



SUBSIDIARITY: ASSESSING AN EU PROPOSAL

[This note is based on the EU Treaties as amended by the Lisbon Treaty, in force from 1 December 2009.]

What is subsidiarity?

1. In the EU context, Subsidiarity is a concept about the level of governance (EU, national, regional or local) at which action should be taken. The Treaties make the concept into a legal principle, defined in Article 5(3) TEU:

Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

It is based on the presumption that action should be taken at the lowest level of governance consistent with the subject matter and the objective to be attained. Where the EU has exclusive competence, the principle necessarily has no application.

2. The principle applies to all kinds of action by the EU and is not limited to legislation. (The reasoned opinion procedure - see paragraph 6 below - is, however, applicable only to legislation.)

3. The principle was part of EU law before the coming into force of the Treaty of Lisbon. That Treaty did not alter the meaning of the principle.

The Role of National Parliaments

4. The Protocol on the Role of National Parliaments in the EU provides a minimum period for scrutiny of proposals for legislation by national parliaments. It requires that draft legislative acts be sent to national parliaments, and that an **eight-week period for scrutiny** must elapse between such a draft being made available to national parliaments and the date when the draft appears on the agenda of the Council of Ministers for adoption. Other than in urgent cases, no agreement is to be reached on the legislation in that period.

5. The Protocol on the Application of the Principles of Subsidiarity and Proportionality provides for national parliaments to scrutinise draft

legislation specifically on the issue of compliance with the principle of subsidiarity, and for a **reasoned opinion procedure** where a proposal is found not to comply with the principle. Any chamber of a national parliament may submit a reasoned opinion (Article 6 of the Protocol). If there are enough of them, such Opinions will trigger a review of the proposal (the “yellow or orange card”) in accordance with Article 7 of the Protocol.

6. The procedure for reasoned opinions applies in relation to “draft legislative acts”. “Draft” means formal proposals from the Commission or other institution with the power to make draft legislation (Article 3 of the Protocol). “Legislative act” means a regulation, directive or decision adopted by the ordinary legislative procedure (known as codecision before the Lisbon Treaty) or a special legislative procedure (any other procedure specified in the TFEU) (see Article 289 TFEU).

7. Other documents, for example –

- draft “non-legislative” acts to be adopted under delegated powers or implementing powers (see Articles 290 and 291 TFEU),
- draft decisions under the Common Foreign and Security Policy,
- draft decisions to be made by the Council alone,
- draft Recommendations or Opinions,
- Commission Communications,
- Green papers

are subject to the principle of subsidiarity, but not subject to the reasoned opinion procedure.

The principle

8. The principle may be clearly stated in the Treaty but its application is not necessarily straightforward since it is, as the Select Committee said when considering the comparable provisions in the Constitutional Treaty, “malleable” and even “elusive”.

9. Subsidiarity is different from competence. Competence refers to the power of the Community to act. If the Community has no competence to act in a particular case, then the principle of subsidiarity has no application.

10. Subsidiarity is different from proportionality.

The principle of proportionality is defined in Article 5(4) TEU:

Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.

Subsidiarity is about who should take action; proportionality is about the nature of any action there should be. The subsidiarity check comes first. If a proposal complies (or if it is an area of exclusive competence – see paragraph 12 below), the principle of proportionality can then be considered as part of normal scrutiny. In practice, the two concepts are closely related.

11. Subsidiarity is a legal concept but assessment depends essentially on policy judgements.

Making the assessment

12. A preliminary Yes/No question must be considered.

Does the proposal relate to an area of exclusive EU competence?

The principle of subsidiarity cannot apply in areas of exclusive EU competence, since by definition action in those areas may only be taken by the EU. The definition of subsidiarity in Article 5 TEU expressly confirms this. The 5 areas of exclusive are defined in broad terms in Article 3 TFEU:

- customs union;
- the establishing of the competition rules necessary for the functioning of the internal market;
- monetary policy for the Member States whose currency is the euro;
- the conservation of marine biological resources under the common fisheries policy;
- common commercial policy.

The EU also has exclusive competence in relation to the making of international agreements in certain circumstances.

13. It may not always be clear whether a proposal falls into one of these areas - consult the legal advisers in cases of doubt. All other proposals for action are subject to the subsidiarity principle

14. Two tests can be derived from the definition in Article 5 TEU:

- **a necessity test:**

Is action by the EU needed to achieve the objective? Can the objective of the proposed action only be achieved, or only achieved to a sufficient extent, at EU level?

- and **a greater benefits test:**

Would the objective be better achieved at EU level – ie. would action at EU level provide greater benefits than action by Member States? To put it another way, would the whole be greater than the sum of the parts?

15. The following comments and **questions** are drawn from the 1997 Protocol on subsidiarity. That protocol is repealed by the Lisbon Treaty but the guidelines it contains remain relevant.

- The concept of subsidiarity is intended to be flexible. It should be applied having regard to the EU objective under consideration and the circumstances at the time.
- Does the subject matter have trans-national aspects that cannot be regulated by the Member States acting separately?
- Would action by the Member States, or the continuation of different national regimes, conflict with the provisions of the Treaties on the internal market, the distortion of competition, or economic or social cohesion?
- Would action at EU level produce clear benefits by reason of its scale or effects, compared with action by the Member States?
- EU measures should leave as much scope for national decision as possible. Accordingly, other things being equal, directives are to be preferred to regulations since they leave Member States choices as to how EU rules are to be implemented within their national systems.
- Does the proposal respect national arrangements and legal systems?
- Does the proposal take account of regional and local factors?
- Does the proposal contain sufficient reasoning for an assessment of subsidiarity to be made?

16. Other suggested ways of putting some of those questions:

- Can Member States fix the problem acting individually?
- Can Member States, acting individually, fulfil the objectives of the Treaties?

- Would action by the Member States damage the collective interest?

MIKE THOMAS

LEGAL ADVISER

NOVEMBER 2009