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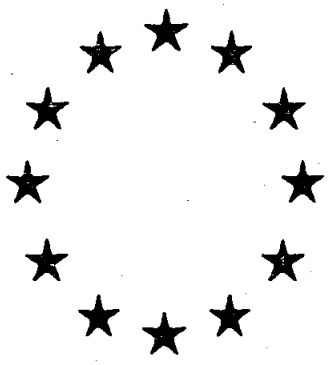
FLEXIBILITY AND SUBSIDIARITY

JEAN MICALLEF GRIMAUD

EDRC Information Paper 9



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FLEXIBILITY AND SUBSIDIARITY

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FLEXIBILITY AND SUBSIDIARITY

Flexibility Introduction

Flexibility has been considered a great deal in the Maastricht Treaty IGC but unfortunately, like many other words, such as federalism and subsidiarity, it is misunderstood. On the16th and 17th June 1997, the Heads of State and Government of the fifteen countries of the European Union drew up a new Treaty for Europe - the Amsterdam Treaty. It lays the foundations for the Europe of the twenty-first century. This is why the Heads Of State and of Government of the European Union wanted the Treaty to be transparent and easy to understand. They also wanted to produce a Treaty responding to the European peoples' real concerns. The challenges ahead are considerable, but there are also opportunities. For the first time in five hundred years there is the chance to bring together the whole European continent, by enlarging the Union. But, before enlarging the Union to the East and to the South, EU leaders felt that it was important to bestow on the European Union a fresh identity. This is what they set out to do with the Treaty of Amsterdam.

The Amsterdam Treaty - General Clauses to be inserted as a new Title in the common provisions of the TEU.[1]

The importance given to flexibility is very evident as Section five of the Amsterdam Treaty deals with closer cooperation - Flexibility. This title is new and appears for the first time in the Amsterdam Treaty. Article 1 of this title deals with cooperation between Member States, in order that they may make use of the institutions, procedures and mechanisms laid down by the Treaties. However there are set provisions to this that will be dealt with later on in this paper. The second paragraph of Article 1 deals with the application of the acts and decisions adopted for the implementation of the cooperation in which the Member States participate. It also states that Member States not participating in such cooperation shall not impede their implementation by the participating Member States.

Article (2) of the Amsterdam Treaty states that for the purposes of the adoption of the acts and decisions necessary for the implementation of the cooperation referred to in Article (1), the relevant institutional provisions of the Treaties shall apply. However, while all members of the Council shall be able to take part in the adoption of decisions, the qualified majority shall be defined as the same proportion of votes of the Council members concerned weighted in accordance with Article 148(2) of the Treaty establishing the European Community. Unanimity shall be constituted by only those Council members concerned.

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[1] Amsterdam European Council Draft Treaty.

Article (3) states that the Council and the Commission shall regularly inform the European Parliament of the development of closer cooperation established on the basis of this Title.

Flexibility - A necessity to this new Europe?

Many believe some arrangements to encourage countries to cooperate more closely with each other - acting within the EU Treaty and its institutions - could provide a key element in restoring genuine momentum to the process of European integration. Infact, flexibility will be essential to the future operation of the EU. The EU is trying to act together in specified fields because this is a better way to get results than if every Member State attempts to act on its own. However, others question whether freedom for selective groups to move to closer union is compatible with the Treaty in key policy areas. Some even fear it could lead to greater disunity within the EU.

The Dutch presidency's paper on flexibility tries to answer the question of how flexibility can be applied to the three pillars of the Maastricht Treaty: the single market and EMU (pillar 1), Common Foreign Security Policy (pillar 2) and internal security (pillar 3). The Dutch Presidency sees flexibility not as a means to introduce new fields of action into the Union but to deal with the belief of some Member States that only through a regulated and binding joint exercise of sovereignty can the necessary results be obtained. The Dutch Presidency appeared convinced that in many areas individual national sovereignty has been so eroded by historical and worldwide developments that the real choice is between inaction or the joint exercise of sovereignty.

