



## THE PRINCIPLE OF SUBSIDIARITY

In areas in which the European Union does not have exclusive competence, the principle of subsidiarity, laid down in the Treaty on European Union, defines the circumstances in which it is preferable for action to be taken by the Union, rather than the Member States.

### LEGAL BASIS

Article 5(3) of the Treaty on European Union (TEU) and Protocol (No 2) on the application of the principles of subsidiarity and proportionality.

### OBJECTIVES

The principle of subsidiarity and the principle of proportionality govern the exercise of the EU's competences. In areas in which the European Union does not have exclusive competence, the principle of subsidiarity seeks to safeguard the ability of the Member States to take decisions and action and authorises intervention by the Union when the objectives of an action cannot be sufficiently achieved by the Member States, but can be better achieved at Union level, 'by reason of the scale and effects of the proposed action'. The purpose of including a reference to the principle in the EU Treaties is also to ensure that powers are exercised as close to the citizen as possible, in accordance with the proximity principle referred to in Article 10(3) of the TEU.

### ACHIEVEMENTS

#### A. Origin and history

The principle of subsidiarity was formally enshrined by the Maastricht Treaty, which included a reference to it in the Treaty establishing the European Community (TEC). The Single European Act (1987) had already incorporated a subsidiarity criterion into environmental policy, however, albeit without referring to it explicitly as such. In its judgment of 21 February 1995 (T-29/92), the Court of First Instance of the European Communities ruled that the principle of subsidiarity was not a general principle of law, against which the legality of Community action should have been tested, prior to the entry into force of the TEU.

Without changing the wording of the reference to the principle of subsidiarity in the renumbered Article 5, second paragraph, of the EC Treaty, the Treaty of Amsterdam annexed to the EC Treaty a 'Protocol on the application of the principles of subsidiarity and proportionality'. The overall approach to the application of the principle of subsidiarity agreed at the 1992 European Council in Edinburgh thus became legally binding and subject to judicial review via the protocol on subsidiarity.

The Lisbon Treaty incorporated the principle of subsidiarity into Article 5(3) TEU and repealed the corresponding provision of the TEC while retaining its wording. It also added an explicit reference to the regional and local dimension of the principle of subsidiarity. What is more, the Lisbon Treaty replaced the 1997 protocol on the application of the principles of subsidiarity

and proportionality with a new protocol of the same name (Protocol No 2), the main difference being the new role of the national parliaments in ensuring compliance with the principle of subsidiarity (1.3.5).

## **B. Definition**

The general aim of the principle of subsidiarity is to guarantee a degree of independence for a lower authority in relation to a higher body or for a local authority in relation to central government. It therefore involves the sharing of powers between several levels of authority, a principle which forms the institutional basis for federal states.

When applied in the context of the European Union, the principle of subsidiarity serves to regulate the exercise of the Union's non-exclusive powers. It rules out Union intervention when an issue can be dealt with effectively by Member States at central, regional or local level and means that the Union is justified in exercising its powers when Member States are unable to achieve the objectives of a proposed action satisfactorily and added value can be provided if the action is carried out at Union level.

Under Article 5(3) TEU there are three preconditions for intervention by Union institutions in accordance with the principle of subsidiarity: (a) the area concerned does not fall within the Union's exclusive competence (i.e. non-exclusive competence); (b) the objectives of the proposed action cannot be sufficiently achieved by the Member States (i.e. necessity); (c) the action can therefore, by reason of its scale or effects, be implemented more successfully by the Union (i.e. added value).

## **C. Scope**

### **1. The demarcation of Union competences**

The principle of subsidiarity applies only to areas in which competence is shared between the Union and the Member States. Following the entry into force of the Lisbon Treaty, the competences conferred on the Union have been more precisely demarcated: Part One, Title I, of the Treaty on the Functioning of the European Union (TFEU) divides the competences of the Union into three categories (exclusive, shared and supporting) and lists the areas covered by the three categories.

### **2. Where it applies**

The principle of subsidiarity applies to all the EU institutions and has practical significance for legislative procedures in particular. The Lisbon Treaty has strengthened the role of both the national parliaments and the Court of Justice in monitoring compliance with the principle of subsidiarity. It not only introduced an explicit reference to the subnational dimension of the subsidiarity principle, but also strengthened the role of the Committee of the Regions and made it possible, at the discretion of national parliaments, for regional parliaments with legislative powers to be involved in the *ex-ante* 'early warning' mechanism.

## **D. National parliamentary scrutiny**

In keeping with the second subparagraph of Article 5(3) and Article 12(b) TEU, national parliaments monitor compliance with the principle of subsidiarity in accordance with the procedure set out in Protocol No 2. Under the *ex-ante* 'early warning' procedure referred to above, any national parliament or any chamber of a national parliament has eight weeks from the date of forwarding of a draft legislative act to send to the Presidents of the European Parliament, the Council and the Commission a reasoned opinion stating why it considers that the draft in question does not comply with the principle of subsidiarity. If reasoned opinions represent at least one-third (one vote per chamber for a bicameral parliamentary system and two votes

for a unicameral system) of the votes allocated to the national parliaments, the draft must be reviewed ('yellow card'). The institution which produced the draft legislative act may decide to maintain, amend or withdraw it, giving reasons for that decision. For draft acts relating to the area of freedom, security and justice, the threshold is lower (one-quarter of the votes). If, in the context of the ordinary legislative procedure, at least a simple majority of the votes allocated to national parliaments challenge the compliance of a proposal for a legislative act with the principle of subsidiarity and the Commission decides to maintain its proposal, the matter is referred to the legislator (European Parliament and Council), which takes a decision at first reading. If the legislator considers that the legislative proposal is not compatible with the principle of subsidiarity, it may reject it subject to a majority of 55% of the members of the Council or a majority of the votes cast in the European Parliament ('orange card').

