept. Spain will firmly oppose any listing of Community powers. Subsidiarity must not be used as an instrument to limit or increase competencies for either the Community or the member states. It should only be used in cases of shared competence to determine "who should do what". The official Spanish view is that subsidiarity is nothing but an aid to establish if a matter can be more effectively carried out at Union or at member state level.

Considering that the subsidiarity issue is but one – albeit important – of many critical issues for the IGC 1996 and that the different positions are already at this early stage fairly locked it is easy to understand the challenge facing the negotiators. Tabling problems

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<sup>54</sup>The national positions have been summarized and are constantly updated by the European Parliament, Political and Institutional Affairs Division in its "Note on the positioning of the Member States of the European Union with respect to the 1996 Intergovernmental Conference". Luxembourg 12 April 1995. First updated version. Germany p. 8–16, France p. 22 and Spain p. 45.

will not help as there are too many important concerns which must be addressed.<sup>55</sup>

## 6. Concluding reflections

It has been suggested that a federal structure is by definition one in which powers or competencies are shared between constituent bodies, usually on a regional basis. The European Union could qualify as a federation under this definition.<sup>56</sup> Yet, few suggest that the Union has a federative character today.

When does a pre-federation become a federation? The above quoted definition is far from complete.<sup>57</sup> Is the essential feature related to where the decision making power lies? In a federation it is centralized – whereas in other forms of international collaboration the states maintain the control over development. Other elements are also significant.

The European Union remains under the control of the member states. It is only in areas where competence has been transferred (explicitly or implicitly) that a Union competence exists. Further development is subject to additional transfer of power at the discretion of the states. In the European Economic Community of six it was still possible to find political consensus whereas with the enlarged European Union it becomes increasingly difficult. The risk is that integration could halt at its present stage due to the impossibility of finding political agreements acceptable to all member states.

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<sup>55</sup> How should the two criteria of Article 3b which determine who shall take action in a specific matter be interpreted; who will decide which level has competence; is the Court competent to interpret the principle; does it have a direct effect etc.

<sup>56</sup> See Cass, *op. cit.* (note 22), with further references. The Union contains several federative elements: the directly elected parliament, majority decisions in the Council, direct effect, priority for Community law, plans for a common currency, Union citizenship etc. See SOU 1994:12, *op. cit.* (note 5) p. 99.

<sup>57</sup> SOU 1994:12, *op. cit.* (note 5), p. 94 defines a federation as an organization where both the federal level and the state level have democratically elected decision making bodies. In case of conflict, the law of the higher (federal) level will have priority over the lower (state) level – a situation which will arise without any decision being required at the lower. The common order has the character of a constitution.

The concept of subsidiarity adds a new dimension to the development. Subsidiarity is often interpreted as decentralization with decision-making as close to the people as possible. In Denmark and Sweden the concept has frequently been translated to "närhetsprincipen" or the "nearness principle". President Chirac referred during his electoral campaign to the subsidiarity principle as a way of shifting power back to the member states. This is, however, not a complete interpretation of the principle. Subsidiarity is also a way for the members in a collaboration to agree to perform certain tasks jointly because it affects them all and/or because it is more efficient. Accordingly, the concept contains a centralizing aspect as well.

As applied in the Union subsidiarity contains a good number of uncertainties and is a concept still under development. A part of the IGC 1996 discussion will be devoted to whether these uncertainties shall be settled or left hanging in the air. Some of the member states favour precise definitions and wordings whereas others would rather leave matters to a case by case development.

To take a too Lutheran and formalistic approach to the subsidiarity notion requiring prompt and exact determination of its real meaning would deprive the concept of its inherent dynamic possibilities. Finding very precise words and exhaustive lists identifying which entity has competence to act in every situation would also be a cumbersome exercise as suggested by the European Parliament. In fact it would require the same kind of political decisions as would an amendment to the Treaty. The varied views on the European collaboration would make such a mission, if not impossible, at least very difficult.<sup>58</sup> The strength of the subsidiary concept as presently encapsulated in Article 3b TEU is that it will allow a gradual development in par with the underlying political will, but avoiding too rigid formalism and possibilities to abuse veto rights.

In areas of shared competence the subsidiarity principle in its present form allows the dynamic development to continue. In certain

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<sup>58</sup> Germany has in its constitution been able to make catalogues for exclusive legislation (Article 73) and concurrent legislation (Article 74) which defines the distribution of competencies within the Federal Republic. P. Hallström, "Några tankar om subsidiaritetsprincipens tillämpning i EG-rätten", *Svensk Juristtidning*, (1972), pp. 177-187 favours a similar solution for the Unione.

fields Sweden favours such dynamics<sup>59</sup> whereas in others it takes a more hesitant approach. This is precisely the challenge. Member states are forced to look for politically acceptable compromises before the collaboration and the Community competencies can be extended to new areas.

The ECJ will ultimately decide if the institutions have used their powers under the subsidiarity principle in a correct way.<sup>60</sup> Yet the Court must move cautiously if it intends to alter political decisions reached by representatives of the member states. When legislation is made by way of application of an essential political discretion, the Court will only intervene in cases of flagrant abuse of the principle.<sup>61</sup>

Will the Union at some stage become a federation? Due to lack of precise definitions it may depend on where the real decision-making power will lie in the future. If it is the member states who retain the control, the answer is no. The collaboration is rather intergovernmental. The more unanimity is abandoned in favour of qualified majority in the decision making and the more the European Parliament is influencing the distribution of competence the more supranational the organization becomes.

The conclusion therefore is that the Union remains at its pre-federative stage. At some future date a situation may appear where European nations and people have gained so much confidence in their Union that they are prepared to write a clear and simple constitution and allow the central institutions to control the future development under democratic forms. At that time it may be appropriate to use the "F-word". Meanwhile, the present Union with all its deficiencies subscribing to the concept of subsidiarity may prove to

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<sup>59</sup> Crime preventions and environmental collaboration are two areas identified by the Swedish government in its preliminary position paper for IGC 1996, "Svenska principiella intressen inför EU:s regeringskonferens 1996", Regeringskansliet, juli 1995.

<sup>60</sup> The principle is a part of the operative text of the ECT and not the preamble as was suggested by some member states during the Maastricht negotiations. One effect of this structure is that the EJC is competent to interpret it.

<sup>61</sup> In the *Hormones* case op. cit. (note 20) the Court at para. 14 stipulated with respect to the Common Agricultural Policy that "the Community legislature has a discretionary power . . . the legality of a measure adopted in that sphere can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue."



be just the right solution, allowing a dynamic collaboration to develop at the same time as diversity in Europe is protected.

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