This means that some form of majority decision-making is preferred to the unanimity rule and therefore should be introduced in a certain number of cases. However it is of extreme importance that decisions would have to take place in a way that ensures democratic accountability and judicial control. Some other Member States believe that with few exceptions decisions can and should be taken on the basis of the unanimity rule.

On two important points all proposals on flexibility agree. Firstly, under no circumstances should flexibility discriminate against those who do not want to take part in a specified joint action and wish to retain cooperation under the unanimity rule. Secondly, flexibility arrangements should involve as much as possible all the Unoin's institutions.

Excessive preconditions on the application of flexibility may be seen as an attempt to limit the right of those Member States who want to move forward toward the joint exercise of sovereignty. Such an attempt would imply the most far reaching limitation on sovereignty ever conceived in the 40 years of the European Community's existence. This means that in all areas where the Treaty does not limit national sovereignty by requiring

its joint exercise, Member States remain perfectly free to act as they wish, providing there is no discrimination against other Member States.

However, since it is impossible to forbid them to move towards the joint exercise of sovereignty, those states should be encouraged to do it within the framework of the Union and not outside it as has happened, for example, with the Schengen Agreement.

It is very important that all Member States agree on how the Union's institutions could be used by those wanting to move forward. This has been done for example in the case of EMU. It is quite impossible to agree on these conditions on a theoretical basis because nearly everything will depend on what action and in which fields it is envisaged.

The recent Dutch Presidency's paper on "The Progressive Establishment of an Area of Freedom, Security and Justice", seems to move the flexibility debate away from a theoretical to a practical basis. Maybe on the basis of this paper a general breakthrough and agreement in this extremely important field of internal security can be reached. In that case no flexibility solution will be needed. If such a general agreement proves impossible, then the matter of pillar III will be particularly suitable to the application of flexibility.

Therefore what needs to be done then is to formulate the way the Union's institutions should operate if flexibility in this field is to be applied. This does not solve the overall flexibility problem. It would however present an example of what could and should be done using the flexibility method in pillars II and III. This would enlighten the room and thus solve the flexibility problem.

The Beginning of the Flexibility Debate.

The challenge of flexibility has been with the European Community from its inception. Flexibility belongs, in many ways, in the same stable as differentiation, multi-speed Europe, hardcore and the vanguard. All of these terms have been employed in various contexts and at various times to address the problem of how the process of European integration can be reconciled with the different circumstances and constraints experienced by Member States. They all mean a different paradigm of Euro integration. There are now 15 Member States which have come to the EU with different historical backgrounds, cultures and aspirations for the future. The pace of integration has undoubtedly been accelerated primarily as a consequence of the introduction of the Single Market and all that flows from it. Inevitably this has given rise to tensions which at times have gone to the heart of what the EU is all about.

At the heart of the flexibility proposal is a determination that those countries unwilling or unable to pursue closer cooperation should not be in a position to veto or prevent those which are willing to move ahead from doing so. Initially, this was seen in terms of the

creation of a hardcore of Member States oriented towards closer integration, but operating within the legal and political framework of the EU.

It is not only the more integrationist-minded Member States which have expressed interest in the flexibility issue. The British government, whose opposition to closer integration is well documented, has made it clear that it would be willing to see flexibility as a way of reconciling differences between Member States within the Union. In essence, the British government might be happy to see other countries cooperate more closely as long as it retained a right to veto any particular proposal for closer cooperation.

This view is echoed among some other Member States. Concerns have been expressed in the Nordic countries that too liberal a use of flexibility might become a formula for a two-tier European Union. A minority fear the emergence of a de facto Franco - German directorate leading the European Union in directions which not all of its members approve of.

On the other hand, the overwhelming majority of Member States recognise that without closer cooperation, as well as further institutional reform, the European Union will simply not be capable of rising to the challenge of enlargement. They see flexibility as having an important , but limited, application in a specific number of areas such as internal security, immigration and the fight against crime. But suggestions that flexibility might be some kind of magic formula to more rapid progress towards political union seem unjustified.

