

The Principle of Subsidiarity in the Treaty of Lisbon, a New Role for National Parliaments?

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Abstract

The principle of subsidiarity within the European Union (EU) is sanctioned in Article 5(3) of the Treaty on European Union (TEU) and in the Protocol No.2 "On the Application of the Principles of Subsidiarity and Proportionality". Its main function is to regulate the exercise of competences of EU institutions in areas where these powers are shared with Member States of the Union, with the aim that, as also required by Article 5 of TEU, the proposed action can rather be better achieved at Union level. Regarding national parliaments, according to Article 12 of TEU their general institutional role is to "contribute actively to the good functioning of the Union". Also, referred to paragraph 3 of Article 5 of the TEU, Protocol No 1 "On the role of national parliaments in the European Union" and "On the Application of the Principles of Subsidiarity and Proportionality" national legislatures are charged with the duty to check the correct application of the principle of subsidiarity by the institutions of the Union. For this purpose a new mechanism is introduced, known as the Early Warning System (EWS). The purpose of this paper is the analysis of the provisions on the EWS in order to evaluate the protection that the Treaty of Lisbon provides for the subsidiarity principle and consequently the role played by national legislatures in the EU legislative procedures.

Keywords: subsidiarity, national parliaments, Treaty of Lisbon, role

1. Introduction

1.1 Definition of the principle – a more inclusive approach?

The principle of subsidiarity refers in general to the choice of the most suitable and efficient level for taking policy action.¹

Within the EU law, subsidiarity is a fundamental principle sanctioned in Article 5 of the Treaty on European Union (TEU). It aims to ensure that decisions are taken as closely as possible to the citizen and that constant checks are made to verify that action at EU level is justified in light of the possibilities available at national, regional or local level.²

From the content of Article 5 of the TEU, the principle of subsidiarity does not apply in areas where the EU has exclusive competence. In the areas in which the EU has exclusive competence, to take the decision, cannot be raised the issue of whether other subjects exercise this power or to what extent they have the right to act.³

In areas where the EU does not have exclusive competence, in order to act in accordance with this principle, its actions have to meet these three conditions:

1. the Union shall act only if and insofar as the objectives of the proposed action cannot be achieved by the Member States;
2. the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States;
3. the proposed action, can rather be better achieved at Union level, by reason of the scale or effects.⁴

The conditions for the correct implementation of the principle of subsidiarity contained in the text of Article 5, does

¹ Arribas, G.V., Bourdin, D. "What Does the Lisbon Treaty Change Regarding Subsidiarity within the EU Institutional Framework?", pg 13 www.eipa.eu

² eur-lex.europa.eu

³ Beqiraj (Mihani), P. (2014) "Subsidiarity in the Jurisprudence of the Court of Justice of the European Union", *Mediterranean Journal of Social Sciences* Vol. 5, No. 13 ISSN 2039-2117 (online) pg 312 www.mcser.org

⁴ *Ibid*, pg 312

not constitute a novelty in the Lisbon Treaty. The novelty regarding subsidiarity definition in the treaties provisions is the inclusion of regional and local authorities. As added actors in the new subsidiarity definition, the new approach of EU to subsidiarity principle is more inclusive that it was in the former treaties provisions.

1.2 Origin of the principle

In the Single European Act (1986), was made the first reference to the principle of subsidiarity only in the area of environment. However, the Single European Act did not refer to it explicitly as such when sanctioned in paragraph 4 of Article 130r that: *"the Community shall take action relating to the Environment to the extent to which the objectives can be attained better at Community level than at the level of individual Member States."*

But the first legal regulation of the principle of subsidiarity in the primary legislation of the European Community was made by the Maastricht Treaty (1993), which for the first time formally sanctioned explicitly the principle of subsidiarity in Article 5 of the European Community Treaty: *"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"*.

The Treaty of Amsterdam (1997) represents an important legal step regarding subsidiarity. While the Maastricht Treaty referred to the Community⁵ to act in accordance with the principle of subsidiarity, the Treaty of Amsterdam extended its application to the Union. Also, an important legal instrument for the better implementation of the subsidiarity principle was added to the European Community Treaty: The Protocol *"On the application of the principles of subsidiarity and proportionality"* (the Protocol).

The Protocol contained procedural steps that must be followed by the institutions of the European Community in order that their acts did not infringe the principle of subsidiarity. This is stated more specifically in the paragraph (5) of the Protocol, which required three guidelines to be used in order that the subsidiarity conditions are fulfilled:

- If the Member States couldn't regulate satisfactorily the transnational aspects of the action in question;
- If the member States acted alone or the Community did not take any action this would bring to the conflict with the requirements of the Treaty, or damage notably the interests of the Member States;
- The benefits of the action taken at Community level are clearer by reason of its scale or effects compared with action taken by the Member States.

2. The Principle of Subsidiarity in the Treaty of Lisbon – The Early Warning System

Under the Treaty of Lisbon, the subsidiarity principle is enshrined in general terms in the TEU and more specifically in the Protocol No. 2 *"On the application of the principles of subsidiarity and proportionality"* attached to it. (Protocol No.2)

In paragraph 3 of Article 5 of the TEU is defined the core principle of subsidiarity:

"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. "

In paragraph (b) of Article 12 of the TEU is determined that *"National parliaments contribute actively to the good functioning of the Union ...by seeing to it that the principle of subsidiarity is respected in accordance with the procedures provided for in the Protocol on the application of the principles of subsidiarity and proportionality."* Thus, the Treaty of Lisbon, apart from recognizing the general institutional role of national parliaments for the good functioning of the Union, assigns them the power to act as guardians of the principle of subsidiarity.

