

## 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 principles of subsidiarity and proportionality govern the exercise of the EU's competences. In areas in which the EU 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 TEU, signed in 1992: the TEU included a reference to the principle in the [Treaty establishing the European Community \(TEC\)](#). [The Single European Act](#), signed in 1986, 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 TEC, the [Treaty of Amsterdam](#), signed in 1997, annexed to the TEC a [Protocol on the application of the principles of subsidiarity and proportionality](#) (hereinafter '1997 protocol'). The overall approach to the application of the principle of subsidiarity, previously agreed at the 1992 European Council in Edinburgh, thus became legally binding and subject to judicial review via the protocol on subsidiarity.

The Treaty of Lisbon amending the TEU and TEC, signed in 2007, incorporated the principle of subsidiarity into Article 5(3) of the 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 Treaty of Lisbon replaced the 1997 protocol with a new 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 EU, 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 themselves at central, regional or local level. The Union is justified in exercising its powers only 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) of the 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 Treaty of Lisbon, 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 \(TFEU\)](#) (signed in 2007 and entered into force in 2009) 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 European 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) of the 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' mechanism 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 police cooperation or judicial cooperation in criminal matters, 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 (Parliament and the 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 per cent of the members of the Council or a majority of the votes cast in the European Parliament ('orange card').

To date, the 'yellow card' procedure has been triggered three times, while the 'orange card' procedure has never been used. 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 \('Monti II'\)](#)<sup>[1]</sup>. In total, 12 out of 40 national parliaments or chambers thereof 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 following the submission of the [proposal for a regulation on the establishment of the European Public Prosecutor's Office](#)<sup>[2]</sup>. After examining the reasoned opinions received from the national parliaments, the Commission decided to [maintain the proposal](#)<sup>[3]</sup>, 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](#)<sup>[4]</sup>. The

[1] Proposal for a Council Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services, (COM(2012)0130).

[2] Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office, (COM(2013)0534).

[3] Communication from the Commission to the European Parliament, the Council and the National Parliaments on the review of the proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office with regard to the principle of subsidiarity, in accordance with Protocol No 2, (COM(2013)0851).

[4] Proposal for a Directive of the European Parliament and of the Council amending Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, (COM(2016)0128).

Commission gave extensive [reasons](#)<sup>[5]</sup> for maintaining its proposal, given that it did not infringe the principle of subsidiarity, the posting of workers being, by definition, a transnational issue.

The Conference of Parliamentary Committees for Union Affairs of Parliaments of the European Union (COSAC) serves as a useful platform for national parliaments to share information related to subsidiarity control. In addition, the Subsidiarity Monitoring Network (SMN) maintained by the European Committee of the Regions facilitates the exchange of information between local and regional authorities and the EU institutions. SMN members include regional parliaments and governments with legislative powers, local and regional authorities without legislative powers and local government associations in the EU. It is also open to national delegations of the European Committee of the Regions and chambers of national parliaments.

#### E. Conference on the Future of Europe

In March 2017, the Commission created a dedicated '[Task Force on subsidiarity, proportionality and doing less more efficiently](#)', as part of the Better Regulation agenda, and in particular the debate on the future of Europe launched by Commission President Juncker's [white paper](#). The Task Force aims to 1) make recommendations on how to better apply the principles of subsidiarity and proportionality; 2) identify policy areas where work could be re-delegated or definitely returned to EU countries; and 3) find ways to better involve regional and local authorities in EU policy-making and delivery.

Based on the recommendations given by the Task Force, the Commission published its [subsidiarity package](#) in October 2018, aiming to strengthen the role of the principles of subsidiarity and proportionality in EU policymaking. One of the main Task Force recommendations taken on board was to incorporate a grid for assessing subsidiarity and proportionality in the Commission's better regulation guidance and to use the grid to present the Commission's findings in impact assessments, evaluations and explanatory memorandums.

The principles of subsidiarity and proportionality were also in the spotlight of the Conference on the Future of Europe, in line with the [Joint Declaration on the Conference on the Future of Europe](#) signed by the Presidents of Parliament, the Council and the Commission.

#### F. 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 of the 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](#), Philip Morris, paragraph 218), the Court reaffirmed

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[5]Communication from the Commission to the European Parliament, the Council and the National Parliaments on the proposal for a Directive amending the Posting of Workers Directive, with regard to the principle of subsidiarity, in accordance with Protocol No 2, (COM(2016)0505).