Some degree of differentiation between Member States in future does appear inevitable. This is one of the consequences of the fact that not all countries will move to EMU at the same time. It is not difficult to foresee further differentiation emerging within a European Union of twenty or more Member States. If the European Union is to become more effective, some foreign and security policy arrangements which allow those countries willing to undertake greater peacekeeping responsibilities and other related missions, may be inevitable.

But flexibility is unlikely in any significant way to apply in the core areas of common policies or the common political and legal framework. In this sense, flexibility offers no way out from political dilemmas linked with the questions of whether and at what speed to move to closer integration.[2]

Consideration of an extensive enlargement in EU's History.

Europe is considering the most extensive enlargement it has ever known in terms of both numbers and diversity and at a time when its Members are already moving at different

[2] Challenge Magazine; John Palmer p 4.

speeds under various arrangements, some reasonably satisfactory, others less so. Those arrangements under the most strain are the Social Protocol and Schengen. These two formulas that are now part of today's Europe will inevitably reappear at some time in a Europe of twenty or thirty Members.

It is openly admitted now that the Schengen situation could have been avoided if there had been a flexibility clause in the Treaty. It is also evident that far more serious conflicts of interest could arise from cooperation arrangements agreed outside the Amsterdam Treaty in areas likely to have an impact on the Single Market or common policies.

No mechanism for flexibility could be found in the Maastricht Treaty and this leads to the Union running three types of risk.

The risk of the Community being condemned to moving forward at the pace of the slowest or the least enthusiastic Member states;

The risk of the outside circles where the Union could have lost control and coherence as mentioned earlier;

The risk of more opt-outs by individual Member states or groups of states finding themselves in a minority.

Now that the Amsterdam Treaty has been approved, the sole purpose of flexibility is to make possible progress in an enlarged Europe. The Treaty states that qualified majority voting is the ideal procedure due to the increasing number of Member States. Therefore flexibility is no more than an exception, where needed, to enable Member States to settle their differences. However in what areas might it be applied ? At first, attention was focused on the areas where unanimity is the rule. Flexibility here would have the two-fold advantage of applying only where there is a higher likelihood of deadlock than elsewhere and in situations that, by definition, imply the participation of a large majority of Member States.

The difficulty is that unanimity is a strictly procedural criterion that does not apply uniformly to the area involved. The free movement of people, for example, where flexibility would appear to be impossible, is in part subject to unanimous decision-making and in part to qualified majority voting.

The question then is to decide whether to define a list of areas where flexibility might be envisaged and/or a list of areas where it should be ruled out. For many experts the ideal solution would be to arrive at formulas along the lines of EMU. This form of differentiation is complete and also reassuring, because it is entirely predefined in the Treaty. However, there can be no doubt that the IGC (Intergovernmental Conference) is unable to reproduce a solution of this kind since it cannot predict now what flexibility

requirements may emerge in the future. This consideration led the Commission to rule out the option of a positive list.

Enhanced cooperation could be implemented only where it would not be detrimental either to the acquis and the fundamental principles of the Treaty or to the entire range of intangible areas, like the Single Market.

One thing to be said for this solution is that it subordinates the implementation of any enhanced cooperation prior to the assessment of its merits and possible dangers. It allows the possibility, where necessary, of redefining the terms of any planned cooperation arrangements in order to safeguard the interests of Member States that do not participate and gives them a way to join in at any time.

As guardian of the Treaty, the Commission feels that it is not really its role to propose enhanced cooperation arrangements. It will, however, have a major part to play in setting up any such arrangements and subsequently taking the initiative for whatever corrective measures may be necessary.

The Commission would act at the request of a minimum number of Member States concerned. This could be by a simple or two thirds majority. It would produce a draft of the enhanced cooperation arrangements and a detailed opinion on the feasibility of the plan, having regard to all the criteria laid down by the Treaty and taking account of the interests of all the Member States.