In May 2012, the first 'yellow card' was issued with regard to a Commission proposal for a regulation concerning the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services ('Monti II'). Twelve out of 40 national parliaments or chambers thereof (19 out of 54 votes allocated) considered that the content of the proposal was not consistent with the principle of subsidiarity. The Commission ultimately withdrew its proposal, though it took the view that the subsidiarity principle had not been infringed. In October 2013, another 'yellow card' was issued by 14 chambers of national parliaments in 11 Member States (18 votes) following the submission of the proposal for a regulation on the establishment of the European Public Prosecutor's Office. After examining the reasoned opinions received from the national parliaments, the Commission decided to maintain the proposal, arguing that it was in line with the subsidiarity principle. In May 2016, a third 'yellow card' was issued by 14 chambers in 11 Member States against the proposal for a revision of the directive on the posting of workers. The Commission again decided to maintain its proposal, given that it did not infringe the principle of subsidiarity, the posting of workers being, by definition, a transnational issue.

#### **E. Judicial review**

Compliance with the principle of subsidiarity may be reviewed retrospectively (following the adoption of the legislative act) by means of a legal action brought before the Court of Justice of the European Union. That is also stated in the protocol. The Union institutions enjoy wide discretion in applying this principle, however. In its judgments in Cases C-84/94 and C-233/94, the Court found that compliance with the principle of subsidiarity was one of the conditions covered by the requirement to state the reasons for Union acts, under Article 296 TFEU. This requirement is met if it is clear from reading the recitals that the principle has been complied with. In a more recent judgment (Case C-547/14, *Philipp Morris*, paragraph 218), the Court reaffirmed that it must verify 'whether the Union legislator was entitled to consider, on the basis of a detailed statement, that the objective of the proposed action could be better achieved at Union level'.

Legal actions of this kind may be brought by Member States or notified by them on behalf of their national parliament or a chamber thereof, in accordance with their legal system. The Committee of the Regions may also bring actions of this kind against legislative acts if the TFEU provides that it must be consulted on the adoption of such acts.

## **ROLE OF THE EUROPEAN PARLIAMENT**

The European Parliament was the instigator of the concept of subsidiarity and, on 14 February 1984, in adopting the draft TEU, proposed a provision stipulating that in cases where the Treaty conferred on the Union a competence which was concurrent with that of the

Member States, the Member States could act as long as the Union had not legislated. Moreover, it stressed that the Community should only act to carry out those tasks which could be undertaken more effectively in common than by individual states acting separately.

Parliament was to reiterate these proposals in many resolutions (for example those of 23 November and 14 December 1989, 12 July and 21 November 1990 and 18 May 1995), in which it reaffirmed its support for the principle of subsidiarity.

#### **A. Interinstitutional agreements**

On 25 October 1993, the Council, Parliament and the Commission signed an interinstitutional agreement which demonstrated clearly the three institutions' eagerness to take decisive steps in this area. They thus undertook to comply with the principle of subsidiarity. The agreement lays down, by means of procedures governing the application of the principle of subsidiarity, arrangements for the exercise of the powers conferred on the Union institutions by the Treaties, so that the objectives laid down in the Treaties can be attained. The Commission undertook to take into account the principle of subsidiarity and show that it has been observed. The same applies to Parliament and the Council, in the context of the powers conferred on them.

The three institutions agreed to regularly use their internal procedures to check whether the proposed action complies with the principle of subsidiarity as regards both the choice of instruments and the substance of the proposal. Rule 42 of Parliament's Rules of Procedure thus states that 'during the examination of a proposal for a legislative act, Parliament shall pay particular attention to whether that proposal respects the principles of subsidiarity and proportionality'. In addition, the Commission produces an annual report on compliance with the subsidiarity principle, on which Parliament usually gives its opinion in the form of an own-initiative report drawn up by its Committee on Legal Affairs.

Under the terms of the Interinstitutional Agreement on 'Better Lawmaking' of April 2016 (replacing the Agreement of December 2003 and the Interinstitutional Common Approach to Impact Assessment of November 2005), the Commission must explain in its explanatory memoranda how the proposed measures are justified in the light of the principle of subsidiarity and must take this into account in its impact assessments. Moreover, in concluding the framework agreement of 20 November 2010 Parliament and the Commission undertook to cooperate with the national parliaments in order to facilitate the exercise by those parliaments of their power to scrutinise compliance with the principle of subsidiarity.

#### **B. European Parliament resolutions**

In its resolution of 13 May 1997, Parliament already made clear its view that the principle of subsidiarity was a binding legal principle but pointed out that its implementation should not obstruct the exercise by the EU of its exclusive competence, nor be used as a pretext to call into question the *acquis communautaire*. In its resolution of 8 April 2003, Parliament added that disputes should preferably be settled at political level, while taking into account the proposals made by the Convention on the Future of Europe concerning the establishment by the national parliaments of an 'early warning' mechanism in the area of subsidiarity. This mechanism was indeed incorporated into the Lisbon Treaty (see above and [1.3.5](#)).

In its resolution of 13 September 2012, Parliament welcomed the closer involvement of the national parliaments in scrutinising legislative proposals in the light of the principles of subsidiarity and proportionality and suggested that any ways to alleviate impediments to national parliaments' participation in the subsidiarity control mechanism should be investigated. It also suggested that an assessment be made to determine whether appropriate criteria should

be laid down at EU level for evaluating compliance with the principles of subsidiarity and proportionality.

[Roberta Panizza](#)

01/2018