Protocol No.2, to which Article 12 of the TEU makes reference, establishes the Early Warning System (EWS), an *ex ante* control mechanism reinforcing the subsidiarity scrutiny.

The procedure of the EWS is stated in Articles 6 and 7 of the Protocol No. 2. From the date of transmission of a draft legislative act, any national parliament or any chamber of a national parliament have eight weeks to send to the respective EU institution a reasoned opinion if they consider that the draft legislative act does not comply with the

⁵ See Article 5 of the TEC

principle of subsidiarity. Consequently, the reasoned opinion shall be taken into account by the EU institutions. Depending on the policy area and decision-making procedure in question, a simple majority (orange card), one-third or one-fourth (yellow cards) of all fifty-four votes (two per member state) are required in order to enforce the draft review.⁶

The "yellow card" procedure enforces the review of the draft legislative act if the number of the reasoned opinion which considered it non compliant with subsidiarity, is at least one third of the total votes or a quarter in the case of a draft legislative act submitted on the area of freedom, security and justice. After that, the EU institution from which the draft originated, can maintain, amend or withdraw it, but must give the reasons for its decision.

The "orange card" procedure is applied only for the ordinary legislative procedure and if the proposal originated from the Commission. Under this procedure, if the number of reasoned opinions considering non compliance of the draft legislative act with the subsidiarity principle, represents at least a simple majority of the votes allocated to national parliaments, the Commission must review the proposal and can maintain, amend or withdraw it.

If the European Commission decides to maintain the proposal, it has to justify its decision, and both the Council and the European Parliament can reject it before the end of the first reading if they find it incompatible with the subsidiarity principle.⁷

3. The Role of National Parliaments in the New Treaty Provisions on Subsidiarity

The role of national parliaments in the architecture of EU governance has evolved in different stages of the EU legal order. As a response to the "democratic deficit" in the EU, the treaty provisions adopted within EU primary law have enhanced the national parliaments' role and bring the Union closer to its citizens. The national legislature powers in relation to the EU have gradually been expanded so they could contribute actively and influence in the EU governance.

With the Lisbon Treaty, for the first time national parliaments are mentioned in the body of the treaty, in contrast with the Declarations or Protocols added to the previous treaties.

According to Article 12 of the TEU, national parliaments are involved in the activities of the Union in these spheres:

- National parliaments have the right to be informed by the Union institutions by putting them at the disposal of the draft legislative acts. This right is further regulated in detail in the Protocol No. 1 "*On the Role of National Parliaments in the European Union*" (Protocol No.1), which also specifies the acts that the Commission should forward to national parliaments and the meaning of "draft legislative acts". Also, national parliaments have the right to be notified for the applications for accession to the Union.
- By taking part in the revision procedures of the Union primary law;
- The rights of national parliaments in the area of freedom, security and justice;
- By taking part in the interparliamentary cooperation with other national parliaments and the European Parliament according to articles 9 and 10 of the Protocol No.1 ;
- Ensuring the respect of the subsidiarity principle by sending reasoned opinions to the EU institutions according to the procedures provided in the Protocol No.2.

From the above mentioned rights of national parliaments, their role in ensuring the compliance of EU draft legislative acts with the principle of subsidiarity through the *ex ante* control mechanism of EWS, is considered the main and most important novelty introduced by the Treaty of Lisbon. This right represents an important step forward to encourage national legislature of Member States to take part and influence in the decision making process of the EU.

4. Conclusion

As a conclusion, it can be summarized that:

- The definition of the subsidiarity principle in the Treaty of Lisbon retains unchanged the conditions of subsidiarity enshrined by the Treaty of Maastricht. But, it extends the subsidiarity definition by adding regional and local levels as involved actors in the better achievement of the objective of the action proposed.
- A new mechanism is introduced in order to guarantee at a higher degree the implementation of the principle of subsidiarity, the EWS. This is an *ex ante* scrutiny of the compliance of the acts of the EU institutions with the

⁶ Korhonen, K. (2011) "Guardians Of Subsidiarity, National Parliaments Strive To Control EU Decision-Making" FIIA BRIEFING PAPER 84, pg 4 www.fiaa.fi

⁷ Piedrafita, S. (2013) "EU Democratic Legitimacy and National Parliaments", CEPS ESSAY, No. 7, pg 4 <http://aei.pitt.edu>

principle of subsidiarity. Two procedures are provided for the EWS: the yellow card and the orange card stated in Article 7 of Protocol No.2. The role of the guarantor of the *ex ante* scrutiny control is assigned to national parliaments. National parliaments by using the instrument of the reasoned opinion if they consider the proposed legislative act not in accordance with the principle of subsidiarity could influence the decision making procedure of the EU. Even so, the final decision for the assessment of the proposal on grounds of subsidiarity is a prerogative of both the European Parliament and the Council.

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