The draft arrangements, together with a favourable or negative Opinion, would be sent to the European Parliament and Council under the usual procedures.

In the Commission's view, if the system is to be transparent and consistent, each institution must play its usual role. The point of enhanced cooperation and the benefit it offers is to be part of the Union's institutional system.

Within a framework of this kind, the Council would have to be able to vote on such flexibility arrangements by a qualified majority. Flexibility would involve a new pact among Member States - not to prevent any forward progress and not to be obliged to take part. It would be for the institutions, including the European Court, to watch over the interests of every member.

The IGC considered the concrete terms of the provisions to be included in the Treaty on the basis of various national contributions. The discussions concerning Pillar I served as a starting point for the mechanisms that are beginning to emerge for Pillars II and III. It is hoped that this work will lead to an amicable solution.

Some Member States want to strengthen the security standards that applicant countries will have to live up to before joining the Union. The full acceptance of the Schengen acquis by all the Member States, making it a Union acquis, would help achieve that goal. Flexibility in justice and home affairs is not completely new for Member States. Article K.7 of the TEU allows for closer cooperation among two or more Member States outside the Union. This is what Schengen is all about. It started with five members (Benelux, France & Germany) and ended up attracting all Member States except Britain and Ireland. But what was at stake in the IGC was the use of flexibility within the Union.

Three approaches were contemplated by the IGC Conference:

> Case-by-case flexibility which is best suited for operational actions such as those in common foreign security policy, where a Member State could constructively abstain from voting for a specific decision without blocking its adoption. Even if Pillar III is more regulation than action oriented, one should not exclude this kind of flexibility.
>
> The enabling clause approach, suggested by France and Germany. A general clause, located in the common provisions of the TEU, would set out the conditions and institutional arrangements for enhanced cooperation and specific clauses applicable to the Treaty, CFSP and justice and home affairs. It would also set out the conditions for enhanced cooperation in each of these areas.
>
> The predetermined flexibility approach which seeks to authorise, through a Protocol, the thirteen Member States which are party to Schengen. They can then avail themselves of the institutions, procedures and instruments of the TEU to develop Schengen cooperation.[3]

Beyond the legal aspects, there is a more sensitive idea floating around. Incorporation of Schengen into the Union could have a price - a British/Irish opt-out on frontiers. This would mean that Britain and Ireland would be officially allowed to retain internal border controls between themselves and the other Schengen countries. The EU would then be divided into two frontier-free parts. The territory of the thirteen Member States engaged in a closer cooperation and the common travel area between Britain and Ireland. These two countries should be asked to adopt the coercive side of the Schengen, for example, the Schengen information system, closer police cooperation, legal assistance in criminal matters and other related issues.

[3] Case-by-case flexibility; Challenge March '97

EMU - an economic union.

A much better coordination of economic and fiscal policy will be required in the EU to make EMU a lasting success. But it is also obvious that the Treaty provisions from both Maastricht and Amsterdam are far from sufficient. Could the notion of flexibility change this situation? Would it be possible for a core of Member States to strengthen the coordination of non-monetary policies such as fical measures without needing support from countries which are marginalising themselves for economic or political reasons, like Britain, Greece and Denmark ? This is possible and could happen soon.[4]

There is already comprehensive obligatory cooperation within the EU in supply-side politics. That is, what the Single Market, structural funds, research programmes and common trade policy are about. What is lacking is the obligatory cooperation in fiscal policy. But even there, things are moving forward. We have an embryonic framework for indirect taxation. VAT and exise are now subject to harmonised EU legislation, although the rates differ.

What would now be helpful is a harmonisation of corporate tax, capital gains tax, capital revenue tax and other rules of major importance for the proper functioning of the Single Market. Could flexibility help us to create progress in that field ? In my opinion it certainly could.

If a large number of Member States were allowed to move forward with the objective of harmonising the rules of the game and tax rates without making it more difficult for the rest to the join the group at a later stage, it would be a positive development. If the same Member States would be prepared to sit down and coordinate macreoeconomic policies, they should be allowed to go forward.