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'. Concerning procedural safeguards and, in particular, the obligation to state reasons as regards subsidiarity, the Court recalled that observance of that obligation 'must be evaluated not only by reference to the wording of the contested act, but also by reference to its context and the circumstances of the individual case' (paragraph 225).

Member States may bring actions for annulment before the Court against a legislative act on grounds of infringement of the principle of subsidiarity on behalf of their national parliament or a chamber thereof, in accordance with their legal system. The European Committee of the Regions may also bring such actions against legislative acts if the TFEU provides that it must be consulted.

## ROLE OF THE EUROPEAN PARLIAMENT

Parliament was the instigator of the concept of subsidiarity and, on 14 February 1984, in adopting the draft Treaty on European Union, 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

Parliament adopted a series of measures to carry out its role under the Treaties as regards the application of the principle of subsidiarity. Pursuant to Rule 43 of its Rules of Procedure, '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'. The Committee on Legal Affairs is the parliamentary committee with horizontal responsibility for monitoring compliance with the principle of subsidiarity. In this regard, it regularly draws up a report on the Commission's annual reports on subsidiarity and proportionality.

On 25 October 1993, the Council, Parliament and the Commission signed an interinstitutional agreement<sup>[6]</sup> that 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.

[6] Interinstitutional agreement of 25 October 1993 between the Parliament, the Council and the Commission on procedures for implementing the principle of subsidiarity, OJ C 329, 6.12.1993, p. 135.

Under the terms of the [interinstitutional agreement of 13 April 2016 between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making](#) (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](#)<sup>[7]</sup>, 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](#)<sup>[8]</sup>, 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](#)<sup>[9]</sup>, 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](#)<sup>[10]</sup>, 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.

In its [resolution of 18 April 2018](#)<sup>[11]</sup>, Parliament noted the sharp increase in the number of reasoned opinions submitted by national parliaments, which reveals their growing involvement in the Union’s decision-making process. It also welcomed national parliaments’ interest in adopting a more proactive role through the use of a ‘green card’ procedure. In this respect, it recommended making full use of the existing tools enabling national parliaments to participate in the legislative process without creating new institutional and administrative structures.

In its [resolution of 13 February 2019 on the state of the debate on the future of Europe](#)<sup>[12]</sup>, Parliament highlighted the fundamental role of local authorities and, in particular, regional parliaments with legislative powers. It also took note of the

[7] Framework Agreement on relations between the European Parliament and the European Commission, OJ L 304, 20.11.2010, p. 47.

[8] European Parliament resolution on the Commission’s report to the European Council – ‘Better law-making 1997’, OJ C 98, 9.4.1999, p. 500

[9] European Parliament resolution on the Commission report to the European Council on better law-making 2000 (pursuant to Article 9 of the Protocol to the EC Treaty on the application of the principles of subsidiarity and proportionality) and on the Commission report to the European Council on better law-making 2001 (pursuant to Article 9 of the Protocol to the EC Treaty on the application of the principles of subsidiarity and proportionality), OJ C 64E, 12.3.2004, p. 135.

[10] European Parliament resolution of 13 September 2012 on the 18th report on Better legislation – Application of the principles of subsidiarity and proportionality (2010), OJ C 353E, 3.12.2013, p. 117.

[11] European Parliament resolution of 18 April 2018 on the Annual Reports 2015–2016 on subsidiarity and proportionality ([2017/2010\(INI\)](#)), OJ C 390, 18.11.2019, p. 94.

[12] European Parliament resolution of 13 February 2019 on the state of the debate on the future of Europe ([2018/2094\(INI\)](#)).

recommendations of the 'Task Force on subsidiarity, proportionality and doing less more efficiently' but pointed out that many of them, particularly regarding the role of national parliaments and the need to reform the early warning system, had already been highlighted by Parliament.

In its [resolution of 24 June 2021](#)<sup>[13]</sup>, Parliament pointed out that local and regional authorities implement and use approximately 70% of EU legislation and called on the Commission to better involve them in its consultation processes, and to integrate a 'model grid' to assess the application of principles of subsidiarity and proportionality throughout the decision-making process. Parliament also highlighted that the current structure of the subsidiarity control mechanism procedure results in national parliaments dedicating excessive amounts of time to technical and legal assessments with short deadlines, which complicates the goal of holding a deeper political discussion on European politics.

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[13]European Parliament resolution of 24 June 2021 on European Union regulatory fitness and subsidiarity and proportionality – report on Better Law Making covering the years 2017, 2018 and 2019 ([2020/2262\(INI\)](#)).