

OVERALL APPROACH TO THE APPLICATION BY THE COUNCIL  
OF THE SUBSIDIARITY PRINCIPLE AND ARTICLE 3b OF  
THE TREATY ON EUROPEAN UNION

## I. BASIC PRINCIPLES

European Union rests on the principle of subsidiarity, as is made clear in Articles A and B of title I of the Treaty on European Union. This principle contributes to the respect for the national identities of Member States and safeguards their powers. It aims at decisions within the European Union being taken as closely as possible to the citizen.

1. Article 3b of the EC Treaty " covers three main elements:

- a strict limit on Community action (first paragraph);
- a rule (second paragraph) to answer the question "Should the Community act?". This applies to areas which do not fall within the Community's exclusive competence;
- a rule (third paragraph) to answer the question: "What should be the intensity or nature of the Community's action?". This applies whether or not the action is within the Community's exclusive competence.

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(1) Article 3b, as introduced in the EC Treaty by the Treaty on European Union, reads as follows:

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

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.

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

2. The three paragraphs cover three distinct legal concepts which have historical antecedents in existing Community Treaties or in the case-law of the Court of Justice:

- i) The principle that the Community can only act where given the power to do so - implying that national powers are the rule and the Community's the exception - has always been a basic feature of the Community legal order (The principle of attribution of powers).
- ii) The principle that the Community should only take action where an objective can better be attained at the level of the Community than at the level of the individual Member States is present in embryonic or implicit form in some provisions of the ECSC Treaty and the EEC Treaty; the Single European Act spelled out the principle in the environment field. (The principle of subsidiarity in the strict legal sense).
- iii) The principle that the means to be employed by the Community should be proportional to the objective pursued is the subject of a well-established case-law of the Court of Justice which, however, has been limited in scope and developed without the support of a specific article in the Treaty. (The principle of proportionality or intensity).

3. The Treaty on European Union defines these principles in explicit terms and gives them a new legal significance
- by setting them out in Article 3b as general principles of Community law;
  - by setting out the principle of subsidiarity as a basic principle of the European Union; <sup>1)</sup>
  - by reflecting the idea of subsidiarity in the drafting of several new Treaty articles. <sup>2)</sup>
4. The implementation of Article 3b should respect the following basic principles
- Making the principle of subsidiarity and Article 3b work is an obligation for all the Community institutions, without affecting the balance between them.

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1) See Articles A and B of the Treaty on European Union.  
2) Articles 118a, 126, 127, 128, 129, 129a, 129b, 130 and 130g of the EC Treaty, Article 2 of the Agreement on social policy.  
Furthermore, Article K.3(2)b directly incorporates the principle of subsidiarity.

An agreement shall be sought to this effect between the European Parliament, the Council and the Commission, in the framework of the interinstitutional dialogue which is taking place among these Institutions.

- The principle of subsidiarity does not relate to and cannot call into question the powers conferred on the European Community by the Treaty as interpreted by the Court. It provides a guide as to how those powers are to be exercised at the Community level, including in the application of Article 235. The application of the principle shall respect the general provisions of the Maastricht Treaty, including the "maintaining in full of the *acquis communautaire*", and it shall not affect the primacy of Community law nor shall it call into question the principle set out in Article F(3) of the Treaty on European Union, according to which the Union shall provide itself with the means necessary to attain its objectives and carry through its policies.
- Subsidiarity is a dynamic concept and should be applied in the light of the objectives set out in the Treaty. It allows Community action to be expanded where circumstances so require, and conversely, to be restricted or discontinued where it is no longer justified.
- Where the application of the subsidiarity test excludes Community action, Member States would still be 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.
- The principle of subsidiarity cannot be regarded as having direct effect; however, interpretation of this principle, as well as review of compliance with it by the Community institutions are subject to control by the Court of Justice, as far as matters falling within the Treaty establishing the European Community are concerned.