The problem here is that monetary policy has been placed under supranational institutions while fiscal policy is in national governments' hands. The creation of a single central bank, monetary policy and currency is only going to be a sustainable and successful strategy if those who participate in that enterprise are prepared to coordinate their whole fiscal policy. The idea of establishing a stability pact is a consequence of all that. The creation of a Stability Council is the institutional implication of this strategy.

The Stability Council should not be seen as a competitor to the European System of Central Banks but as a complementary component. The task of the Stability Council must be to coordinate non-monetary policies of the Euro countries in order to deliver an appropriate balance between themselves and the decisions of the European Central Bank. Does the Treaty of Rome allow for this kind of flexibility ? It appears that it does.

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[4] EMU must be an economic Union; Henning Christophersen.

The Member States are not allowed to work against the objectives of the EU, but if some of them wish to speed up the implementation of the objective, they are allowed to do so. The Schengen agreement and the work of the Nordic Council are two examples.

Flexibility is acceptable as long as you do not make it more difficult to reach the common goals of the Union. For fiscal and economic policy, flexibility would make it easier for all Member States at the end of the day to reach the common goal. That is why flexibility is part of the new Treaty and the institutional framework has been available to those who want to move forward with more speed than others. The creation of a genuine European economic and political union should be allowed, provided it is not made more difficult for others to join policies at a later stage.

The need for a tighter coordination of economic and fiscal policy is closely linked to the move into stage three of EMU. The best option would have been to insert a provision in the Treaty allowing countries participating in the final stage of EMU to coordinate their fiscal policy by a qualified majority. Unfortunately, not much has been done about it in the Amsterdam Treaty.

Flexibility - Conclusion

The main debate on flexibility is now over. A flexibility clause has been included in the Treaty of Amsterdam. The remaining contentious questions focus on the method and minimum number of states required to trigger flexibility and the areas, including within which pillar, it is applicable. Agreement has been reached on flexibility being an element of last resort. It has also been accepted that a number of principles have to be respected in order to proceed with a flexible solution. These principles have been included in the new Treaty in a preamble applicable equally to all three pillars. These include a commitment to enhancing European integration, protecting and serving the interests of the Union, respecting the principles and objectives of the Treaty, safeguarding the Union's single institutional framework, respecting the acquis and not prejudicing the interest of non-participating Member States, but allowing them to become party to flexible measures at any time. Non-participating Member States should be unable to impede the implementation of flexible measures. The Commission sees flexibility as a way forward, but cautions that it must not be seen as an answer to all problems. Flexibility is not an alternative for agreement within the Treaty or for the extension of qualified majority voting, especially within Pillar I.

SUBSIDIARITY

Subsidiarity is the creation of the Member States having been introduced into Community law by the Maastricht Treaty[5] . Its foundation is therefore the Treaties rather than the

[5] See Art. 130r(4) EC; See also Art. 5 ECSC.

case law of the Court. In the Preamble of the Treaty on European Union (Maastricht Treaty), 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[6] . 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 EC) will be respected.

Procedure as stated in the Treaty.

The principle of subsidiarity is defined and established by the second paragraph of Article 3b EC (inserted into the Treaty by the MaastrichtTreaty), where it stated: "In areas which do not fall within its exclusive competence, the Community will 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".

This is a good definition as far as it goes, but it should be noted that it adopts the principle of subsidiarity only in areas which do not fall within the exclusive jurisdiction of the Community, and it is far from clear which areas should be so regarded.[7] The Commission takes the view that an area falls within the exclusive jurisdiction of the Community if the Treaties impose an obligation to act on the Community because it is regarded as having sole responsibility for the performance of a particular task.[8]

The Commission has identified the following areas as satisfying this criterion: the removal of barriers to the free movement of goods, persons, services and capital; the common commercial policy; the general rules on competition; the common organisation of agricultural markets; the conservation of fisheries resources; and the essential elements of transport policy.[9] This is a large area, but the Commission has made clear that it will continue to expand as integration progresses.[10]

Moreover, if one looks at the decisions of the European Court on the implied treaty-making powers of the Community, it seems that whenever the EC Treaty gives the Community an internal power to take binding measures, and the Community exercises that power either by adopting legislation or by entering into an international agreement in a given area, that area is regarded as falling within the exclusive jurisdiction of the Community as far as international agreements are concerned. In other words, once the Community has occupied the field, the Member States are no longer permitted to make

[6] See also Art. A (second paragraph) TEU.
[7] See Toth, 'The Principle of Subsidiarity in the Maastricht Treaty' 29 CMLRev. 1079, at 1080-86.
[8] See 'The principle of Subsidiarity', Com. Doc. SEC(92) 1990, 27 October 1992, 5.
[9] Ibid., 7.
[10] Ibid., 8.

Treaties in that field. It is uncertain whether the European Court will apply a similar principle with regard to Article 3b, but if it does, any given area would be regarded as falling within the exclusive jurisdiction of the Community once the Community has occupied the field; consequently, subsidiarity would be applicable only when the Community legislated for the first time in a new field.

In order to challenge a Community measure on the basis of Article 3b, an applicant must establish the objectives of the measure and show that those objectives could be attained just as well 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.

In practice, it will almost be possible to formulate the objectives of the measure in different ways. In defending the measure, the Commission or the Council will argue for a formulation which requires Community action. One can even expect that the preamble and wording of the measure might 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 jurisdiction; 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. Since the essence of subsidiarity is that it protects the rights of the Member States against infringement by the Community, it is doubtful whether the Court takes this into consideration.

Subsidiarity and the new Treaty.

Chapter nine of the Amsterdam Treaty deals with subsidiarity[11]. Here, the high contracting parties are determined to establish the conditions for the application of the principles of subsidiarity and proportionality enshrined in Article 3b of the Treaty establishing the European Community with a view to defining more precisely the criteria for applying them and to ensure their strict observance and consistent implementation by all institutions. They also wish to ensure that decisions are taken as closely as possible to the citizens of the Union.

[11] Protocol on the application of the principles of subsidiarity and proportionality; Amsterdam European Council Draft Treaty.

Unlike the Maastricht Treaty, the high contracting parties in the Amsterdam Treaty have confirmed that the conclusions of the Birmingham European Council on 16 October 1992 and the overall approach to the application of the subsidiarity principle agreed by the European Council meeting in Edinburgh on 11-12 December 1992, will continue to guide the action of the Union's institutions as well as the development of the application of the principle of subsidiarity, and, for this purpose, have agreed on the following provisions which shall be annexed to the Treaty establishing the European Community :

1. In exercising the powers conferred on it, each institution shall ensure that the principle of subsidiarity is complied with. It shall also ensure compliance with the principle of proportionality, according to which any action by the Community shall not go beyond what is necessary to achieve the objectives of the Treaty.

2. The application of the principles of subsidiarity and proportionality shall respect the general provisions and the objectives of the Treaty, particularly as regards the maintaining in full of the acquis communautaire and the institutional balance; it shall not affect the principles developed by the Court of Justice regarding the relationship between national and Community law, and it should take into account Article F(3) of the TEU, according to which ì the Union shall provide itself with the means necessary to attain its objectives and carry through its policies.

3. The principle of subsidiarity does not call into question the powers conferred on the European Community by the Treaty, as interpreted by the Court of Justice. The criteria referred to in Article 3b(2) shall relate to areas for which the Community does not have exclusive competence. The principle of subsidiarity provides a guide as to how those powers are to be exercised at the Community level. Subsidiarity is a dynamic concept and should be applied in the light of the objectives set out in the Treaty. It allows Community action within the limits of its powers to be expanded where circumstances so require, and conversely, to be restricted or discontinued where it is no longer justified.

4. For any proposed Community legislation, the reasons on which it is based shall be stated with a view to justifying that it complies with the principles of subsidiarity and proportionality; the reasons for concluding that a Community objective can be better achieved by the Community must be substantiated by qualitative or, wherever possible, quantitative indicators.