- Paragraphs 2 and 3 of Article 3b apply only to the extent that the Treaty gives to the institution concerned the choice whether to act and/or a choice as to the nature and extent of the action. The more specific the nature of a Treaty requirement, the less scope exists for applying subsidiarity. The Treaty imposes a number of specific obligations upon the Community institutions, for example concerning the implementation and enforcement of Community law, competition policy and the protection of Community funds. These obligations are not affected by Article 3b: in particular the principle of subsidiarity cannot reduce the need for Community measures to contain adequate provision for the Commission and the Member States to ensure that Community law is properly enforced and to fulfil their obligations to safeguard Community expenditures.
  
- Where the Community acts in an area falling under shared powers the type of measures to apply has to be decided on a case by case basis in the light of the relevant provisions of the Treaty.<sup>1)</sup>

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1) The new Articles 126 to 129 of EC Treaty in the area of education, vocational training and youth, culture and public health will explicitly rule out harmonisation of laws and regulations of Member States. It follows that the use of article 235 for harmonisation measures in pursuit of the specific objectives laid down in Articles 126 to 129 will be ruled out. This does not mean that the pursuit of other Community objectives through Treaty articles other than 126 to 129 might not produce effects in these areas. Where Articles 126, 128 and 129 refer to "incentive measures", the Council considers that this expression refers to Community measures designed to encourage cooperation between Member States or to support or supplement their action in the areas concerned, including where appropriate through financial support for Community programmes or national or cooperative measures designed to achieve the objectives of these articles.

## II. GUIDELINES

In compliance with the basic principles set out above, the following guidelines - specific to each paragraph of Article 3b - should be used in examining whether a proposal for a Community measure conforms to the provisions of Article 3b.

### First paragraph (Limit on Community action)

Compliance with the criteria laid down in this paragraph is a condition for any Community action.

In order to apply this paragraph correctly the institutions need to be satisfied that the proposed action is within the limits of the powers conferred by the Treaty and is aimed at meeting one or more of its objectives. The examination of the draft measure should establish the objective to be achieved and whether it can be justified in relation to an objective of the Treaty and that the necessary legal basis for its adoption exists.

### Second paragraph (Should the Community act?)

- i) This paragraph does not apply to matters falling within the Community's exclusive competence.

For Community action to be justified the Council must be satisfied that both aspects of the subsidiarity criterion are met: the objectives of the proposed action cannot be sufficiently achieved by Member States' action and they can therefore be better achieved by action on the part of the Community.

- ii) The following guidelines should be used in examining whether the above-mentioned condition is fulfilled:
- the issue under consideration has transnational aspects which cannot be satisfactorily regulated by action by Member States; and/or
  - actions by Member States alone or lack of Community action would conflict with the requirements of the Treaty (such as the need to correct distortion of competition or avoid disguised restrictions on trade or strengthen economic and social cohesion) or would otherwise significantly damage Member States' interests; and/or
  - the Council must be satisfied that action at Community level would produce clear benefits by reason of its scale or effects compared with action at the level of the Member States.
- iii) The Community should only take action involving harmonisation of national legislation, norms or standards where this is necessary to achieve the objectives of the Treaty.
- iv) The objective of presenting a single position of the Member States vis-à-vis third countries is not in itself a justification for internal Community action in the area concerned.
- v) The reasons for concluding that a Community objective cannot be sufficiently achieved by the Member States but can be better achieved by the Community must be substantiated by qualitative or, wherever possible, quantitative indicators.

Third paragraph (Nature and extent of Community action)

- i) This paragraph applies to all Community action, whether or not within exclusive competence.
- ii) Any burdens, whether financial or administrative, falling upon the Community, national governments, local authorities, economic operators and citizens, should be minimised and should be proportionate to the objective to be achieved;
- iii) 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 organisation 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.
- iv) Where it is necessary to set standards at Community level, consideration should be given to setting minimum standards, with freedom for Member States to set higher national standards, not only in the areas where the treaty so requires (118a, 130t) but also in other areas where this would not conflict with the objectives of the proposed measure or with the Treaty.

- v) The form of action should be as simple as possible, consistent with satisfactory achievement of the objective of the measure and the need for effective enforcement. The Community should legislate only to the extent necessary. Other things being equal, directives should be preferred to ~~regulations and framework~~ directives to detailed measures. Non-binding measures such as recommendations should be preferred where appropriate. Consideration should also be given where appropriate to the use of voluntary codes of conduct.
  