5. For Community action to be justified, both aspects of the subsidiarity principle shall be met: the objectives of the proposed action cannot be sufficiently achieved by Member States action in the framework of their national constitutional system and can therefore be better achieved by action on the part of the Community.

6. The form of Community action shall be as simple as possible, consistent with satisfactory achievement of the objective of the measure and the need for effective enforcement. The Community shall legislate only to the extent necessary. Other things being equal, directives should be preferred to regulations and framework directives to detailed measures. Directives as provided for in Article 189, while binding upon each Member State to which they are addressed as to the result to be achieved, shall leave to the national authorities the choice of form and methods.

7. Regarding the nature and the extent of Community action, Community measures should leave as much scope for national decision as possible, consistent with securing the aim of the measure and observing the requirements of the Treaty. While respecting Community law, care should be taken to respect well established national arrangements and the organization and working of Member States legal systems. Where appropriate and subject to the need for proper enforcement, Community measures should provide Member States with alternative ways to achieve the objectives of the measures.

8. Where the application of the principle of subsidiarity leads to no action being taken by the Community, Member States are required in their action to comply with the general rules laid down in Article 5 of the Treaty, by taking all appropriate measures to ensure fulfilment of their obligations under the Treaty and by abstaining from any measure which could jeopardize the attainment of the objectives of the Treaty.

9. Without prejudice to its right of initiative, the Commission should :

except in cases of particular urgency or confidentiality, consult widely before proposing legislation and, wherever appropriate, publish consultation documents;

justify the relevance of its proposals with regard to the principle of subsidiarity; whenever necessary, the explanatory memorandum accompanying a proposal will give details in this respect. The financing of Community action in whole or in part from the Community budget shall require an explanation;

take duly into account the need for any burden, whether financial or administrative, falling upon the Community, national governments, local authorities, economic operators and citizens, to be minimized and proportionate to the objective to be achieved;

submit an annual report to the European Council, the Council and the European Parliament on the application of Article 3b of the Treaty. This annual report shall also be sent to the Committee of the Regions and to the Economic and Social Committee.

10. The European Council shall take account of the Commission report referred in paragraph 9, fourth indent, within the report on the progress achieved by the Union which it is required to submit to the European Parliament in accordance with Article D of the Treaty on European Union.

11. While fully observing the procedures applicable, the European Parliament and the Council shall, as an integral part of the overall examination of Commission proposals, consider their consistency with Article 3b. This concerns the original Commission proposal as well as amendments which the European Parliament and the Council envisage making to the proposal.

12. In the course of the procedures referred to in Articles 189b and 189c, the European Parliament shall be informed of the Council's position on the application of Article 3b, by way of a statement of the reasons which led the Council to adopt its common position. The Council shall inform the European Parliament of the reasons on the basis of which all or part of a Commission proposal is deemed to be inconsistent with Article 3b of the Treaty.

As a conclusion the Treaty states that compliance with the principle of subsidiarity shall be reviewed in accordance with the rules laid down by this Treaty.

Subsidiarity - Conclusion

Subsidiarity has been employed as a slogan for challenging the expansion of Community activity. Yet the wording of Article 3b is directed at identification of the appropriate level at which action should be taken. It is not based on any entrenched preconception in favour of State action at the expense of the Community. The nature and purpose of the principle of subsidiarity in the context of allocating competences between States and Community has been subjected to increasing scrutiny as the Community continues to develop.

Leon Brittan, a lawyer himself, argued that subsidiarity should not be seen as something for the theologians of Community law, but as something intensely practical: where to draw the dividing line between what is best done by the Community and what is best done by national governments. Subsidiarity needs to be developed and applied with much more vigour in practice.[12]

[12] M. Wilke and H. Wallace, 'Subsidiarity; Approaches to Power-Sharing in the European Community'. RIA Discussion Paper No. 27 (1990) pp. 21, 30-31.

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