- vi) Where appropriate under the Treaty, and provided this is sufficient to achieve its objectives, preference in choosing the type of Community action should be given to encouraging cooperation between Member States, coordinating national action or to complementing, supplementing or supporting such action.
  
- vii) Where difficulties are localised and only certain Member States are affected, any necessary Community action should not be extended to other Member States unless this is necessary to achieve an objective of the Treaty.

### III. PROCEDURES AND PRACTICES

The Treaty on European Union obliges all institutions to consider, when examining a Community measure, whether the provisions of Article 3b are observed.

For this purpose, the following procedures and practices will be applied in the framework of the basic principles set out under paragraph II and without prejudice to a future interinstitutional agreement.

#### a) Commission

The Commission has a crucial role to play in the effective implementation of Article 3b, given its right of initiative under the Treaty, which is not called into question by the application of this article.

The Commission has indicated that it will consult more widely before proposing legislation, which could include consultation with all the Member States and a more systematic use of consultation documents (green papers). Consultation could include the subsidiarity aspects of a proposal. The Commission has also made it clear that, from now on and according to the procedure it already established in accordance with the commitment taken at the European Council in Lisbon, it will justify in a recital the relevance of its initiative with regard to the principle of subsidiarity. Whenever necessary, the explanatory memorandum accompanying the proposal will give details on the considerations of the Commission in the context of Article 3b.

The overall monitoring by the Commission of the observance of the provisions of Article 3b in all its activities is essential and measures have been taken by the Commission in this respect. The Commission will submit an annual report to the European Council and the European Parliament through the General Affairs Council on the application of the Treaty in this area. This report will be of value in the debate on the annual report which the European Council has to submit to the European Parliament on progress achieved by the Union (see Article D in the Treaty on European Union).

b) Council

The following procedure will be applied by the Council from the entry into force of the Treaty. In the meantime they will guide the work of the Council.

The examination of the compliance of a measure with the provisions of Article 3b should be undertaken on a regular basis; it should become an integral part of the overall examination of any Commission proposal and be based on the substance of the proposal. The relevant existing Council rules, including those on voting, apply to such examination<sup>1)</sup>. This examination includes the Council's own evaluation of whether the Commission proposal is totally or partially in conformity with the provisions of Article 3b (taking as a starting point for the examination the Commission's recital and explanatory memorandum) and whether any change in the proposal envisaged by the Council is in conformity with those provisions. The Council decision on the subsidiarity aspects shall be taken at the same time as the decision on substance and according to the voting requirements set out in the Treaty. Care should be taken not to impede decision-making in the Council and to avoid a system of preliminary or parallel decision-making.

The Article 3b examination and debate will take place in the Council responsible for dealing with the matter. The General Affairs Council will have responsibility for general questions relating to the application of Article 3b. In this context the General Affairs Council will accompany the annual report from the Commission (see 2 a) above) with any appropriate considerations on the application of this Article by the Council.

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- 1) In the course of this examination, any Member State has the right to require that the examination of a proposal which raises Article 3b issues be inscribed on the provisional agenda of a Council in accordance with Article 2 of the Council's rules of procedure. If such examination, which will include all relevant points of substance covered by the Commission proposal, shows that the majority required for the adoption of the act does not exist, the possible outcomes include amendments of the proposal by the Commission, continued examination by the Council with a view to putting it into conformity with Article 3b or a provisional suspension of discussion of the proposal. This does not prejudice Member States or Commission rights under Article 2 of the Council's rules of procedure nor the Council obligation to consider the opinion of the European Parliament.

Various practical steps to ensure the effectiveness of the Article 3b examination will be put into effect including:

- working group reports and COREPER reports on a given proposal will, where appropriate, describe how Article 3b has been applied,
  - in all cases of implementation of the Article 189b and 189c procedure, the European Parliament will be fully informed of the Council's position concerning the observance of Article 3b, in the explanatory memorandum which the Council has to produce according to the provisions of the Treaty. The Council will likewise inform the Parliament if it partially or totally rejects a Commission proposal on the ground that it does not comply with the principle of Article 3b.
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